Neutral Citation Number: [2023] EWHC 2059 (Fam)

Case No: FD22P00668

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/08/2023

Before :

John McKendrick KC
(Sitting as Deputy High Court Judge)

- -

Between :

A MOTHER — Applicant

- and -

(1) A FATHER

(2) A GIRL

(3) A BOY (By his CAFCASS Guardian**)**

Respondents

Mr Brian Jubb instructed by Philcox Gray & Co for the applicant
Ms Anita Guha instructed by Osbornes Law for the first respondent
Professor Rob George instructed by Goodman Ray LLP for the second and third respondents

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APPROVED JUDGEMENT

This judgment was handed down remotely at 10.30am on 08.08.2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr McKendrick KC
(Sitting as Deputy High Court Judge)

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their

family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr McKendrick KC :

The Deputy Judge:

Introduction

1. By way of an application, dated 3 October 2022, made pursuant to the Child Abduction and Custody Act 1985 (incorporating, by Schedule 1, the 1980 Hague Convention on the Civil Aspects of International Child Abduction, hereafter the "Hague Convention") the applicant seeks the summary return of the second and third respondents to the Republic of France. The second respondent is a girl, aged 13 years 9 months (I shall refer to her as X). The third respondent is a boy, aged 10 years and 11 months (I shall refer to him as Y). I shall refer to X and Y collectively as "the children". The first respondent is the (separated) husband of the applicant and father to the second and third respondents.

2. After hearing limited evidence from the Cafcass officer only and submissions at a hearing on 31 July and 1 August 2023 I reserved judgment. I have determined the appropriate course of action is to dismiss the application. I endeavour to set out my reasons for this decision below.

Background

3. The applicant and first respondent are British citizens. The second and third respondent are British citizens and both were born in the United Kingdom.

4. The applicant and first respondent met in 2014 and were married in England in November 1996. They remain married although they are separated. On the applicant's case they separated in 2014. On the first respondent's case they separated in 2018. It is not necessary to resolve this issue.

5. They have four children. The two eldest children were born in 1996 and 1997 and are 26 and 25 years old respectively. They have played no part in these proceedings.

6. In or around November 2013 the applicant relocated to France with the children. They have resided there continuously since then. The first respondent continued to have employment in England. He visited regularly and spent time with his wife and children. During the COVID pandemic the first respondent was not able to easily travel and did not spend much time with the children.

7. In July 2022 the applicant and the children moved to the south east of France. During August 2022 the children were at home with the applicant. The first respondent arrived to have a vacation with the children around 16 August 2022. It transpired that on 18 August 2022 he took them to London without the applicant's permission. The children travelled on passports which the mother was not aware of, and in respect of which, she had not provided her consent for the children to obtain.

8. The applicant used private investigators to locate the children. She stated in evidence that she involved the state authorities and the police but limited or no action was taken. The first respondent issued proceedings in the Family Court seeking a

Prohibited Steps Order to prevent the applicant removing the children from England and Wales and a Specific Issue Order to enrol them in school. The applicant's solicitors wrote to the court seeking a stay pursuant to Article 16 of the Convention. The applicant sought the voluntary return of the children to her care. This did not take place.

The Proceedings

9. The applicant issued proceedings. The matter came before Mr Richard Todd KC on 26 October 2022. Directions were made for disclosure of papers from private law proceedings before the Family Court and for the parties to file and serve written evidence. Given the summary nature of this jurisdiction, the application was listed for a hearing on 14 December 2022, with a time estimate of one day. The judge also directed that the Cafcass High Court Team prepare a report in relation to the children's wishes and feelings and whether the children should be separately represented.

10. The first respondent filed a defence in the form of an 'Answer' dated 24 November 2022. He relied on four grounds to defend the application, namely:

    a. the children were not habitually resident in France prior to their removal to England;
    b. pursuant to Article 13 (a) of the Convention the mother consented to the removal of the children;
    c. pursuant to Article 13 (b) the children would be at risk of grave emotional and psychological harm if return to France;
    d. pursuant to Article 13 both children raised an objection to return.

11. Evidence was filed and served and the High Court CAFCASS team filed a written report for the court.

12. The final hearing took place before Morgan J, as directed, on 14 December 2022. Prior to the hearing the parties had engaged in mediation. Both parties were legally represented at the December hearing. On the morning of the hearing the parties asked for more time to discuss a compromise. A consent order was drafted which provided for X to remain in England and Wales with her father and for Y to be returned to France to reside with his mother. The order was considered and approved by the court. The following recitals were recorded:

    The parties agreed to the summary return of Y to France, and that the applicant should withdraw her application in respect of X, on the basis that Y shall reside with the mother and X with the father

    The child Y, born [ ] /09/2012, is and remains at all material times habitually resident in the Republic of France.

13. It was ordered that Y should be summarily returned to France by no later than 23:59 hrs on 3 January 2023. The parties agreed Y would return on 1 January 2023. At 09:24 on 1 January the first respondent sent a text to the applicant informing: *"Y is ill*

and is refusing to go to France." No further information about his health or as to when he would return to France was provided. Y continued to live with the first respondent in England.

14. The applicant filed and served an application, dated 5 January 2023 for enforcement of the 14 December 2022 order. The matter came before Mr Simon Kolton KC on 9 January 2023. The judge ordered that Y return to France before 23:59 15 January 2023.

15. On 12 January 2023 solicitors acting for the children applied for them to be joined as parties to the proceedings. It would appear that the children first attempted to contact a solicitor, Mr Kevin Skinner of Goodman Ray LLP, on or round 22 December 2022. Mr Skinner first met with Y and then X in early January 2023.

16. This application was heard by Mr David Rees KC on 13 January 2023 when the parties were represented by counsel, as were the children. The judge gave directions requiring the filing of evidence in respect of the following matters:

    a. from the children's solicitor regarding how the children came to instruct him;

    b. from the applicant and first respondent setting out the circumstances whereby X would remain in England and Y would return to France and in the case of the father the circumstances (save for any privileged information) following the making of the order on 14 December leading up to the children consulting with Mr Skinner;

    c. for Cafcass to provide a letter setting out her views about what Mr Skinner stated with regards to Y's competence to instruct him.

17. The judge directed the matter to be restored at a hearing on 24 January 2023 and the mother gave an undertaking not to enforce the order for the summary return of Y meanwhile. The proceedings came before Hayden J who joined the children as parties with Cafcass acting as Guardian for Y (but not X) and Mr Skinner acting for both children.

18. The matter returned before Hayden J on 1 March 2023. The applicant wished to pursue her application for Y to return to France, but not X, recognising the weight to be attributed to X's wishes and feelings. Prior to the hearing the children's solicitor issued an application to set aside the 'return order' of 14 December 2022. The hearing was adjourned to consider the first respondent's free-standing application for Y to attend school in England and other matters. The application to set-aside the December 2022 order was re-listed for 2 May 2023. On 3 March 2022 Hayden J, with the parties' consent, ordered Y attend a school in England.

19. On 5 April 2022 the applicant issued a FPR Part 18 application to set aside the order of Morgan J which provided for the withdrawal of her application for the return of X to France. The application notice stated "there has been a change of circumstances and I now wish to pursue my application for X to return to the jurisdiction of France".

20. On 2 May 2022 the proceedings came before Moor J. He set aside "in full" paragraphs 14 (the order for Y's return to France) and 16 (permission for the applicant to withdraw her application in respect of X's return and the withdrawal of the application) of the order made on 14 December 2022. Recital C states:

> The Court gave an oral judgment wherein it determined that R12.52A FPR 2010 applied to both a return and non-return order irrespective of whether the non-return was occasioned by an application to withdraw. The Court on the 1 March 2023 had provided for this hearing and directed further evidence and the Court determined there should be no further delay in determining the set aside applications. A set aside of the whole of the return order ensured a level playing field and furthered the over-riding objective and was in accordance with the best interests of the children

21. Moor J listed the matter for "an attended re-hearing on 6 and 7 July 2023". The order said: "The Court directing that the matter must be heard by the end of July 2023". Further directions regarding evidence were made.

22. The application came before Sir Jonathan Cohen on 6 July 2023. At this hearing the applicant appeared in person and the other parties were presented by solicitors and counsel. On 3 July 2023 the applicant's father died. On 5 July the mother applied to adjourn the hearing in the light of her grief. The court acceded to this application and determined the hearing on 6 July 2023 should proceed as a case management hearing. The applicant's further applications for: (i) permission to file a further witness statement; (ii) the instruction of a psychological expert to assess the children; and (iii) an order that X's passport must be lodge with a solicitor were all refused. A recital to the order makes clear the applicant was urged to attend the final hearing in person and that participation directions would be made for her. The matter was re-listed and some limited ancillary directions were made.

The Hearing on 31 July and 1 August 2023

23. The applicant attended remotely from France by CVP. She was represented in court by Mr Brian Jubb, counsel. The first respondent was present in court, represented by Ms Anita Guha, counsel. The second respondent was represented by her solicitor and Professor Rob George, counsel. The third respondent was represented through his Cafcass Guardian and by the same solicitor and counsel as the second respondent. Mr Jubb observed in writing that it was 'somewhat unusual' for the same solicitor to represent both parties but I was not addressed on this issue. I considered the matter but noting the commonality of interest between X and Y, the fact no conflict of interest arises between them; and that their counsel noted no tension between his clients' instructions, I consider there is no difficulty in X, and Y through his Guardian, retaining the same solicitor. I am grateful to all solicitors and counsel for their assistance.

24. Mindful of the allegations of domestic abuse raised in the evidence, I raised with the parties at the outset the role of Family Procedure Rules ("FPR") Practice Direction 3AA. The applicant was content to appear by CVP but with her camera switched off. I checked with the parties and there was no objection. I was content that the duty on the court imposed by the Practice Direction was satisfied.

25. At the outset of the hearing, Mr Jubb applied to adjourn the hearing. He submitted that the combination of: i. his client's on-going distress arising from the death of her father; ii. the knowledge the body of her father would require to undergo a *post mortem* examination; and iii. her underlying ill-health which led to a doctor in France providing an opinion on 10 May 2023 that she required four months off work, had the combined effect that an adjournment of the hearing was necessary. The application was opposed by counsel for the other three parties. As I was about to rule on the application, Mr Jubb further indicated that his client authorised him to inform the court she had also discovered a lump on her breast on Friday 28 July 2023, albeit she had not yet seen a doctor about this but was, naturally, concerned.

26. I was sympathetic to the series of significant personal problems raised by the applicant. I raised with the parties, that given the summary nature of this jurisdiction, it did not appear necessary for either the applicant or first respondent to give evidence. Mr Jubb agreed. Whilst the parties wished to ask questions of the Guardian, it was recognised her evidence would be short. Mr Jubb very properly accepted he had filed and served two thorough position statements, in respect of which he had full instructions. Therefore, considering these matters, and making clear I was content for the hearing to be the subject of regular short adjournments to permit the applicant to retain her attention and participate, it did not seem that an adjournment was necessary to ensure justice to the applicant. Furthermore, I note the letter from the doctor from May 2023 was before Sir Jonathan Cohen and this did not form the basis for his decision to adjourn the earlier July 2023 hearing. Whilst justice is the touchstone of any such case management decision, there is a pressing welfare need to resolve these long-running proceedings for X and Y, without further delay. Moor J identified, with characteristic firmness, the need for no further delay on 2 May 2023 and the imperative that the proceedings be determined before the end of July 2023. I respectfully agree. For all these reasons an adjournment was not necessary; not unjust and in any event contrary to the welfare of X and Y.

27. Professor George called the Cafcass officer and the court briefly heard her evidence.

28. On the morning of 1 August 2023, Mr Jubb informed me the applicant conceded that X and Y should not be separated and that her case was that both children should be return to France and should I find X should not be returned, then Y should not be returned alone.

29. After hearing submissions on the relevant issues, I reserved judgment.

The Position of the Parties

30. I briefly summarise the position of the four parties at the outset of the hearing on 31 July and briefly summarise their respective submissions in support.

31. The applicant submitted both children were habitually resident in France in August 2022. They had been wrongfully removed. None of the respective defences were made out (consent/acquiescence; grave risk of harm; children's objections). It was submitted the date for the assessment of the acquiescence defence was the morning of 14 December 2022 and not the date of this hearing. Mr Jubb submitted this followed

from the terms of the order of Moor J, setting aside the order of Morgan J. Mr Jubb submitted that the allegations of domestic abuse made by his client in respect of the first respondent were not relevant to the issues in these proceedings. I was invited to order the summary return of X and Y to her care in France.

32. The first respondent father initially submitted the children were not habitually resident in France in August 2022. At the outset of the hearing Ms Guha conceded this point. Rightly so, in my judgement. It was submitted the applicant had acquiesced in the retention of X as a result of her agreement evidenced by the 14 December 2022 consent order that X remain with the first respondent in England. Ms Guha said the facts clearly demonstrated that from 14 December 2022 up to 5 April 2023 the applicant had acquiesced to X residing in England and therefore to her not being returned to France. It was noted the applicant had not objected to X beginning school in January 2023. It was submitted X was at risk of grave psychological and physical harm if returned to France and there were no appropriate protective measures, particularly in circumstances where the applicant has not yet identified a home where the children would live. It was submitted both children objected and the objections provided an exception to their return. It was submitted that it would be intolerable for Y to be separated from X, albeit in the light of the concession made on day 2, this point was not pursued. Ms Guha disagreed that the date for assessment of the acquiescence defence was the morning of 14 December 2022. I was invited to dismiss the application for the summary return.

33. Professor George on behalf of children accepted they were habitually resident in France in August 2022. He submitted X became habitually resident in England and Wales in December 2022 and this was relevant to any exercise of the court's discretion. He agreed with the first respondent's submissions that the return to France would place X at grave risk of psychological and physical harm and that the objections raised by both children were a barrier to their return. It was further submitted that the applicant had acquiesced in X's removal as a result of her agreement to the 14 December 2022 consent order. I was invited to refuse the application.

The Evidence

The Applicant (Mother)

34. The applicant filed and served four witness statements. In her first statement she stated that the children had been habitually resident in France since moving there in 2013. She explained the limited role of the first respondent in their lives and how she had largely brought up the children as a single parent. She explained that she did not consent to the removal of X and Y from France in August 2022. She said that the first respondent was controlling and she sought a non-molestation order against him before the children were born. She alleges domestic abuse took place in their marriage. She denied the first respondent's allegations of physical harm or emotional abuse of X and Y. She explained that she did not believe the children objected to returning and spelt out some potential protective measures.

35. In her second witness statement she recounts what took place at the hearing on 14 December 2022. She says the proposal to separate X and Y came from the first

respondent. She explains the evolution of her thinking to agreeing to withdraw her application for X's return to France. Paragraph 14 sets out her reasons for consenting to withdraw her application. This was largely because she thought X "had a fantasy life about life in London including going to school because she had not experienced it before". She felt reviewing matters in June would help. She stated she had not discussed this proposal with the children. She explains events from after the hearing on 14 December to the matter being restored to the court and her view as to why Y did not return to France as agreed and ordered. She considered the children were being marginalised from her and the first respondent was alienating them from her and failing to promote contact.

36. In her third witness statement, dated 5 April 2023, the applicant described how her relationship with X had improved and she would not then have made the same decision as she did in December to agree to her remaining with the first respondent in England. She references the impact on the children of separation after her consideration of the Cafcass report dated 14 February 2023 (see below). She states: "I have decided that I will pursue my application for X to return home with her brother". She said that the first respondent was unduly influencing the children to stay in England. She said she felt the first respondent posed a threat to her physical safety in England. She explained that even if X could not return it remained better for Y to return to France alone.

37. In her fourth statement, dated 19 June 2023, she explained why X was not habitually resident in England and Wales. She discussed the protective measures in France and explained her own immigration status. She set out, in detail over five pages, her evidence of serious domestic abuse by the first respondent (which includes allegations of non-consensual sex). She said that she had only recently enrolled in the 'Freedom' programme online.

The first Respondent (Father)

38. In his first witness statement the first respondent asserted the children had moved nine times whilst living in France. He says they also moved to Italy and Switzerland. He complains they often lived in hotels or Airbnbs and their existence was peripatetic. He details the various places the applicant and children lived, mostly around France and his visits to them. He said that their schooling had been erratic. X had not been in school since March 2021 and was not properly home schooled. He said Y had not been in school since January 2021 or properly home schooled.

39. He explained the children would be at risk of physical chastisement if returned to the applicant. He recounts examples of times he says the applicant used physical chastisement. It was said there was a grave risk of psychological harm and various examples were provided. Mention was made of X self-harming. The first respondent said that both children informed him they object to being returned.

40. He gave a detailed account of the events of 16-18 August 2022. He said the family stayed together in "the flat". That the applicant asked him to take X back to England and he refused, refusing to split the children. He said the applicant was erratic and violent. The children were upset and scared. As a result he took the children to

England. He says he telephoned the applicant the day after they arrived back. He has provided indirect contact by telephone and video conference call since.

41. In his second witness statement he says the proposal to split the children came from the applicant. He explained that he had not spoken with them about the proposal before 14 December 2022. He describes the gravity of the children's response to the proposal they be separated ("they were distraught"). As a result he says he put the children in touch with a lawyer.

42. In his third witness statement, he denied physical or verbal aggression to the applicant. He said he had never been served with a non-molestation order. He lamented two in person contact sessions had been arranged for the children to see the applicant and she had not attended either. That they had wanted to see their mother.

43. In his fourth witness statement he agrees that X is habitually resident in England and Wales and has been since December 2022. He noted the mother cancelled three contact sessions in total and the children are upset by this. He responded to the mother's proposed protective measures explaining why he considered they would not safeguard the children. He raised the applicant's unstable immigration status in France. He denied the allegations of abuse. He accepted there were non-molestation proceedings in 2001, but had no memory of having been served an order from those proceedings. It was noted a third arranged session for in person contact with the applicant and the children had not been attended by the applicant.

Mr Kevin Skinner

44. Mr Skinner provided three witness statements. His first witness statement dated 12 January 2023 set out that he had been approached by X and Y and they objected to Y's return as provided for in the order of 14 December 2022, wished to become parties and to set aside the 14 December 2023 order and wished to remain together. He said that they: "feel that their wishes and feelings have not been heard. They are devastated at the thought of being separated from each other". He explained he had spoken to them both for around 45 minutes each. In his second statement he sets out how X and Y came to instruct him as directed by David Rees KC (see above). He sets out in detail his background, his understanding of competence and involvement with both children. His third witness statement dated 28 June 2023 sets out why he considered X became habitually resident in England and Wales in December 2022. X told him she considers England is her home. She talked of her fondness for France but that England was where she wanted to live. She said: "I would way prefer to run away than live with my mum". Mr Skinner also revealed that X disclosed an allegation of sexual abuse by a third person when in her mother's care when she was around ten years old. He concluded expressing X's disappointment than during her 10 months in England she had not had contact in person with her mother.

Ms Sarah Gwynne, CAFCASS

45. Ms Gwynne has provided reports dated 9 December 2022 and 14 February 2023. In addition there is a position statement drafted by her solicitors dated 29 June 2023 in which she recounts her most recent meeting with Y. Ms Gwynne met with X and Y at a Cafcass office on 5 December 2022. Ms Gwynne noted that X was confident and

came to the meeting with a great deal of information about her experience in France. She recounted that her father had secretly obtained passports and secretly arranged flights. She kept her phone on 'airplane' mode whilst they awaited the flight to England. She spoke negatively and at length about her mother's care. Y was feeling nervous when he met Ms Gwynne but could hold a conversation 'very well' and 'stayed engaged throughout'. He said his closest sibling relationship was with X and she is his "favourite sister" (of three). When asked about what he missed in France he said "his mum". He said his relationship with his mum was good but she was not nice to his sister, X.

46. Ms Gwynne noted:

    a. "both children stated that they did not wish to return to France."
    b. "Y said that he would like me to tell the judge that 'I would like to stay here (England) because it is better" and he would not be very happy if a return order was made.
    c. He said it would be a "medium worry" if returned to France, the second of five options on an increasing worry scale used by Cafcass.
    d. "However, Y was also clear that he would not wish to be separated from his sister and he raised this without prompting, telling me 'I don't want to be separated from her'.
    e. "X said 'I would definitely tell the judge that I don't want to go back to France"

47. She explained that both children 'are able to grasp why the family court is involved'. X was assessed to be 'an intelligent and charismatic young person, and on an initial impression seems older than her thirteen years'. Overall both children were considered to be broadly in line with their chronological age. Ms Gwynne noted that: 'they might have been recruited to their father's narrative of events'

48. Ms Gwynne noted that "it is evident that both children hold preferences (of varying degrees) to remain living in" England. "I consider both children to be of sufficient age and maturity where their feelings need to be considered" although she said it was difficult to put an absolute measure on their strength of feeling given their alignment with the first respondent. Y wanted to live in England but missed his mother. She considered Y might be a bit conflicted given X's views. She went on to consider grave risks of harm and protective measures.

49. In her second report she notes she met with Y again on 6 February 2023. She did not meet X given she is represented by Mr Skinner. Y said he was less nervous than their first meeting. She notes the following:

> "Y said that he and X spoke alone together after they were told about the [14 December 2022 order] plan to separate them. He said they had agreed to run away together if they tried to make him leave for France. I asked whose initial idea this was, and Y shared "*my idea"* with a little gusto….
>
> I asked Y how he felt about the decision for him to return to France and he responded: "I was sad because 1) I didn't want to leave X, 2) I didn't really want to go back to France and 3) life just wasn't really good there." I asked Y

> if he could describe to me why he feels so strongly that he does not want to be separated from X and he explained, 'normally every time we wake up, we knock on each other's doors and say hello', 'recently before she goes to school, she wakes me up and gives me a hug.' And 'I just love spending time with her'.
> ….
> "I explained that the plan his parents had agreed was that he would still spend time with X during the school holidays. Y was certain that this was not enough time and responded, 'I still want to see her every day' He elaborated that an arrangement where they would spend school holidays together is 'still not okay, I just like seeing her every day, talking to her, it just makes my life easier'.
> X asked that, 'I make sure that the judge knows that I don't want to return because I want to say [sic] here with my sister and go to school.'
> "..X also spoke about her close relationship with Y and warned me that he had been nervous about meeting me the previous night and had kept asking her if he could sleep in her room. X could see that I had come to the meeting prepared with pens and paper and she advised that colouring would be a good way to distract Y from his nerves whilst I was talking to him. This struck me as an insightful comment for a 13-year-old to make and likely to be borne out her own hands-on experience of interacting with him"

50. Ms Gwynne says: "I struggle to understand how either parent considered this to be a decision that their children would have found acceptable." Later she says "the risk of emotional harm to both children arising from this stark change of circumstance [their separation] is great". She said there were no significant indicators that Y had been subject to coaching but it was not possible to rule out Y had been coached about his views in respect of his mother. She goes on: "It is my analysis that this family's circumstances are far removed from a sufficiently supportive environment for siblings to cope with living separately from each other".

51. Her conclusion is that the applicant's application to enforce the return order made in respect of Y:

> "poses him at risk of emotional harm, if it disrupts the strong bond that he shares with his sister, and leaves Y feeling isolated and caught between the separated households. Y advocated the strength of his feeling by suggesting that he would run away. Whilst higher levels of supervision may mitigate the physical risk of Y, it is difficult to define the protective measures that may ameliorate the risk of emotional harm."

52. Her solicitor's position statement dated 29 June 2023 sets out her meeting with Y on 21 June 2023 (she confirmed in oral evidence this account was accurate). It said the following:

> The mother's proposal for the children to return to France was shared with Y, as to where she would like them to live, and attend school in France – he recognised the place names, he talked about missing the Lake, it was not clear if this was Lake D, or Lake N – both of which the family have lived close to at times. Y said 'I miss the lake and some of my old friends'.

> Y was asked what he would like to tell the judge, his response was: 'I want to stay here because (1) I have a lot of friends and a lot of family here; and (2) I want to spend time with my dad and my sister and (3) I didn't like living with mum.'
> Ms Gwynne explored with him why he didn't like living with his Mum, to which he responded, 'all the time she would go out for coffee with her friends and not really come back until around 10pm'. When Y was asked how things are with his Mum right now 'not really good - I don't like calling her so much - sometimes when she calls me, I accidently don't answer and then she calls me back when I have it on silent because it is late.' Y shared that he would like his mum to call him at 8pm because he goes to sleep at 9.30pm; he said that they speak three times a day ……
> ….
> Ms. Gwynne explored with Y again (as she did when first reporting in this matter) that the court is being asked to decide if Y should return to live in France. Y was firm that he wouldn't like to do that and went on to share that he would be worried about how long the court in France would take (to consider an application his father might make, for permission to relocate the children back to England) given the English one has already taken a long time. The length of time these proceedings have been ongoing for, has clearly had an impact on both the children.
> Y suggested that maybe he could see mum during half-terms, and school holidays, but that he wouldn't want to live in France permanently again. He asked if we could tell the Judge that he thinks 'custody of me and X should be 70/30' with 70% of time being in England.
> …..
> Ms. Gwynne considered that there had been a hardening of Y's responses, and his position since she last met with him. She recognised that this was due to the passage of time that he has been in England, but also because he has not had direct contact with his mother. The hardening of Y's responses to returning to France, Ms. Gwynne believes, would not be so strong (which the court may now find amounts to an objection) if the mother had been to England to see the children, something that Ms Gwynne has encouraged her to do throughout this case."

53. She said in her oral evidence she was "really, really concerned about separating the children". She was worried about the emotional impact on both of them and described their "very, very close relationship" and that they relied on each other for emotional support. Whilst Y had taken on something of a motherly role she had reverted to a more appropriate sibling role. When asked by Mr Jubb about holidays amounting to a protective measure to reduce the harm of separation, Ms Gwynne gave evidence that the parents cannot communicate and trust each other to arrange holidays and as a result she was very worried regular holidays together would not take place. In answer to my question whether there was a grave risk of psychological harm to Y, if X were not returned to France and he was, Ms Gwynne answered "absolutely". She went on to outline the paucity of protective measures. She said that Y's objection had hardened and had gone from a "strong preference" to remain England to a "firm objection" to being returned to France.

The Legal Background

The Hague Convention 1980: Purpose

54. The objective of the Hague Convention is set out in the preamble:

> "Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,"

55. Article 12 of the Hague Convention provides:

> "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."

56. The HCCH 1980 Child Abduction Convention Guide to Good Practice ("the Good Practice Guide") makes clear the wider purpose of the Convention and the need for any court considering these issues to have firmly in mind the principles of international comity between jurisdictions which underpins the Hague Convention. I remind myself of paragraphs 14, 15 and 16 of the Good Practice Guide:

> The second underlying concept is that the wrongful removal or retention of a child is prejudicial to the child's welfare and that, save for the limited exceptions provided for in the Convention, it will be in the best interests of the child to return to the State of habitual residence.
>
> The third underlying concept is that, as a rule, the courts of the child's State of habitual residence are best placed to determine the merits of a custody dispute (which typically involves a comprehensive "best interests" assessment) as, inter alia, they generally will have fuller and easier access to the information and evidence relevant to the making of such determinations. Therefore, the return of the wrongfully removed or retained child to his or her State of habitual residence not only restores the status quo ante, but it allows for the resolution of any issues related to the custody of, or access to, the child, including the possible relocation of the child to another State, by the court that is best placed to assess effectively the child's best interests. This third underlying concept is founded on international comity, which requires that the Contracting Parties
>
> > "[…] be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them – those of the child's habitual residence – are in principle best placed to decide upon questions of custody and access
>
> The above-mentioned purpose of the Convention and underlying concepts define the narrow scope of the Convention, which deals exclusively with the

> prompt return of wrongfully removed or retained children to their State of habitual residence, subject only to the limited exceptions provided for by the Convention. In doing so, rights of custody existing in the State of habitual residence are respected in the other Contracting Parties. In dealing with the prompt return of children, the Convention does not deal with the merits of custody and access, which are reserved for the authorities of the State of habitual residence (see para. 15 above).

The Exceptions

57. Article 13 provides:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -
>
> > *a)* the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
> >
> > *b)* there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> 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.
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Acquiescence

58. The leading case is *Re H and Others (Minors) (Abduction: Acquiescence)* [1998] AC 72. The headnote to the law report states:

> "that English law concepts of acquiescence had no direct application to the construction of article 13 of the Convention; that acquiescence under article 13(a) was a matter of the actual subjective intention of the wronged parent, save only where his words or actions clearly showed, and had led the other parent to believe, that he was not asserting or going to assert his right to summary return and were inconsistent with such return; and that acquiescence was a question of fact, the burden of proof being on the abducting parent, but that judges should be slow to infer an intention to acquiesce from attempts by

> the wronged parent to effect a reconciliation or to reach an agreed voluntary return of the abducted child."

59. Lord Browne-Wilkinson (with whom the other four Law Lords agreed) framed the issues acquiescence and removal as follows at 84 G-H:

> The primary question in the present case is whether the father, by pursuing his remedies in the Israel Beth Din in accordance with the tenets of his religion rather than promptly bringing proceedings for summary return of the children under article 12, has acquiesced in "the removal" of the children. It is not a case of wrongful "retention" by the mother: it is established by the decision of this House in *In re H. (Minors) (Abduction: Custody Rights)* [1991] 2 A.C. 476 that there is "retention" of the child for the purposes of the Convention only where the child has been lawfully taken from one country to another (e.g. for staying access for a defined period) and there has then been a wrongful failure to return the child at the expiry of that period. In the present case, the mother wrongfully removed the children and the question is whether the father has acquiesced in that removal.

60. Lord Browne-Wilkinson focused on the nature of the Hague Convention and its international application, holding at p. 87 E-G:

> In my view these English law concepts have no direct application to the proper construction of article 13 of the Convention. An international Convention, expressed in different languages and intended to apply to a wide range of differing legal systems, cannot be construed differently in different jurisdictions. The Convention must have the same meaning and effect under the laws of all contracting states. I would therefore reject any construction of article 13 which reflects purely English law rules as to the meaning of the word "acquiescence." I would also deplore attempts to introduce special rules of law applicable in England alone (such as the distinction between active and passive acquiescence) which are not to be found in the Convention itself or in the general law of all developed nations.

61. He held that:

> What then does article 13 mean by "acquiescence?" In my view, article 13 is looking to the subjective state of mind of the wronged parent. Has he in fact consented to the continued presence of the children in the jurisdiction to which they have been abducted? …..In my judgment it accords with the ordinary meaning of the word "acquiescence" in this context. In ordinary litigation between two parties it is the facts known to both parties which are relevant. But in ordinary speech a person would not be said to have consented or acquiesced if that was not in fact his state of mind whether communicated or not.
>
> ….
>
> In my judgment, therefore, in the ordinary case the court has to determine whether in all the circumstances of the case the wronged parent has, in fact, gone along with the wrongful abduction. Acquiescence is a question of the

> actual subjective intention of the wronged parent, not of the outside world's perception of his intentions.
>
> …
>
> Once it is established that the question of acquiescence depends upon the subjective intentions of the wronged parent, it is clear that the question is a pure question of fact to be determined by the trial judge on the, perhaps limited, material before him.

62. He then turned to the effect of a finding of acquiescence in the retention by the wronged parent and held at 89 D-E:

> It follows that there may be cases in which the wronged parent has so conducted himself as to lead the abducting parent to believe that the wronged parent is not going to insist on the summary return of the child. Thus the wronged parent may sign a formal agreement that the child is to remain in the country to which he has been abducted. Again, he may take an active part in proceedings in the country to which the child has been abducted to determine the long-term future of the child. No developed system of justice would permit the wronged parent in such circumstances to go back on the stance which he has, to the knowledge of the other parent, unequivocally adopted: to do so would be unjust.

63. Lord Browne-Wilkinson held: "Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."

64. The issue of consent and acquiescence was raised in *In re P-J (Children) (Abduction: Consent)* [2009] EWCA Civ 588; [2010] 1 WLR 1237. Wilson LJ (as he then was) (with the agreement of Ward LJ) noted the difference between consent and acquiescence at paragraph 53:

> Nowadays not all law can be simple law; but the best law remains simple law. (a) However Professor Perez-Vera may have expressed herself in her Explanatory Report, we have to construe the words "had consented to or subsequently acquiesced in the removal or retention" in article 13(a) of the Hague Convention. The use of the pluperfect tense ("had consented"), contrasted with the qualification of the word "acquiesced" by the word "subsequently", seems clearly to show that the concept of "consent" relates to a stance taken by the left-behind parent prior to the child's removal (or retention) and that the concept of "acquiescence" relates to his stance afterwards.

Grave Risk of Harm

65. The law in respect of the defence of grave risk of harm or intolerability pursuant to Article 13(b) was considered by the Supreme Court in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27; [2012] 1 AC 144. In *E v D (Return Order)* [2022]

EWHC 1216 (Fam) MacDonald J helpfully summarised the relevant principles at paragraphs 29 and 30:

> "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. …..
>
> In *Re E*, the Supreme Court made clear that in examining whether the exception in Art 13(b) has been made out, the court is required to evaluate the evidence against the civil standard of proof, namely the ordinary balance of probabilities whilst being mindful of the limitations involved in the summary nature of the Convention process. Within the context of this tension between the need to evaluate the evidence against the civil standard of proof and the summary nature of the proceedings, the Supreme Court further 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 grounding the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm can be identified."

Child's Objections

66. I have had regard to *In re M & others (Children) (Abduction: Child's Objections)* [2015] EWCA Civ 26; [2016] Fam 1 in respect of the "gateway".

67. In *V v C (A Child) (Wrongful Retention: Child's Objections: Discretionary Return)* [2023] EWHC 560 (Fam) Richard Harrison KC, sitting as a deputy High Court Judge, summarised the principles to be applied when the court is considering the defence of child objections. At paragraph 76 and following the judge held:

> "76. The leading authority on the child's objections exception - at least so far as the so called 'gateway' stage is concerned - is *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26. As to discretion, the leading authority is *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55.
>
> 77. In Re *Q & V (1980 Hague Convention and Inherent Jurisdiction Summary Return)* [2019] EWHC 490 (Fam) at paragraph 50, Williams J summarised the relevant principles to be derived from both of the *Re M* cases as well as the later decision of *Re F (Child's Objections)* [2015] EWCA Civ 1022 as follows:
>
> i) The gateway stage should be confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in 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 his or her views.
>
> ii) Whether a child objects is a question of fact. The child's views have to amount to an objection before Article 13 will be satisfied. An objection in this context is to be contrasted with a preference or wish.
>
> iii) The objections of the child are not determinative of the outcome but rather give rise to a discretion. Once that discretion arises, the discretion is at large. The child's views are one factor to take into account at the discretion stage.
>
> iv) There is a relatively low threshold requirement in relation to the objections defence, the obligation on the court is to 'take account' of the child's views, nothing more.
>
> v) At the discretion stage there is no exhaustive list of factors to be considered. The court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available. The court must give weight to Convention considerations and at all times bear in mind that the Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly.
>
> vi) Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the

extent to which they are authentically the child's own or the product of the influence of the abducting parent, the extent to which they coincide or at odds with other considerations which are relevant to the child's welfare, as well as the general Convention considerations.

The same summary appears in the judgment of MacDonald J in *B v P* [2017] EWHC 3577 (Fam).

78. As Williams J also pointed out at paragraph 51 of *Re Q & V*, in some cases an objection to a return to one parent may be indistinguishable from a return to a country.

79. Although in *Re M (Republic of Ireland)* the Court of Appeal distinguished an objection from a preference or wish, they did not set out a positive definition of the term. No such definition is to be found in the 1980 Hague Convention or in the Explanatory Report. The French language version of the Convention uses the reflexive verb '*s'opposer*' in this context, a verb which can be translated as either 'to object' or 'to oppose'.

80. At paragraph 77 of *Re M (Republic of Ireland)* Black LJ offered the following guidance:

"I am hesitant about saying more lest what I say should be turned into a new test or taken as some sort of compulsory checklist. I hope that it is abundantly clear that I do not intend this and that I discourage an over-prescriptive or over-intellectualised approach to what, if it is to work with proper despatch, has got to be a straightforward and robust process. I risk the following few examples of how things may play out at the gateway stage, trusting that they will be taken as just that, examples offered to illustrate possible practical applications of the principles. So, one can envisage a situation, for example, where it is apparent that the child is merely parroting the views of a parent and does not personally object at all; in such a case, a relevant objection will not be established. Sometimes, for instance because of age or stage of development, the child will have nowhere near the sort of understanding that would be looked for before reaching a conclusion that the child has a degree of maturity at which it is appropriate to take account of his or her views. Sometimes, the objection may not be an objection to the right thing. Sometimes, it may not be an objection at all, but rather a wish or a preference.

81. *Re F (Child's Objections)* [2015] EWCA Civ 1022 the Court of Appeal was critical of the introduction of glosses to the meaning of the word 'objection' including the introduction of the concept of 'a Convention objection' or the suggestion

that for these purposes what needs to be established is 'a wholesale objection'. Black LJ made clear that:

"Whether a child objects is a question of fact, and the word "objects" is sufficient on its own to convey to a judge hearing a Hague Convention case what has to be established; further definition may be more likely to mislead or to generate debate than to assist."

82. So far as the exercise of discretion is concerned, in *Re M (Children) (Abduction: Rights of Custody)* Baroness Hale emphasised that once the gateway is crossed, discretion is 'at large': it is not the case that a return can only be refused in exceptional cases. At paragraph 43 she said:

"… 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."

At paragraph 46 she added:

"In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances.

Separation of Siblings

68. Notwithstanding the concession, it is necessary to consider guidance in respect of the separation of siblings in the context of a Hague Convention return. I note the guidance

provided in the Good Practice Guide at paragraphs 73 to 76. Paragraphs 74 and 76 provide:

> In some cases, a separation of siblings may be difficult and disruptive for each child. The focus of the Article 13(1)(b) analysis, however, is whether the separation would affect the child in a way and to such an extent as to constitute a grave risk upon return. This analysis must be made for each child individually, without turning into a "best interests" analysis. Consequently, the separation of the siblings resulting from the non-return of one child (regardless of the legal basis for the non-return) does not usually result in a grave risk determination for the other child.
>
> In a case involving the possible separation of siblings in particular, courts should also consider that the return order need not result in an absence of contact between the children or lead to a permanent separation of the siblings. It may be possible either by agreement or by an order of the court in the State of habitual residence or the court seised of the return proceedings to maintain contact between the siblings, face to face or by other means. Courts should keep in mind that the courts of the State of habitual residence will have the opportunity to consider where the siblings should reside, and whether they should reside together, as part of a full best interests assessment, in any custody proceedings upon return.

69. I have been assisted by the decision of the Court of Appeal in *Re T (Abduction: Child's Objection To Return)* [2000] 2 FLR 192 where Ward LJ held (with the agreement of Simon Brown and Sedley LJJ):

> The exercise of discretion must be taken in the round and I accept that it may be appropriate therefore to ask whether G's objections should be overridden to remove the intolerability T would face returning alone, thus enabling his future to be determined where it should be, in Spain. Once again, in my judgment, upholding the spirit of the Convention is too high a price for these children to pay.

70. I have also been assisted by the decision of Baker J (as he then was) in *WF v RJ* [2010] EWHC 2909 (Fam); [2011] 1 FLR 1153. That case has some similarity to these proceedings. I note his Lordship noted at paragraph 79 that each of these types of case turns, of course, on their own facts. Nonetheless I note the reasoning set out at paragraphs 77 and 78:

> In *Re D (Abduction: Rights of Custody)*, (*supra*) Lord Brown of Eaton-under-Heywood in argument and Baroness Hale at paragraph 55 of the judgment pointed out that it is inconceivable that a court which reached the conclusion that there was a grave risk that a child's return would place him in an intolerable position would nevertheless return him to face that fate. Thus, once the court has made the finding that a return would place a child in an intolerable situation, it is highly probable, indeed almost inevitable, that it will exercise its discretion by refusing to return the child. In this case, therefore, I conclude that R cannot be returned alone. The ultimate question is whether I

should order that both B and R should return or exercise my discretion by refusing to return either of them.

I have reached a clear conclusion, taking the discretion in the round and having regard to all the circumstances, that these children should not be returned summarily to Germany. The fact that returning R alone would place him in an intolerable situation, coupled with both children's objections - in B's case strong clear, considered and consistent objections which are congruent with many of her welfare interests, and authentically her own; in R's case less clear and strong, but nonetheless the established objections of a child who, as his guardian submits, is of an age and level of maturity at which such views should be taken into account - considered together point clearly towards refusing return.

71. Lastly, also of considerable assistance is the analysis of Cobb J in *Re A and B (Rescission of Order: Change of Circumstances* [2021] EWFC 76; [2022] 1 FLR 1143 at paragraphs 53 to 61 and I quote paragraphs 54, 55 and 60 and 61:

> To this, Mr Goodwin referenced an important judgment of *Re C (Older Children: Relocation)* [2015] EWCA Civ 1298, [2016] 2 FLR 1159 – a case which concerned teenage boys (16 and 14 at the time of the judgment under appeal). In the leading judgment, Peter Jackson J (sitting then as an additional judge of the Court of Appeal) referenced (at [2]) the:
>
> > "… caution that should be felt by any court seeking to make arrangements for children of this age. In the first place, it is likely to be inappropriate and even futile to make orders that conflict with the wishes of an older child. As was memorably said in *Hewer v Bryant* [1970] 1 QB 357 in a passage approved in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112:
> >
> > > "… the legal right of a parent to the custody of a child ends at the eighteenth birthday and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, the older he is. It starts with a right of control and ends with little more than advice."
> >
> > … With an older child, the court's grasp cannot exceed its reach, any more than a parent's can, and attempts to regulate something that is beyond effective regulation can only create a forum for disagreement and distract the family from solving its own problems."
>
> I note that Peter Jackson LJ returned to this theme at [62], asserting that "the general intention of the *Act* (prominently seen in *section 9*) is to prevent the imposition of inappropriate requirements on older children." He linked this to the 'no order' principle in *section 1(5)*, and added at [63]:
>
> > "The simple fact is that E is too old to be directed by the court in a matter of this kind. Although the existing child arrangements order, buttressed by the effect of *section 13* is not addressed to him, it directly

> affects him as the subject of the proceedings. This is not to ignore the common interests of this strong pair of brothers, but to recognise the proper limits on the court's exercise of its powers in the case of a mature and intelligent older child who is now 17 years of age".

…

> The courts have long recognised the importance of sibling relationships, and my firm view is that the core principle of the *Convention on the Rights of the Child 1989*, United Nations General Assembly, Resolution: 64/142, para 17 in this regard is generally applied in the English family courts:
>
> > "Siblings with existing bonds should in principle not be separated by placement in alternative care unless there is a clear risk of abuse or other justification in the best interests of the child".
>
> In the context of the domestic caselaw, I have in mind Ryder LJ's comments in *Re K (Children)* [2014] EWCA Civ 1195, [2015] 1 FLR 95, in an appeal against a first-instance decision which would have the effect of separating siblings:
>
> > "I need not do more than state the obvious in a case of this nature. As young people who have experienced family courts, public care and relationship breakdown make very clear in, for example, the proceedings of the Young Peoples Board of the Family Justice Board, the separation of siblings can be one of the most traumatic elements of their experience, particularly where no provision is made for the sibling relationship to be maintained so as to safeguard their long-term welfare into adulthood. Generalisations are dangerous, the intensity of sibling relationships can be very different, and this court has not been taken to any of the research studies that consider this issue. However, it is sufficient to say that a sibling relationship is central to both the article 8 respect for family life which is engaged in a decision to make a public law order such as an interim care order and welfare, which by section 1 CA 1989 is the court's paramount consideration when it 'determines any question with respect to the upbringing of a child'. It will be a relevant factor in all or nearly all of the section 1(3) factors to which the court is required to have regard." (Emphasis by underlining added)."

The Hague Discretion

72. A leading case is *In re M and Another (Children) (Abduction: Rights of Custody)* [2007] UKHL 55; [2008] 1 AC 1288. The headnote states:

> That when exercising the discretion under the Convention there were general policy considerations, such as the swift return of abducted children, comity between contracting states and the deterrence of abduction, which might be weighed against the interests of the child in the individual case; that the Convention discretion was at large and the court was 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; that the weight to be given to the Convention considerations and to the interests of the child would vary enormously, as would the extent to which it would be appropriate to investigate such other welfare considerations; that it did not necessarily follow that the Convention objectives should always be given any more weight than any other consideration; and that the further away one got from the speedy return envisaged by the Convention the less weighty those general Convention objectives must be, since the major objective of the Convention could not be met.
>
> That in cases where the child objected to being returned the range of considerations might be even wider than those under the other exceptions to ordering immediate return; that taking account of a child's views did not mean that those views would always be determinative or even presumptively so, but that was far from saying that a child's objections should only prevail in the most exceptional circumstances; and that the older the child was the greater the weight her objections were likely to carry.

73. I also note the more recent decision of the Court of Appeal in *Re G (Abduction: Consent/Discretion)* where Peter Jackson LJ held (with the agreement of Baker and Nugee LJJ) at paragraph 45:

> It is therefore clear that the Judge approached the balancing exercise in this case by attaching significant weight to what he described as Convention considerations favouring return to the extent that he looked to see whether there were pressing or compelling welfare reasons that might override them. That was an error of approach. His discretion was at large and he was required to identify the relevant factors and attribute to them the weight that they bore in the particular circumstances of the case: that could not be done at the level of theory.

Analysis

74. Both X and Y are under 16. Both were habitually resident in France in August 2022. The applicant has custody rights within the meaning of the Hague Convention in respect of the children.

75. Mr Jubb's concession in respect of sibling separation is an entirely appropriate concession, in my judgement. It followed the applicant's overnight reflection on Ms Gwynne's oral evidence. Nonetheless, given the applicant has previously asked the court to deal with matters by consent and then sought to set aside the orders made by consent, based upon a change of circumstances, I approach any concession with a little caution. I have therefore considered all relevant matters myself, in part to ensure that any concession made by the applicant properly serves the interests of X and Y. That being said, given no case has been put by the applicant in respect of several important matters, my reasons are shorter than they may otherwise have been.

76. The issues that fall to be determined as seen against the summarised facts, evidence and law above are as follows:

    a. Has the first respondent made out an exception of acquiescence to X's return and what is the date to determine whether the exception is made out?
    b. Have the first to third respondents made out an exception of grave harm or intolerability in respect of either X or Y?
    c. Have the first to third respondents made out an exception based upon either X or Y's objection?
    d. Consideration of the court's discretion.

Article 13 (a) - Acquiescence

77. As is made clear in the authorities set out above the issue of whether there has or has not been acquiescence is a question of fact for the trial judge. The burden of proof is on the first respondent and he must prove this to the ordinarily civil standard. Given this case involved a wrongful removal rather than a wrongful retention following a lawful removal, I am concerned with whether the applicant acquiesced in X's removal from France.

78. The applicant says the relevant time and date for the determination of this matter is the morning before the hearing of 14 December 2022 and excludes the factual matters from then until the date of this hearing. The respondents disagree and submit I should consider, at this hearing, all relevant matters which lead up to it. Mr Jubb's written case in this was found in his supplementary position statement which submitted:

> The mother submits that the order of 2nd May directed a re-hearing and that a 'level playing field' could only be achieved if the court was to approach the matter afresh on the basis of the application at the time it was issued or at the beginning of the day on 14th December. The mother submits that to prevent the mother from making her submissions as lodged before the hearing would be to negate the intention of Mr Justice Moor's order.

79. I am not able to accede to that submission, as far as I understand it.

80. I have not been provided with an approved note of the judgment of Moor J which is referenced at recital C, or an advocates' agreed note. I am not sure one exists.

81. In my judgement, Moor J's order has the effect of setting aside the legal consequences of the return order in respect of Y and the withdrawal of the application for the return of X, no more or less. Moor J's reference to a 'level playing' field at C of the recital to his order is a reference to it being fair to allow the mother to seek the return of both X and Y. Fairness dictated that given the inter-related position of X and Y, it would have been unfair to have held the applicant to her consent to withdraw her application and only set aside the return order in respect of Y. There is nothing on the face of the order to prevent this court surveying the factual background to the proceedings. Such an order would be unusual. There is nothing on the face of the order to suggest Moor J intended evidence on the acquiescence defence be limited to some (unidentified) point in the morning of 14 December 2022.

82. As was made clear by Lord Browne-Wilkinson (see above) the determination of an acquiescence exception pursuant to Article 13 (a) of the Hague Convention is a factual matter for the trial judge. Factual evidence should be received by the trial judge if it is admissible and relevant. I was not asked to rule that any particular piece of evidence was inadmissible or irrelevant. I do not consider the written evidence relied upon by Ms Guha to advance her client's case to be inadmissible or irrelevant.

83. There is nothing in the language of Article 13 to limit this court's inquiry as the applicant submits. 'Subsequently acquiesced' does not limit the court's consideration of facts after the wrong removal.

84. I am satisfied that from 14 December 2022 until the applicant gave instructions to her solicitor to make the set aside application, dated 5 April 2023, the factual position was that the applicant acquiesced to the removal in as much as she agreed during this period to Y residing in England.

85. Ms Guha charts the following points in the written evidence and papers:

    a. paragraph 6 (a recital which set out the agreement to withdraw the return order application in respect of X); paragraph 7 (a recital in which the applicant 'recognises that aged 13 due weight need to be attached to what X is saying'); paragraph 8 (a recital that the parties would discuss X's situation in June 2023); and paragraph 16 (the court's permission to withdraw the return order in respect of X and noting the 'application is hereby withdrawn') of the order of Morgan J dated 14 December 2022;
    b. the C2 application for enforcement dated 5 January 2023 only related to Y's return to France;
    c. the order of Mr Colton KC dated 9 January 2023 only dealt with Y's return;
    d. the order of Mr Rees KC dated 13 January 2023 only dealt with directions for Y's return;
    e. paragraphs 11 and 14 of the witness statement of the applicant dated 20 January 2023 (which is signed with a statement of truth) which recounts why the applicant decided not to pursue the return of X and why she withdrew her application;
    f. the applicant's witness statement of 20 January 2023 which did not seek X's return (also signed by a statement of truth).

86. Ms Guha notes that it was not until the applicant's third witness statement, dated 5 April 2023, that she changed course and sought X's return on the basis she had digested the implications of the separation of the children.

87. Ms Guha submits this is the clearest factual background to permit the court to conclude that the applicant had acquiesced to the removal. I agree.

88. I find as a fact that from 14 December 2023 until the applicant instructed her solicitors to pursue her 5 April 2023 application, she acquiesced in X's removal from France. There is no other permissible interpretation of the factual matters set out in paragraph 85 above. Mr Jubb did not sensibly suggest any other conclusion.

89. The applicant was not subject to coercion, control or undue influence. She was legally represented throughout.

90. Professor George agrees with the first respondent that the defence of acquiescence in respect of X is made out.

91. It is apparent from the background set out above that X and Y were told the applicant had agreed to X residing in England and did not pursue her application to return her. As a result X began school in early January 2023, where she has engaged the English curriculum for the first time and no doubt (I hope) made friends. This is a profoundly important step in her education (particularly given the allegedly peripatetic nature of her French residence and apparent lack of formal schooling) and wider development. Whilst there is no concept of 'detrimental reliance' in respect of the acquiescence test, X's situation in 2023 perfectly illustrates why the Hague Convention permits an exception of acquiescence to the removal. It also vividly illustrates why Lord Browne-Wilkinson explained that it would be unjust for the 'wronged parent' to go back on their word, when unequivocally expressed. X has settled and integrated into English life from December 2022 in the knowledge of the applicant's position. It would be an injustice to X not to permit her reliance on the exception and return her to France.

92. In respect of X, the exception found in Article 13 (a) of acquiescence to the removal by the applicant is made out.

Article 13 (b) - Grave Risk of Harm And/Or Intolerability

93. It is said that return to France would expose both X and Y to the grave risk of psychological and physical harm. It was submitted by Ms Guha and Professor George there were no protective measures that could be put in place to manage this.

94. I proceed as I am required to do, on the basis the allegations made by the first respondent, X and Y are taken at their highest. Mr Jubb invites me to find the children are exaggerating. I do not discount their allegations in that way.

95. The allegations are of psychological and emotional harm caused to both children by the applicant, such harm being particularly focused on X. I summarise the evidence above and do not intend to repeat it. One example which is particularly harmful is X's account that her mother told her she would punch her in her stomach so that she would be unable to have kids. (CAFCASS report of 9/12/22 at paragraph 24). Allegations of physical chastisement were made. Mr Skinner's evidence is also that X told him when she was around ten a man came into her bedroom when she was sleeping and 'touched her'. She says the applicant gave her sleeping tablets and downplayed the incident the next morning telling her it was only a dream.

96. I accept there is a grave risk of psychological harm to X on return to France and her mother's care when these allegations are taken at their highest. Psychological/emotional abuse of this nature could cause lasting emotional harm and there is a grave risk of the same, proceeding on the basis the allegations are correct. Any physical chastisement is likely to be harmful and likely to be emotionally. It is far more than normal teenage-parent challenges. Separately, I note the allegation of

sexual abuse and the related failure to protect. I treat this allegation with some caution, given its emergence in Mr Skinner's witness statement and given the passage of time. I add for clarity, this is denied by the applicant.

97. I accept therefore there is a grave risk of psychological harm, without having made any findings of fact. However the court's focus is on the future risk of harm. I am satisfied that protective measures exist within the French administrative and judicial system to protect X from any psychological harm. The allegations which have now come to light in these proceedings are capable of bring provided to the French authorities. I am satisfied that I can infer the administrative machinery there would consider these allegations to reduce any grave risk of harm going forward to protect X. I also note the protective measures listed at paragraph 21 of the applicant's fourth witness statement. These additionally provide protective measures.

98. I have considered the submissions of Ms Guha that the fact the applicant does not yet have a home means measures cannot be put into place. I reject that submission. The applicant has identified a school and a town within an administrative region. The relevant authorities could be informed and the address supplied in short order, if a return were ordered. I have checked this conclusion against Re A [2021] EWCA Civ 939, [2021] 4 WLR 99, where the Court of Appeal emphasised the importance of a proper and thorough evaluation of the potential risks, and of whether or not there will be adequate protective measures upon a return. Looking at all the evidence I have been provided with and assuming a competent level of state protection in France, as I am entitled to, even without expert evidence on the French legal system, and given X's age and ability to protect herself from physical harm and report emotional harm, I am on balance satisfied that protective measures are in place to prevent the grave risk of harm I have identified above.

99. I do not consider on the evidence that I have read there is a grave risk of psychological or physical harm to Y. Y is the applicant's 'favourite' and was treated differently. I do find, however, that if Y were returned to France alone, the separation from his sister would place him at grave risk of psychological harm. I accept the written and oral evidence of Ms Gwynne. As does the mother through her late concession. There are no protective measures that could be put in place to ameliorate this risk. I accept Ms Gwynne's evidence that the lack of trust between the parents would result in there being no meaningful means for X and Y to see each regularly if they lived in England and France respectively. There are no effective measures to protect against future risk when seen against the concrete situation Y would face in France without his sister. I have considered the Good Practice Guide, but consider on the facts and evidence as presented in these proceedings, that Y would be placed at grave risk of psychological harm if returned to France without his sister. Whilst I have not carried out a best interests analysis, in this summary jurisdiction, I am entirely satisfied it would be more than just a 'difficult or disruptive' interlude for Y.

100. I find that a separation of these closely bonded siblings creates for Y, a grave risk of psychological harm, were he to be returned to France without his sister and in this respect the Article 13 (b) exception is made out.

The Children's Objections

101. X was informed of the order of 14 December 2022. She spoke with Mr Skinner on 11 January 2023 for around 45 minutes. His second witness statement sets out the care he takes to assess a child's competence to conduct the proceedings and instruct a solicitor. He was satisfied X could instruct him without a Guardian. That has not been challenged in these proceedings. X, through her solicitor and counsel has been entirely clear that she objects to being returned to France. This was foreshadowed in X's meeting with Cafcass in December 2022 and Ms Gwynne's report. X objected to returning to France.

102. I have no doubt that X is objecting to her return to France. It is a strong, powerful and consistently held objection. She is of the age (nearly 14) and maturity (see the Cafcass reports) that the court must have regard to her wishes and feelings. It would be wholly improper to ignore them. Whilst X is "in her father's camp" I am satisfied the evidence demonstrates she is making her own decision without coercion or undue influence from the first respondent. Her voice is clearly heard in these proceedings and it is genuinely her voice. Mr Skinner is satisfied of that, as is the court.

103. Ms Gwynne's assessment of Y is that his views have evolved from a strong preference to remain in England to a firm objection to being returned to France. I find that he does object to being returned to France. He has given his reasons to Ms Gwynne (most recently as 21 June 2023) and she has faithfully reported them to the court. I am also satisfied that he is of age (nearly 11) and a maturity (again see the Cafcass reports and the June 2023 position statement) that I must take into account Y's views. I do however consider that Y has been influenced by his fear of being returned to France alone, without his big sister, whom he needs. This has worried him for months. It is likely to have impacted on his thoughts and what he wants the court to hear on his behalf. Whilst Ms Gwynne has been alive to Y being influenced by the first respondent, I am satisfied from considering the written and oral evidence that his views are genuine ones, albeit with the underlay of motivation not to be separated from his sister.

Discretion

104. I start by acknowledging the entirely wrongful removal of X and Y from their mother's care in August 2022. The first respondent's actions were improper and undoubtedly they were harmful to X and Y. The involvement of X in the first respondent's plans and asking X to conceal her location from her mother was inappropriate. I place considerable weight on the policy behind the Hague Convention that removals of this nature must be discouraged and a parent that engages in such actions should not be rewarded, easily or at all.

105. The policy matters which require comity between jurisdictions and the swift and summary return of children to their homes of habitual residence to permit local courts to make decisions on their behalf, are ones I weigh heavily in the discretionary balance. However, I must acknowledge that the lengthy nature of these proceedings results in my placing less weight on the need for a swift return that should normally take place. I have recounted the steps taken in these proceedings and they speak for themselves against a swift decision. I also note that the court now has far more welfare information than would often take place in summary proceedings. The children have been joined as parties. Their solicitor has presented significant

evidence. Cafcass have met Y three times. There is background information about their education in England in 2023. All of this must be included in the discretionary balancing, albeit I am clear I am not invoking any welfare checklists or full best interests analysis. I simply note that because of the nature of these proceedings, they are less summary than might otherwise be expected.

106. I also acknowledge a powerful factor in the discretionary balance is the imperative to ensure X and Y remain together and are not separated. It is clear to the court they need each other and throughout the last challenging twelve months have relied on each other physically and emotionally to support each other. Y in particular has needed his sister. He has told Ms Gwynne, he misses his mother. He is after-all ten years old and has not hugged her since August 2022.

107. I weigh in the discretionary balance the fact the applicant has had no in person contact with the children since their removal. There have been three arranged in person contacts arranged (in addition to the online calls etc) but the applicant has not been prepared or able to come to England for this to take place. It weighs heavily on the court that because of the first respondent's actions, this mother has been physically separated from her children. It is a factor I have considered carefully in the balancing exercise. I hope that the resolution of the proceedings and clarity about where X and Y now live, will permit in person contact between X and Y and the applicant very soon. It is important to their wellbeing. I have reflected on the applicant's allegations of domestic abuse. They are of a very serious nature. Whilst there has been contact, indeed much family life, since some of the allegations, this background may work to undermine contact between the applicant and X and Y. Cafcass have raised no safeguarding concerns. I weigh the applicant's allegations as part of the overall picture. It may be, beyond this summary application, this issue may need to be considered by the Family Court.

108. I also note the powerful argument that X has been habitually resident in England and Wales since December 2022 when her position became settled. She has obtained a significant degree of integration into life in England with her comfort at her father's home, her schooling and her friends. Y too, despite the disagreement between his parents, has in reality been rooted in English life through his home with his father, his schooling since March and the friends he reports to Ms Gwynne. I need not rule on whether X (in particular) and Y are, or are not, now habitually resident in England and Wales to exercise my discretion under the Hague Convention. I note all these factual matters and the significant degree of integration both now have in England.

109. I also consider that the return of both X and Y to France would quite likely result in them "running away" as Y has planned. This is not a fanciful risk, it is a real one which could place both children at serious physical risk and wider emotional risk.

110. Professor George urged me to consider the precarious immigration status of the applicant in France. He submitted there was little certainty the children could return to France on anything other than a three month tourist visa. I have seen a letter from the applicant's French solicitor. It is not conclusive. Without expert evidence on French immigration law, I am only prepared to note that there is a lack of certainty regarding the applicant's position. I attach only a little weight to this issue.

111. Weighing all the evidence and considering matters in August 2023, I am clear that X is articulating a clear objection to being returned to France, and given it is appropriate to take into account her views, the court should be slow to over-ride them. It would cause her emotional harm to have wishes, so clearly stated, over-ruled. Even if the French family courts were to promptly consider her position and rule she be returned to England, this would cause her harm. She is entitled to know that she is now settled and can look forward to returning to her school in September and continuing with her education and her wider personal development as a young woman in England. It follows that as X should not be returned, nor should Y. It would not be right for this close sibling relationship to bend to the detriment of Y, to the policy demands of the Hague Convention. Indeed, as Professor George reminded me in his submissions, by promoting the voice of these children and concluding there is a grave risk of harm to Y, if separated from his big sister, the court is giving effect to the policy imperative of the Hague Convention, which must apply, at times, in the exception to the rule that children are returned.

112. This is a case, perhaps unusually, where several of the exceptions to return are made out on the facts. I am most persuaded by the fact X fundamentally opposes her return. I am equally satisfied, as the mother recognises, separation would place Y at grave risk of harm. As it happens, acquiescence is also made out.

Conclusion

113. For these reasons I dismiss the applicant's application for an order returning X and Y to the Republic of France. I find that the applicant acquiesced in X's removal as set out above. I find both children object to being returned to France and take into account their objections. I find it would place Y at grave risk of psychological harm if returned alone. I exercise my discretion in favour of an order that they do not return.

114. I thank all solicitors and counsel for their considerable assistance and ask they draft an order to give effect to my decision.

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