Neutral Citation Number: [2021] EWHC 2758 (Fam)

Case No: FD21P00296

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 October 2021

Before :

MR JUSTICE MOSTYN

- -

Between :

ES

Applicant

- and -

LS

Respondent

- -
- -

Jonathan Evans instructed by Sills Legal for the Applicant
Mehvish Chaudhry instructed by Dawson Cornwell for the Respondent
Jamie Niven-Phillips of Cafcass Legal for the children

Hearing dates: 5-6 October 2021

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Approved Judgment

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MR JUSTICE MOSTYN

This judgment was delivered in private. The judge authorises its publication in this anonymized form. No publication may identify the children or their parents. Breach of this prohibition will be a contempt of court.

Mr Justice Mostyn:

1. On 5 October 2021 there was listed before me a two-day Hague 1980 Convention application. It was the second in as many weeks. It was listed for two days so that oral evidence could be given about defences of settlement and the children's objections. The children, girls aged 14½ and 12, had been joined as parties and were separately represented. The costs of everybody were met by the taxpayer. I received two bundles of documents containing 484 and 153 pages respectively. I received a bundle of authorities containing 14 reported cases running to 309 pages. No regard was paid to the rules about bundles in FPR PD27A paras 4.3A.1 and 5.1.

2. On 6 October 2021 I announced my decision on the application and stated that my reasons would follow in a written judgment. This is that judgment.

3. Before I turn to the facts of the case I wish to make some observations of a general nature.

A simple summary process

4. I have reached the conclusion - and I know that this is a view shared by other judges - that many of these outward return cases under the Hague 1980 Convention have become disproportionately complex, lengthy and expensive. Invariably they bristle with abstruse legal points. They occupy an unreasonable amount of the resources of the High Court at the expense of other urgent cases of a serious and substantive nature, which are pushed to the back of an ever-lengthening queue.

5. It is important to have clearly in mind the nature of the relief sought and awarded under the 1980 Convention. I endeavoured to summarise this in my own decision of *FE v YE* [2017] EWHC 2165 (Fam), [2018] 2 WLR 200 at paras 14 – 15:

> "14. It is therefore important to recognise that the nature of the relief which is granted under the 1980 Convention is essentially of an interim, procedural nature. It does no more than to return the child to the home country for the courts of that country to determine his or her long-term future. The relief granted under the Convention does not make any long-term substantive welfare decisions in relation to the subject child. If one were to draw an analogy with a financial dispute the relief is akin to a freezing order coupled with a direction that the assets the subject of the dispute be placed within the jurisdiction of the *forum conveniens*.
>
> 15. It is for this reason that the procedure for a claim under the 1980 Convention is summary. Oral evidence is very much the exception rather than the rule. The available defences must be judged strictly in the context of the objective of the limited relief that is sought. Controversial issues of fact need not be decided."

6. Yet, as I have stated above, this case was listed for two days to allow for oral evidence to be given about the defences of settlement and the objections of the children. Specifically, Mr Evans on behalf of the father wished to cross-examine the children's

Guardian, Ms Baker, on her opinion on the factual question of whether or not the children have become "settled" in England in the 17 month period that they have been here up to the date of the father's application. Further, Mr Evans wished to cross-examine Ms Baker on the nature and strength of the children's objections and their maturity in general.

7. I was told by counsel that cross-examination of the Family Court Adviser/Guardian ("FCA") is routinely allowed where defences of settlement, or objections by the children are pleaded. This does not accord with my experience. If this practice does exist, it is very hard to understand given the clear terms of the *Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings* issued by Sir James Munby P on 13 March 2018 ("The Practice Guidance"). This states at para 3.8:

> "*Oral Evidence*
> The court will **rarely** make a direction for oral evidence to be given. Any party seeking such direction for oral evidence will need to demonstrate to the satisfaction of the court that oral evidence is **necessary** to assist the court to resolve the proceedings justly." (emphasis added)

8. Ms Chaudhry submitted to me that it was her understanding that this only applied to oral evidence from the parties and not to oral evidence from the FCA. I cannot accept that. Were that the case, the Guidance would have said so. Further, it is not logical. I can well see that the oral evidence from an FCA in a substantive proceeding concerning the best interests of children is likely to be vitally needed. I struggle to understand why, in summary proceedings of this nature, cross-examination of an FCA on the factual question of whether the children are, or are not, not settled in this country, or on the factual question of whether they have attained a certain level of maturity will ever satisfy the criterion of necessity.

9. The court is fully accustomed to determining a risk of harm defence under article 13(b) summarily and without oral evidence. When raised, that defence is almost invariably hotly contested. Notwithstanding the existence of disputes of fact, and the presence of much controversy about the availability of safeguards, the court always determines the availability of that defence, and, where it arises, how the consequential discretion should be exercised, summarily and without oral evidence. In my judgment that process should, in principle, apply to all available defences. I do not understand why the factual and discretionary issues which arise on a settlement defence routinely warrant the confrontation of witnesses in cross-examination, whereas the factual and discretionary issues which arise on a risk of harm defence do not. It is not as if the factual and discretionary issues arising under a settlement defence have some kind of special quality which is absent from a risk of harm defence. Nor do I think that because some of the evidence about settlement, or about the existence and quality of the children's objections, comes from an FCA an entitlement to cross-examine her inevitably arises.

10. It might be said, because aspects of these defences fall within the professional remit of an FCA, that the court will place greater weight on such evidence than on evidence given by a party to the proceedings, and therefore there arises a right to confront the FCA in cross-examination. I categorically reject that argument. I repeat, these are summary, procedural, interim proceedings. I can see that procedural fairness will

generally insist that in substantive proceedings concerning the welfare of children, a party should be entitled to confront in cross-examination an FCA who has given evidence adverse to that party. But no such right arises on interim procedural applications.

11. In my judgment, whenever it is suggested that oral evidence should be given in an outward return case under the Hague 1980 Convention, whether by a party or by an FCA, the court should strictly apply paragraph 3.8 of the Practice Guidance. The court will have in mind that to permit oral evidence is highly exceptional. It will need to be satisfied that oral evidence is "necessary" to resolve the proceedings justly. In my judgment the criterion of necessity should be interpreted and applied in accordance with *Re H-L (A Child)* [2013] EWCA Civ 655 at para 3, where Sir James Munby P held that the meaning of "necessary" in FPR 25.4(3) (and, by extension, in s.13(6) of the Children and Families Act 2014), had the connotation of the imperative, of what is demanded rather than what is merely optional or reasonable or desirable.

12. In my judgment, that definition should apply to cases governed by paragraph 3.8 of the Practice Guidance. The court should allow oral evidence only where it is **demanded** to resolve the case justly. It should not allow oral evidence where it is merely reasonable or desirable to have it.

13. In view of the practice to which I had been referred I was persuaded, with considerable reluctance, to allow Mr Evans to cross-examine Ms Baker for about 30 minutes on the settlement defence. This limited permission was an indulgence, granted by me because Mr Evans had an expectation that I would allow him to do so. This indulgence was not consistent with the requirements of the Practice Guidance, and I would not expect, following the publication of this judgment, to allow oral evidence in a case on similar facts in the future. I did not allow Mr Evans to cross-examine Ms Baker about the children's objections. That would have been an indulgence too far.

The facts of this case

14. Both the mother and father are of Latvian nationality. They met and married in 2005 and divorced in 2016. From the marriage, two children were born; J born in May 2007 (now aged 14½) and P born in September 2009 (now aged 12), who remained in the mother's care after the divorce.

15. The mother initiated a relationship with Mr L, who lives in the UK. The mother and the children visited England in October 2019. After two weeks, the Mother decided to live in England more permanently and returned to Latvia. She returned to the UK with the children in December 2019. The mother alleges that the father orally agreed to the children remaining in England. The mother claims to have updated the father in respect of the children's schooling arrangements. P began school on 27 January 2020 and J on 24 February 2020. The father does not accept this narrative.

16. According to the mother, the children have lived in this jurisdiction with the father's knowledge since December 2019 and have had some contact with their father on video calls. They have resided in the UK for over 21 months. In that period and up until March 2021, the father did nothing at all to commence a welfare case in Latvia seeking the return of his daughters. The proceedings in this jurisdiction were not commenced until 13 May 2021.

17. The mother's defences are:

    i) Settlement under Article 12

    ii) Children's Objections under Article 13

    iii) Consent and Acquiescence under Article 13(a)

    iv) Grave risk of harm and intolerability under Article 13(b)

18. At the commencement of the hearing I ruled that I would hear the first and second defences and then announce my decision. If my decision was that one or other or both defences succeeded then it would not be necessary to consider the third and fourth defences.

19. My decision was that the first two defences succeeded; therefore, it was not necessary for the third and fourth defences to be considered.

The ex parte application

20. The two children were brought to England from Latvia by the mother in December 2019. The father was aware from an early stage that they were living at an address known to him in Berkshire. The father took no steps seeking the return of the children until he made his application to the Latvian Central Authority on 19 March 2021. That application was duly transmitted to this country. Solicitors were instructed on his behalf on 27 April 2021. Two weeks later on 13 May 2021 father issued his application in Form C67. In section 3 of that form he correctly gave the children's address in Berkshire. However, in section 4 of the form he stated that he "thought" that the children were living with their mother at that address. He went on to say that he was concerned that the mother may leave the UK with the children and her boyfriend and that therefore she should surrender the children's passports to solicitors.

21. In a witness statement made on his behalf on the same day by his solicitor it was stated that the father did not know what school the children attended and, "as far as he is aware" the mother was living at the address in Berkshire. It further stated that the father was "not certain" that that address was her residential address. It said that he only had knowledge of that address because that was where the mother's own mother sent parcels to the children.

22. It is completely clear that the father knew exactly where the children were living. Yet, the day after issuing his main application, he applied to the court, ex parte, for a location order, and, for good measure, disclosure orders against the Department of Education and the NHS.

23. Those orders were granted. Five days later on 19 May 2021 the family was visited by the police and the identity documents and passports of the mother and children were removed. This was a traumatic and distressing experience for the children and their mother.

24. The location order made on 14 May 2021 records that the judge read only the solicitor's witness statement. It does not record in a recital why the application was made ex parte. It is clear that the court was not referred to the Practice Guidance or to the decision of

the Court of Appeal in *A v A* [2016] 2 WLR 111 on which the passages in the Guidance relating to ex parte applications are based.

25. The Practice Guidance states at paras 2.1 – 2.2:

> "2.1 Commencing proceedings by way of a without notice application pursuant to FPR r 12.47 will be justified only where (a) the case is one of exceptional urgency or (b) there is a compelling case that the child's welfare will be compromised if the other party is alerted in advance or (c) where the whereabouts of the child and the proposed respondent are unknown. An urgent out of hours without notice application will be justified only where an order is necessary to regulate the position between the moment the order is made and the next available sitting of the court.
>
> *Evidence in support of without notice applications*
> 2.2. The evidence in support of a without notice application must be as detailed and precise as possible having regard to the material provided by the applicant and transmitted by the Central Authority of the Requesting State. Unparticularised generalities will not suffice. Sources of hearsay must be identified and expressions of opinion must be supported by evidence and proper reasoning. The evidence should set out the orders sought, together with fully particularised reasons. Specifically, with respect to the narrow circumstances justifying a without notice application set out in para 2.1 above:
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> …
>
> (c) Where the justification for proceeding without notice is said to be that the whereabouts of the child and the proposed respondent are unknown, the evidence in support of the without notice application must explain what steps have been taken to locate them, what disclosure orders are required against an identified agency and why there is reason to believe that that agency may be able to provide information which may lead to the location of the child."

26. I regret to have to record that these requirements were not observed in this case. The whereabouts of the children was not unknown. The expressions of uncertainty about the children's address expressed by the father in Form C67 were not honest. The evidence did not particularise, at all, why a location order was necessary or why disclosure orders were needed. The witness statement spuriously repeated that the father had doubts about the whereabouts of his children. This was not true. The witness statement did not even condescend to give any evidence at all about the averment in the father's Form C67 that he feared, if given notice, the mother, her partner and the children would go on the run. That fear was baseless.

27. Ex parte orders are intrinsically unfair. They are unfair because the court hears only from one side. They can only be justified where there is a well-founded belief that the

giving of notice would lead to irretrievable prejudice being caused to the applicant or where there is some exceptional urgency so that there is literally no time to give notice: *ND v KP (Freezing Order: Ex Parte Application)* [2011] EWHC 457 (Fam) at paras 10–12, *CEF Holdings Ltd & Anor v City Electrical Factors Ltd & Ors* [2012] EWHC 1524 (QB) at para 235; *R v R (Family Court: Procedural Fairness)* [2014] EWFC 48 at para 1; *Practice Guidance (Family Courts: Without Notice Orders)* [2017] 1 WLR 478.

28. The case law has emphasised the adverse consequences for litigants and their advisers if the requirements are not observed and applications are made which are wanting in candour or otherwise improper. It is noteworthy that in the Administrative Court, where there has been for years gross abuse of the Immediates facility, sanctions are now meted out to delinquent practitioners who have sought to gain an illegitimate litigation advantage by making spurious urgent one-sided applications to the Immediates judge: see *R (DVP) v SSHD* [2021] EWHC 603 (Admin); *Re the Court's exercise of the Hamid jurisdiction* [2021] EWHC 1895 (Admin). The most usual sanction is a summons to attend a public sitting of what is known as the Hamid court in order to be openly, and shamingly, admonished.

29. Historically, in the field of child abduction it was considered acceptable, almost normal, to start virtually every case off with an ex parte location order. Old habits die hard and this one has been particularly sturdy, surviving not merely the robust decision of Sir James Munby P in the Court of Appeal in *A v A*, but his equally tough Guidance of 13 March 2018, set out above. The time has surely come to insist that the standards in the Practice Guidance concerning ex parte applications are scrupulously observed.

The settlement defence

30. The second paragraph of article 12 of the 1980 Hague Convention states:

> "The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year [from the date of the child's wrongful removal or retention], shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

31. There is no dispute in this case that more than a year (in fact 16½ months) elapsed between the date of the children's wrongful removal or retention and the date of the commencement of the proceedings.

32. The court therefore has to determine as a matter of fact whether the children are "now settled in [their] new environment".

33. There is a body of case law concerning the meaning of 'settled'. There is only very limited case law, both here and overseas, as to what the Convention means when it says that the child must be settled "now".

The meaning of 'settled'

34. What is meant by the intransitive verb 'settled'? Before I turn to the case law I go to the definition given by the Oxford English dictionary. This states, where the verb refers to persons:

> "Of persons: To cease from migration and adopt a fixed abode; to establish a permanent residence, take up one's abode, become domiciled; also with *down*. With *in*, to become established in a new home; hence, to become accustomed to a new abode or to new surroundings."

35. Therefore, on this classic definition, the phrase "the child is settled in its new environment" means "the child has become established in, or accustomed to, a new home, abode or surroundings."

36. Clearly, in order to be settled somewhere, a person must not only physically reside in a new home as a permanent residence but must genuinely intend to establish that place as a new home. Thus there must be proof of both a physical constituent and a mental constituent. For a younger child the relevant mental state will be that of her primary carer; for an older child it will be the mental state of the child herself.

37. Unsurprisingly, the case law has stipulated a definition of settlement which incorporates both a physical constituent and a mental constituent. The leading authority is the case of *Cannon v Cannon* [2004] EWCA Civ 1330 [2005] 1 FLR 169. That was an extraordinary case where the mother had not merely disappeared with the child for four years, but had gone to the extent of changing the child's identity using the technique described in *The Day of the Jackal* by appropriating the name and birth-date of a dead child taken from a tombstone in an Irish cemetery. I am very familiar with that case as I had to deal with the final hearing, sitting as a deputy High Court judge in 2005: *Re SC (A Child)* [2005] EWHC 2205 (Fam). The child was then 11½.

38. At a preliminary hearing in that case Singer J had decided that settlement only comprised a physical component; there was no mental constituent. This was overturned in the Court of Appeal.

39. The primary focus in that case was the impact in law of the concealment and subterfuge on an assertion of settlement within the new environment. Thorpe LJ accepted the submission from the Advocate to the Court that it would be very difficult for a parent who has hidden a child away to demonstrate that she is settled in its new environment: see paras 52 – 53.

40. At paras 56 – 57 Thorpe LJ explained why:

> "The fugitive from justice is always alert for any sign that the pursuers are closing in and equally in a state of mental and physical readiness to move on before the approaching arrest.
>
> This consideration amongst others compels me to differ from the opinion of the Full Court in Australia rejecting the previous acknowledgment 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. A very young child must take its emotional and psychological state in large measure from that of the sole carer. An older child will be consciously or unconsciously enmeshed in the sole carer's web of deceit and subterfuge. It is in those senses that Mr Nicholls' proposition holds good."

41. Now, I would entirely accept that a fugitive from justice (and her dependant child) would be unable to satisfy the mental constituent suggested by the dictionary definition of settlement, for the reasons given by Thorpe LJ. It is just not possible to intend in a bona fide way to establish a place as your permanent residence if you are always looking over your shoulder for the arrival of the authorities and making ready to flee if it looks that they are closing in.

42. When Thorpe LJ in para 57 referred to the second constituent element of settlement as the "emotional element" (which he enlarged in para 61 to the "emotional and psychological elements") I do not think that he was referring to anything more than a bone fide intention on the part of the child (or her carer, if the child is young) to make a certain place her permanent home.

43. In the case of *Re C (Child Abduction: Settlement)* [2006] 2 FLR 797 Sir Mark Potter P at para 46 stated that the second element of settlement is "an emotional and psychological constituent denoting security and stability. It must be shown that the present situation imports stability when looking into the future." Again, I do not think that this is intended to suggest that the mental element is anything more than that suggested by the natural use of language namely a bona fide intention on the part of the child, or her carer (depending on the child's age), to make a certain place her permanent home.

44. In my judgment this reasoning is vindicated by the analogy with the law of habitual residence referred to by Thorpe LJ in para 55 of *Cannon*, where he stated:

> "There is obvious common ground between proving that a child is settled in a new environment and proving the acquisition of an habitual residence in a new environment."

45. It is trite law that when determining habitual residence there is no requirement that to support a finding thereof, the individual needs to be happy, well cared for, emotionally stable or free from abuse: *Re R (A Child)* [2015] EWCA Civ 674 at para 47, per McFarlane LJ.

46. Mr Evans construes the authorities on settlement to yield a much wider meaning than the natural use of language would suggest. He submits, in effect, that for there to be a finding of settlement the court must be satisfied that the subject children are living in a stable, contented, normative, conflict-free family environment.

47. Mr Evans argues that after 11 unremarkable months of residence here, conflict and dysfunction appear to have erupted between the children's mother and her partner. Mr Evans relies on six contacts with the local authority concerning the children between November 2020 and July 2021. These incidents included the mother stating that she wished to leave the relationship in February 2021; the mother's partner ejecting the

mother from the house in April 2021; the children witnessing an alcohol fuelled argument again in April 2021; and the mother being arrested and spending the night in custody on 7 July 2021. The mother herself accepted in her written evidence that in April 2021 her relationship with her partner was in difficulty; she also accepts that following the father's application in May 2021 she fell into "a thick fog of depression". Mr Evans also relies on the fact that for most of the time that the children have been in England they have not been physically attending school but rather have been educated online on account of the pandemic. Further he states that during the recent summer holiday the children stayed at home and never went out.

48. Mr Evans states: "It is very difficult to see how they can be settled in such an environment."

49. Ms Chaudhry points out that these difficulties appear to have been transient. The evidence suggests that peace and stability have resumed. The local authority has closed its books and is taking no statutory action in respect of these children.

50. I reject Mr Evans's extended definition of the mental constituent of the concept of settlement. In my judgment it defies the natural linguistic interpretation of the concept; it is at variance with the classic dictionary definition; and it is not consistent with a proper interpretation of the case law.

51. Finally, I would refer again to the fact that for 11 months the children and their mother lived here quite unremarkably. Assume that in that period the children became settled. It seems to me that once that status has been obtained it would be extremely difficult for the children to become "de-settled" by virtue of conflict arising in their family environment. I am not saying that the loss of settled status is impossible, but I am struggling to envisage the circumstances which would give rise to it. Fortunately I do not have to decide that particular issue, as I am quite clear that the children were settled here on 13 May 2021 and have remained settled here to the present day.

The meaning of 'now'.

52. I turn to the date on which proof must be made of settlement.

53. As mentioned above, if an order for immediate return is to be avoided in circumstances where the return application was made more than 12 months after the wrongful act of removal or retention, proof must be made that the child is "now settled in her new environment". When Mr Evans cross examined Ms Baker he put it to her that she had analysed the question of settlement on the wrong date, in that she had done so by reference to the dates of her discussions with the children (July) and of her report (August), rather than to the date that the father made his application (13 May 2021). It was suggested that the children's integration would have been much more tenuous in May and that therefore settlement could not be proved at that date. I was surprised by this argument and pointed to the clear language of the Convention which spoke of the child <u>now</u> being settled in her new environment. Surely, it meant that settlement must be looked at by Ms Baker as at the date of her report, and by me as at the date of trial. That is the only possible interpretation of the word 'now'. I suggested that Mr Evans's interpretation changed 'now' to 'then'.

54. But no. I was told that case law had decided that 'now' meant 'then'.

55. Ms Chaudhry explained to me that Explanatory Report by Professor Elisa Pérez-Vera did not address the issue. She explained that the French version of the convention used the phrase "l'enfant s'est intégré dans son nouveau milieu" omitting the word "maintenant". But that omission is clearly implied by the use of the present tense.

56. I was taken to the limited case law in this jurisdiction, in Australia and in the USA.

57. In *Re N (Minors) (Abduction)* [1991] 1 FLR 413 Bracewell J held:

> "The question has arisen in this case as to the meaning of the word 'now' in art. 12, in the context of 'unless it is demonstrated that the child has now settled in its new environment'. Counsel for the mother has argued that 'now' means: 'today' in deciding the issue. Mr Holman for the father has argued 'now' must mean 'the date of commencement of the proceedings' rather than 'the date of the hearing'. In the absence of any decided authority drawn to my attention, I find that the word 'now' refers to the date of the commencement of proceedings, as otherwise any delay in hearing the case might affect the outcome. However, that is a purely academic finding because, on all the circumstances of the present case, it makes no material difference to my conclusions, whichever of the two dates is chosen."

58. It can be seen that the question was scarcely argued or reasoned. However, this decision seems to have become canonical in that it has been followed without any question, or controversy, debate or analysis, in a number of subsequent cases. For example, in *Re O (Abduction: Settlement)* [2011] EWCA Civ 128, [2011] 2 FLR 1307 Wilson LJ held at para 54:

> "The question whether 'the child is now settled in its environment' within the meaning of Art 12 is required to be answered, and was I believe answered by the judge, by reference to the circumstances as they were at the date of issue of the originating summons: *Re N (Minors) (Abduction)* [1991] 1 FLR 413 at 417F, per Bracewell J.

59. I myself in *SP v EB and KP* [2016] 1 FLR 228 at para 16 accepted, without hearing any argument, that the question of settlement had to be decided as at the date of the application.

60. In no case binding on me has the ratio decidendi been to approve the interpretation provided by Bracewell J. In no case since 1991 has the matter even been the subject of legal analysis.

61. The problem with that interpretation is that it is first and foremost completely contrary to the natural meaning of the word 'now'. The word 'now' means now; it does not mean then.

62. The second problem is that the word 'now' when written down by the framers of the treaty in 1980 must have been a reference to the date of trial. When article 12 was

drafted the framers were well aware that there would be some delay between the date of application and the date of trial. Indeed in article 11 there is a requirement if there has not been a decision within six weeks of the date of commencement of the proceedings for a reason for the delay to be supplied. In such circumstances it is inconceivable that the framers could have intended that settlement was to be assessed at an earlier date than the date of trial. If the framers had intended the analysis to be done at an earlier date then article 12 would have said "unless it is demonstrated that the child, at the date of the commencement of the proceedings, is settled in its new environment". But it did not say that.

63. The third problem is that the clear intention of the framers of the exception was that a child who is settled in the second state should not sent back to the first state. The interpretation of Bracewell J might result in a child who was not settled as at the date of the commencement of proceedings, but who had become settled by the date of trial, being sent back. This would be completely perverse.

64. Bracewell J was persuaded to adopt such an artificial and unnatural meaning of the word 'now' because "any delay in hearing the case might affect the outcome." It is true that the passage of time might change the children's status, and that in such a sense the outcome of the case might be affected, and the claim of the left behind parent prejudiced. But the opposite side of the same coin is that not to look at settlement as at the date of trial could prejudice the children whose interests are surely as important as those of the left behind parent, if not more so.

65. In Australia the Convention is incorporated by the Family Law (Child Abduction Convention) Regulations 1986. Regulation 16(2) deals with settlement as follows:

> (2) If:
>
> (a) an application for a return order for a child is made; and
>
> (b) the application is filed more than one year after the day on which the child was first removed to, or retained in, Australia; and
>
> (c) the court is satisfied that the person opposing the return has not established that the child has settled in his or her new environment;
>
> the court must, subject to sub-regulation (3), make the order.
>
> [sub-regulation 3 refers to the Article 13 defences]

66. While the word "now" is missing from the Australian regulation, it is clearly to be implied not only by the use of the language but by the fact that it is in the Convention itself.

67. Ms Chaudhry has located one Australian authority on the subject. In *State Authority v Castillo* [2015] FAMCA 792 Bennett J held at para 21:

> "My view is, with respect, that the court stands to be satisfied or not satisfied that a child has become settled in Australia at the time of its decision."

68. Ms Chaudhry has discovered one decision in the USA to similar effect: *Wojik v Wojik* 959 F. Supp. 413 (E.D. Mich. 1997) where Cohen J held at para 3:

> "The mother has shown by a preponderance of the evidence that the children, eight and five years old at the time of the hearing, were settled in their new environment as of the time of the hearing."

69. Having looked at the matter carefully, I am convinced that 'now' means 'as at the date of trial'. However, my decision is, like that of Bracewell J, academic as I am satisfied that the children were settled here when proceedings were commenced on 13 May 2021 and have continued to be settled here until the present day.

A consequential discretion

70. In *Cannon* Singer J held that where physical settlement was proved that was the end of the matter. The application for a return order would be refused; there was no consequential or residual discretion to order a return nonetheless. The Court of Appeal overturned this decision and held that notwithstanding a finding of settlement a residual discretion remained. The Court of Appeal did not give any examples of a case where the discretion might be exercised in favour of a return notwithstanding proof of settlement.

71. It is a fact, and not a particularly surprising fact, that there has been no reported decision in England and Wales or, apparently, elsewhere where settlement has been proved but nonetheless a return order has been made. Counsel were unable to paint for me a picture of a case where the discretion might be exercised in that way. This is because the discretion is formal and invariably exercised against a return. It is driven by the primary threshold finding in the same way that the discretion in a risk of harm case is always driven by the primary finding. It is the same where the defence is consent or acquiescence. It would be a vanishingly rare case where the discretion would be exercised in favour of a return where consent or acquiescence is proved. I sought to examine all the relevant principles in my decision of *JM v RM* [2021] EWHC 315 (Fam) at paras 64 - 70.

Decision on settlement

72. The children's Guardian is well aware of the history of turbulence in the relationship of the mother and her partner set out above, but nonetheless is satisfied that the children are settled here both physically and mentally. I agree with her for the reasons given below. Specifically, I am satisfied that the children were settled here on 13 May 2021, and have continued to be settled here until the present day, for the following reasons:

    i) The children have been physically present here living at their home in Reading for a long period. As at 13 May 2021 they had been here for nearly 17 months. At the present time the period is nearly 22 months.

ii) They have throughout that period attended school here, where they are doing very well. P started school on 27 January 2020. Her favourite subjects are art and mathematics. J started school on 24 February 2020. Her favourite subjects are citizenship, music and history. It is true for a significant part of that period their schooling was done online on account of the pandemic. This does not diminish the strength of this factor, in my judgment.

iii) Both children have a network of friends and a social life. They are close to the mother's partner and to his young sons who come to stay on alternate week-ends.

iv) Both children were granted pre-settled status in England in March 2021.

v) Both children have been registered with GPs in England and have received appropriate medical care.

vi) Each child is fluent in English and did not need an interpreter when speaking to Ms Baker.

vii) Their mother is settled in England and has been in stable employment since July 2020. She is undertaking English lessons and is integrated in the local community. She has a half sister in Northampton. The mother's partner is likewise settled here.

viii) It is indisputable that both children and their mother intend that their abode in Reading should be their permanent home.

73. In my judgment, the physical and mental constituents of the concept of settlement are very amply proved in this case. To find otherwise would be perverse.

74. A consequence of this finding about settlement is that the Courts of England and Wales will have exclusive jurisdiction in any later welfare proceedings between the parents. Article 7 of the 1996 Hague Convention provides, so far as is material to this case:

> "In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and … b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment."

My finding that both children are settled here means that all the elements of the article are proved in that:

i) the children are now habitually resident here;

ii) the children have resided here for more than a year since the father was aware of their whereabouts;

iii) there was no request for a return made in that one year period; and

iv) the children are now settled here.

Therefore the authorities of Latvia have lost their jurisdiction. Accordingly, under article 5 only the courts of England and Wales have jurisdiction (based on the habitual residence the children here).

75. I exercise the consequential discretion against a return to Latvia. Given my findings on settlement set out above, and having regard to the resultant exclusive jurisdiction of the courts here, it would be highly aberrant were that discretion to be exercised in any other way.

Children's objections

76. This defence only arises if the settlement defence has failed. I have found above that the settlement defence succeeds. What follows therefore is my decision if I am wrong about the settlement defence. As I am confident that I am not wrong, I shall deal with this defence quite shortly.

77. There is no dispute about what is required for this defence to operate. First, I must be satisfied that the children have actually objected to a return. This is a simple question of fact. Second, I must be satisfied that the children have attained an age and degree of maturity at which it is appropriate to take account of their views. Again, this is a question of fact although its determination requires a limited measure of judicial evaluation. That evaluation will exclude childish nonsense. It will not, however, give rise to the substantive weighing of the children's objections against the Convention's policy. That function happens in the third stage, the exercise of the consequential discretion.

78. In this case the two preliminary "gateway" requirements are clearly proved, and Mr Evans has not sought to argue otherwise. He argues that the consequential discretion should be exercised in favour of a return of both children to Latvia notwithstanding their objections. He submits that the expressed objections of the children are misplaced. They are not objections to a return to Latvia, but objections to being placed in the care of their father. He submits that the objections betray a fierce and uncritical loyalty to their mother, which is likely the product of improper influence. He submits that the dysfunctional, toxic and turbulent relationship between the mother and her partner amply justifies the removal of the children from their current environment and their return to Latvia.

79. The discretion in this sphere is not one which will almost invariably be driven by the primary threshold condition, as is the case where risk of harm, or settlement is proved. It is a genuine discretion, but one in which the objections will weigh very heavily where they are expressed by children of this age. No one is suggesting that these children should be separated and so they have to be treated as a unit when weighing their objections. Within that unit the older child is 14½ years old. She is unquestionably Gillick competent and so her wishes will normally be decisive in any non-medical dispute that she may have with her parents: see *NHS Trust v X (In the matter of X (A Child) (No 2))* [2021] EWHC 65 (Fam) at para 30 per Sir James Munby. I accept that these proceedings are governed by a self-contained set of special rules, and that those

rules do not give decisive weight to objections from a Gillick competent child. However, it seems to me that when weighing a child's objections under the Convention due regard should be had to the universal policy that underpins the Gillick principle namely that a child who has achieved a sufficient degree of maturity should have her decisions about her life respected, provided that they are not foolish or irrational. Whatever the nature of the proceedings it seems to me that Lord Denning's famous dictum in *Hewer v Bryant* [1970] 1 QB 357 at 369 should be kept in mind:

> "… the legal right of a parent to the custody of a child … is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice."

80. I reject Mr Evans's submissions. In my judgment the objections of the children were clearly aimed at a return to Latvia and are not merely confined to an objection to being placed in the care of their father. I do not doubt that the objections reflect loyalty to their mother but that loyalty is in my judgment not the product of improper or undue influence but a normal reflection of a natural adherence to their primary carer. The objections are not to be treated as diminished in quality because of the outbreak of a transient phase of turbulence in the relationship of the mother and her partner; the submission struck me as a non sequitur. It could be equally argued that the objections are fortified when they are expressed in such an environment. In my judgment the objections are rational, reasonable and logical. When combined with the length of time the children have spent here, this is the clearest possible case for exercising the discretion against a return to Latvia.

Conclusion

81. I am satisfied that on 13 May 2021 the children were settled in England and that they have remained so settled to the present day. I exercise the discretion granted to me under article 12 of the Convention against a return of these children to Latvia.

82. I am separately satisfied that the children object to a return to Latvia and that they are of an age and a degree of maturity at which it is appropriate to take account of their views. I exercise the discretion granted to me under article 13 of the Convention against a return of these children to Latvia.

83. I decline to adjudicate the mother's further defences of risk of harm, consent and acquiescence. It is unnecessary for me to do so in circumstances where her first and second defences have succeeded.

84. That is my judgment.
