Neutral Citation Number: [2024] EWHC 991 (Fam)

Case No: FD23P00360

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 April 2024

Before :

Miss Nageena Khalique KC (sitting as a Deputy Judge of the High Court)

- -

Between :

A FATHER **Applicant**

- and –

A MOTHER (1)

- and –

P (2)
By her CAFCASS Guardian

- and –

Q (3)
By his CAFCASS Guardian

Respondents

- -

Re (P and Q) (Rights of Custody, Settlement, Grave Risk of Harm, Objections)

- -

- -

Ms Anita Guha KC and Ms Kitty Geddes (instructed by A & N Care Solicitors) for the Applicant
Mr Henry Setright KC and Ms Julia Gasparro (instructed by Avery Naylor Solicitors) for the First Respondent
Mr Michael Gration (instructed by CAFCASS Legal) for the Second and Third Respondents

Hearing dates: 18, 19, 20, 21 March 2024

- - - - - - - - - - - - - - - - - - - -

Approved Judgment

.....

Miss Nageena Khalique KC sitting as a 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 and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Miss Nageena Khalique KC sitting as a Deputy High Court Judge:

Introduction

1. I am concerned with an application issued on 11 July 2023, made by the applicant father ("F") pursuant to the Child Abduction and Custody Act 1985 for a summary return order under the 1980 Hague Convention. The application concerns P (aged 11) and Q (aged 9) whom F asserts have been wrongfully removed from the USA by the mother ("M"), in breach of his rights of custody. F attended this hearing remotely from the USA.

2. On 15 March 2024, Cusworth J granted M's request for special measures in light of the allegations of domestic abuse against F. At the start of the hearing, I was satisfied that appropriate measures were in place in accordance with the FPR Practice Direction 3AA, permitting M to attend remotely, in a private room with her solicitor, and with her camera turned off throughout the hearing.

3. It is common ground that the country of habitual residence was the USA at the time of removal. It is important to note at the outset that the objective of Hague Convention proceedings is to ensure, subject to a small number of exceptions, the prompt return of the child to the jurisdiction of habitual residence for that jurisdiction to determine all disputed questions of welfare per Baroness Hale in *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, at §48.

4. M relies on the following defences pursuant to the Hague Convention:

   i) the removal was not wrongful within the meaning of Article 3;
   ii) the children are settled within the meaning of Article 12;
   iii) there is a grave risk of harm/intolerability under Article 13(b);
   iv) the children object to return under Article 13.

5. Previously, M had sought to argue the defence of acquiescence and to assert that habitual residence lay at the relevant time in this jurisdiction, but these arguments are now not pursued. The burden of proof is on M to prove the exceptions and on F to establish a breach of his rights of custody.

6. A striking feature of this case is the chasmic gulf between M and F on almost every factual issue. It has not been possible to piece together the background history with any degree of clarity. Ms Guha KC and Ms Geddes on behalf of F have challenged the chronology provided by M and produced a lengthy, detailed schedule to discredit or highlight inconsistencies in almost all of the factual assertions made by M. Likewise, Mr Setright KC and Ms Gasparro, on behalf of M, have identified numerous inconsistencies in F's evidence.

7. On behalf of the Guardian, in his written submissions, Mr Gration KC suggested that the court might wish to hear oral evidence from each parent to resolve key disputed factual issues. Having regard to the rarity with which the court will accede to applications to permit oral evidence given the summary nature of these proceedings, I invited further submissions. No party sought to call M or F and I did not consider it necessary for either to give oral evidence. I have however, heard oral evidence, as directed by Cusworth J, from the Guardian, Ms Odze and the single joint expert, Mr Richard Harris, an attorney practising in Colorado, who attended remotely over two days.

8. It has also been necessary for me to consider a large volume of documentary material (~1500 pages) including a core bundle, an 'American Bundle', lengthy witness statements with many exhibits, F's skeleton argument (37 pages), M's skeleton (25 pages), the Guardian's skeleton and supplemental skeletons. I shall refer to the key evidence as I see it below. I emphasise at the outset that if I have not referred to something in this judgment, that does not mean I have not considered it. Similarly, I was referred to a significant number of authorities in written and oral submissions by the parties, which I have considered, but it is not necessary for me to refer to each and every one.

Summary of decision

9. In summary, F has not established that he had rights of custody and that determines the application, but if I am wrong, a) M fails on settlement and Art. 13(b) defences b) M and the Guardian have established the defence of children's objections and c) in the exercise of my discretion, I would not order a return.

Background / Overview of the Evidence

10. Given the extensive amount of disputed facts, it has been necessary to recount the history and evidence in some detail. F was born in Bolivia in February 1985, is now 39 years old and works as a truck driver. He has both Bolivian and US citizenship. M was born in Dubai in November 1982 according to her medical records, (the same date as in a Bangladeshi passport produced by F, which M claims is a forgery, denying any connection with Bangladesh). M is 41 years old. She is a US citizen but arrived in England in September 2020. Her current immigration status is that she has leave to remain in the UK with P and Q until September 2026, after which she intends to apply for indefinite leave to remain.

11. The parties do not agree the circumstances of where, when and how they met. M asserts that the parties met whilst she was a minor, in Dubai, and F was there for business. However, F would also have been a minor at that time. M says she agreed to travel to Bolivia with F, and did so, apparently using a travel document permitting her to travel across Emirate States, if accompanied by adults.

12. F disputes this and states that he met M online and subsequently in person in London. A copy of a marriage certificate dated 2 August 2010 from the East London Mosque confirms that M and F were married following an Islamic ceremony. M denies this and does not accept the documentation is genuine, although in the American Bundle she is recorded as having told the Colorado Police in August 2020 that she had been married in London in 2010 in a mosque. To add to the confusion, F is recorded as saying that '*he was not sure that he was married'* to the public investigator of the alleged assault in Colorado in June 2020. F says that they were also married in a civil ceremony in Bolivia. M denies this and claims that the copy of the marriage certificate provided by F is also a forgery. Permission was sought by F (and granted by me) to disclose a translation of the certificate into English. The apostilled document states the date of marriage to be 15 February 2012.

13. M alleges that F was abusive and controlling in Bolivia and involved in the supply of illicit drugs. She states that they moved to Florida in 2009 whereas F says that M joined him there in August 2012. Their children were born in Florida. M and F agree they lived a relatively peripatetic lifestyle. M says that domestic abuse continued whilst they lived together in the USA and that F was a member of a criminal gang, 'MS-13' operating in the USA and other countries. The documents disclosed by the FBI show that F was convicted for traffic violations, including knowingly driving without a license, between 2004 and 2006. There is no mention of any gang or drug related convictions. F denies M's allegations and asserts that M has threatened him and made false allegations against him to seek revenge because he wanted to end their marriage. He has produced screenshots of text messages (which M says are not genuine) in which she makes threats to ruin his life and ensure that he is incarcerated.

History of allegations of domestic abuse

14. On 26 April 2017, M made a complaint to the police in Florida that F had been verbally abusive and assaulted her in front of the children. F denies assault but acknowledges he asked M for a divorce and that they had argued. Police records show that F is alleged to have threatened M with a firearm and to have struck her mouth, face or jaw causing bruising and injury to her arm and eyes. F was charged with assault and entered a not guilty plea. M, P and Q moved to a refuge in Miami and a 'stay-away order' was granted by the court on 27 April 2017.

15. On 1 June 2017 M's application for an injunction against F for protection against domestic violence was granted by the Miami-Dade court. Later, both M and F made applications to dismiss the injunction. The criminal trial was set for 4 October 2017 but the case was closed, and the injunction was eventually dismissed on 30 November 2017, following M's withdrawal of her original statement, and the filing of a non-prosecution affidavit, which recorded that M was no longer in fear of F. M signed a declaration that she was not put under any pressure to withdraw the criminal charges but now asserts that she was pressured to do so by F's mother.

16. M claims that the relationship with F ended after this incident and that she left Florida with the children. They travelled to Texas where they lived in refuge accommodation but then fled to Denver, Colorado, after allegedly receiving a sinister phone call from a gang associate of F, who told her that they knew of her whereabouts. M claims she received a further similar telephone call in Denver. On the advice of the refuge staff, M moved to Aurora, Colorado, where she and the children remained until September 2020.

17. F gives a different account, stating that the family moved to Colorado together. He has produced photographs and screenshots of text messages which he says reveal his ongoing relationship with M and the children between 2017 and 2020. M challenges the authenticity of the images and texts. However, F told Colorado Human Services on 5 August 2020 that he lived in Miami, and gave his home address in Miami, also stating that he did not live with or spend time with M, was avoiding her, 'getting a restraining order against her', and did not have a key to M's apartment. Nevertheless, F insists that he lived together with M, P and Q as a family in Colorado until June 2020.

18. The next significant date is 23 June 2020 when M received a phone call from F, having had no contact since 2017. M, P and Q returned home from a restaurant to find F waiting for them. During the evening, M alleges that F physically and sexually assaulted her, hit both children, attempted to sexually assault P and held a gun to P's head and appeared to be under the influence of drugs.

19. A detailed account of this incident appears in the Colorado Human Services records dated 25 June 2020. Both children were interviewed: Q stated that F was 'mean' and hit M but denied anyone had touched his private parts. P gave a fuller account that was broadly consistent with the allegations that M had made but denied sexual abuse. However, P's account to the police on 24 June 2020 differs; she denied that F had hit M, stating M had fallen down and hit her head. When asked by the police if F had ever touched her, P reported that he never touched her '*unless she was in trouble and grabbed her arm to yell at her*'.

20. An ambulance record confirms that on 24 June 2020, M was found sitting on the floor complaining of a headache and abdominal pain. She said she had been struck, pushed and slapped by F but was unsure if she had lost consciousness as a result of being hit or after hitting her head on falling. P was questioned at the scene and denied that F had hit M. The crew found no obvious signs of trauma or injury. M was taken to the Emergency Department. The medical records refer to her being slapped and/or pushed by F and losing consciousness. M also reported a sexual assault (digital penetration by F) with vaginal bleeding, and consented to a sexual assault examination. The medical findings included cervical abrasion and bleeding, right parietal tenderness and soft tissue swelling.

21. F denies all the allegations stating that he had received a message from Ms S (M's sister), asking him to check on M as she was believed to be unwell. M had also contacted him on 23 June 2020 stating she was very sick, and F had messages from P saying she was hungry. It was in this context that he says he attended the property. F says he spent time with P and Q that evening but also raised the issue of a divorce with M. F left the next day to drive his truck to Nebraska. He firmly denies any abuse took place and points to the differing accounts given by M, P and Q suggesting M has made up these allegations.

Civil proceedings: Protection Orders (USA)

22. On 26 June 2020, M issued proceedings in the Denver County Court, Colorado for a civil protection order. A temporary protection order was granted on 29 June 2020 requiring F to vacate the family home and stay away, and granting care and control of the children to M. The orders were renewed on 13 July 2020 and a guardian ad litem ('GAL') was appointed.

23. On 1 September 2020 the court granted a Permanent Civil Protection Order ('PPO') based '*on the preponderance of evidence that the Respondent had committed acts constituting grounds for the issuance of a civil protection order*'. Although F was incarcerated and not present, the transcript shows that court was satisfied that F had been properly served and was legally represented by the same attorney representing F in the criminal proceedings. The magistrate asked F's attorney if she '*represented him for the purpose of this hearing and are you able to ask for a continuance on his behalf?*' to which the attorney replied '***yes***'. Later in the transcript, the magistrate remarks '*I do find Ms Aguilera you are here on behalf of the defendant…I understand your objection. I'll note that for the record. If there's an appeal in this case… you may appeal a magistrate's order up to the District court*', explaining F's route of appeal.

24. The magistrate also made an order granting 'sole decision-making responsibility' for the children to M and 'parenting time' to F. However, the transcript records the recommendation of the GAL: '*there is a MRO* (Mandatory Restraining Order) *in place at this time between the Respondent and the minor children prohibiting any contact. So at this time our recommendation, is no contact, no parenting time'*. The effect of the MRO made by the criminal courts was that contact between F and children was not permitted. The PPO also required F to relinquish all his firearms and ammunition. On the 15 September 2020, M, P and Q left the USA for England. M admits she concealed her plans from F, but informed the children's school and relinquished her tenancy.

Criminal proceedings/Mandatory Restraining Order (USA)

25. F was indicted for assault, sexual assault, child abuse, and domestic violence following the events of 24/25 June and a warrant for his arrest was issued on 20 July

2020. He was arrested on 5 August 2020 after handing himself in and was remanded in custody. Officer McCormack from the Aurora police department prepared a comprehensive investigations report which records details and interviews with M, P and Q on 25, 26, 30 June, 1, 2, 7, 9, 10, 14 and 15 July (including a forensic interview conducted with P and Q separately on 9 July).

26. On 6 August 2020, F appeared remotely in the criminal court, represented by counsel when the MRO was made against him. He remained in custody but continued to appear remotely with counsel in the criminal proceedings throughout 2020 and 2021. A trial date was set for 27 September 2021 but the criminal case was dismissed on 17 September 2021 as the prosecution was unable to secure the appearance of M who did not wish to return to the USA or give evidence as she was fearful of F. The charges against F were later expunged from F's criminal record by a court order.

Events after September 2020

27. M and the children have remained in England & Wales for approximately 3½ years. They have given their accounts of the incident in June 2020, and life with F in the USA, to social services in England & Wales. As has been highlighted in the schedule prepared by F's legal team, their accounts have developed significantly with some new serious allegations which did not feature in the interviews or evidence before the Colorado courts. F says M has unduly influenced the children, alienating them from him and that M's credibility is seriously undermined as "*her evidence is riddled with glaring contradictions and inconsistencies such that the court cannot accept M's allegations at face value...in the absence of corroborative independent evidence*".

28. Meanwhile, F filed applications with the Denver court in March, July, August 2022 and May 2023 to dismiss the PPO, which were refused. A renewed application to dismiss the PPO was due to be heard on 22 November 2023. F issued proceedings in the High Court in England & Wales on 11 July 2023 (having made an application under the 1980 Hague Convention to the US Department of State on 16 May 2023). The matter has since been before the High Court for directions in 2023: on 19, 24 July, 9, 16, 30 August, 6, 20 September, 4 and 20 October, 22 November, 4, 8 December and in 2024: on 9, 20 February and 15 March. There has been delay in hearing this case.

The Law

A. Rights of Custody

29. Article 3 of the 1980 Hague Convention defines the removal of a child is to be considered wrongful where:

> a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
> The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

30. Article 5 of the Hague Convention provides that 'rights of custody' includes rights relating to the care of the person of the child and, the right to determine the child's place of residence. 'Rights of custody' are an autonomous concept which means that it is not necessary to demonstrate that a person has 'custody' of the child in order to demonstrate 'rights of custody' per Lord Donaldson in *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654 at 663. In *Re F (A Minor)(Abduction: Custody Rights Abroad)* [1995] Fam 224 [1995] 2 FLR 1, the Court of Appeal held that the removal of the child breached those rights for the purpose of the 1980 Hague Convention, despite being lawful in Colorado by reason of a temporary protective order:

> "It is the duty of the court to construe the Convention in a purposive way and to make the Convention work. It is repugnant to the philosophy of the Convention for one parent unilaterally, secretly and with full knowledge that it is against the wishes of the other parent who possesses "rights of custody," to remove the child from the jurisdiction of the child's habitual residence. "Rights of custody" within the convention are broader than an order of the court and parents have rights in respect of their children without the need to have them declared by the court or defined by court order. These rights under the Convention have been liberally interpreted in English law…" per Butler-Sloss LJ

31. However, a parent who merely holds 'rights of access' does not hold rights of custody: *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51 at [29], even where the rights of access are very extensive: *Hunter v Murrow* [2005] EWCA Civ 976. The original parties to the Convention drew a deliberate distinction between 'rights of custody' and 'rights of access' and did not intend that mere rights of access should entitle a parent to demand the summary return of the child: per Baroness Hale at [25] in *Re D*.

32. In *Re P (Abduction Rights)* [2004] EWCA Civ 971 a father had been given visitation rights but not custody, but had custody rights because of a '*ne exeat'* clause in the court order, which provided that neither party could remove the child from the State of New York without the consent of the other or an order of the court. The effect of the order was to confer rights of custody on the father.

33. In *Re D* the House of Lords held that a right of veto, giving one parent the right to insist that the other parent did not remove the child from the home country without his or her consent or a court order, did amount to "rights of custody" within the meaning of Art.5(a) of the Convention, *C v C (Abduction: Rights of Custody)* (1989) 2 All ER 465 (*Abbott v Abbott* 560 US 1 (2010) noted).

34. There was no good reason to distinguish the court's right of veto, which was recognised as a right of custody, from a parental right of veto, whether the latter arose by court order, agreement or operation of law, *Re H (A Child) (Abduction: Rights of Custody)*, (2000) 2 WLR 337. But in *Re D* per Baroness Hale at [38] held that a parent's *potential* right of veto, where the parent had the right to go to court and ask for an order, did not amount to a right of custody. To hold otherwise would be to remove the distinction between rights of custody and rights of access, *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562.

35. Save in exceptional circumstances, (e.g. where the ruling had been obtained by fraud or in breach of the rules of natural justice), such a determination had to be treated as conclusive as to the parties' rights under the law of the requesting state. Only if the foreign court's characterisation of the parent's rights was clearly out of line with the international understanding of the Convention's terms should the court in the requested state decline to follow it, *H v M* [2005] EWCA Civ 976, (2005) 2 FLR 1119.

36. The Court of Appeal in *Hunter v Murrow* held that it was for the Requested State (England) and not the Requesting State (New Zealand) to determine whether an applicant had rights of custody (see also Cobb J in *NT v LT* [2020] EWHC 1903 (Fam)) which involves considering:

    i) what rights the applicant enjoyed under the law of the Requesting State, and

    ii) determining whether those rights were rights of custody under the autonomous law of the 1980 Hague Convention.

37. An expert instructed to report about the rights held in another jurisdiction should identify the relevant rights without expressing an opinion as to whether these amount to rights of custody. In *Re F* and also in *Re P* ibid, it was held that this is for the English Court to determine and not a matter for expert opinion.

B. The exceptions:

38. 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.

39. 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.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of one year referred to in the preceding paragraph, shall also order the return the child unless it is demonstrated that the child is now settled in its new environment."

Settlement

40. The effect of Article 12 is that unless the respondent discharges the burden of proof of establishing a defence pursuant to Article 13, the return of the children is mandatory, if the date of removal is less than one year; but if proceedings are initiated after the one year period, and *if the child is settled*, a return order is no longer mandatory and *subject to the court's discretion*.

41. In calculating the period of time from when "*the proceedings have commenced*", Theis J held in *R v P* [2017] EWHC 1804 (Fam) at §111 that the relevant date is when Hague Convention proceedings are issued in the country where the child has been removed to (and not the central authority in the child's country of habitual residence), noting that there is no settled authority on the point (see also Wilson LJ at §54 of *Re O (Abduction: Settlement)* [2011] 2 FLR 1307). However, Mostyn J took a different view in *ES v LS* [2021] EWHC 2758 (Fam), interpreting 'now' to mean that the court should look at whether a child was settled at the date of the trial and not the date the application was issued.

42. Sir Mark Potter P provided guidance in *Re C (Child Abduction; Settlement)* [2006] 2 FLR 797 as to how to define the concept of settlement, at §46:

> "The word 'settled' has two constituents. The first is more than mere adjustment to new surroundings; it involves a physical element of relating to, being established in, a community, and an environment. The second 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…..[T]he term 'new environment' encompasses place, home, school, people, friends, activities and opportunities but not, per se, the relationship with the defendant parent: see *Re N (Minors) (Abduction)* [1991] 1 FLR 413 per Bracewell J, at 417H–41HB.

43. The court held that in determining the issue of settlement, as well as the exercise of discretion if settlement is established, the reason for the delay in bringing proceedings and the parties' conduct, particularly where the abducting parent has concealed the whereabouts of the child, must be considered, *Re C* at [47].

44. In *Cannon v Cannon* [2004] EWCA Civ 1330 at [61], Thorpe LJ stated that in cases of concealment and subterfuge, the burden of demonstrating the necessary elements of emotional and psychological settlement is much increased, especially if the abducting parent is a fugitive from criminal justice.

45. In *F v. M and N (Abduction: Acquiescence: Settlement)* [2008] 2 FLR 1270, at §70 Black J warned against taking an "unduly technical approach" to the question of settlement:

> "The proper interpretation of settlement, in his view, is that it has two elements, the physical and the emotional. A very young child takes its emotional and psychological state in large measure from its carer; an older child will be consciously or unconsciously enmeshed in the carer's web of deceit and subterfuge".

46. If the court finds that the children are settled at the relevant date, it must then consider whether to exercise its residual discretion to return the child see *Re M (Abduction: Zimbabwe)* [2007] UKHL 55.

Article 13 (b) – Grave Risk of Harm or Intolerability

47. The law in respect of the defence of grave risk of harm or intolerability pursuant to Article 13(b) was considered in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27; [2012] 1 AC 144.

48. In *E v D* [2022] EWHC 1216 (Fam) MacDonald J reviewed the law at paras.29 -36. The applicable principles may be summarised as follows at [29]:

i) There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.

ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.

iii) The risk to the child must be 'grave'. It is not enough for the risk to be 'real'. It must have reached such a level of seriousness that it can be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two.

iv) The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'. 'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'.

v) Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child's immediate future because the need for protection may persist.

vi) Where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation would become intolerable the court will look very critically at such an assertion and will, among other things, ask if it can be dispelled. However, in principle, such anxieties can found the defence under Art 13(b).

.....

30. 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, i.e. the balance of probabilities. Within the context of the tension between the need to evaluate the evidence against the civil standard and the summary nature of the proceedings, the Supreme Court further made clear that the approach 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. 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.

48. The Court of Appeal in *Re A (Children) (Abduction: Article 13(b))* [2021] 4 WLR 99 referred to the Guide to Good Practice, at paragraph 40: the court should first "*consider whether the assertions are of such a nature and of sufficient detail and substance, that they could constitute a grave risk*", evaluating the evidence within the summary nature of the proceedings. In this context, the assumptions must be reasoned and reasonable:

> [94] "I would endorse what MacDonald J said in *Uhd v McKay* [2019] EWHC 1239 (Fam); [2019] 2 FLR 1159, para 7, namely that "*the assumptions made by the court with respect to the maximum level of risk must be reasoned and reasonable assumptions*". If they are not "*reasoned and reasonable*", I would suggest that the court can confidently discount the possibility that they give rise to an article 13(b) risk."

49. In *Re A* Moylan LJ emphasised that the court must be careful when conducting a paper evaluation and should not "*discount allegations of physical and emotional abuse merely because he or she has doubts as their validity or cogency*" §92-95. If the judge concludes that the allegations would potentially establish the existence of a grave risk the court must ask how the child can be protected against that risk. Moylan LJ warned that if the *Re E* approach is not taken there is a risk that the allegations will be treated less seriously than they deserve, if true, and that the court will not properly consider the available protective measures §97-98.

50. In determining whether protective measures can meet the level of risk reasonably assumed to exist on the evidence, MacDonald J summarised the following principles in *E v D*, at [32]:

> i) The court must examine in concrete terms the situation that would face a child on a return being ordered. If the court considers that it has insufficient information to answer these questions, it should adjourn the hearing to enable more detailed evidence to be obtained.
>
> ii) In deciding what weight can be placed on undertakings as a protective measure, the court has to take into account the extent to which they are likely to be effective both in terms of compliance and in terms of the consequences, including remedies, in the absence of compliance.
>
> iii) The issue is the effectiveness of the undertaking in question as a protective measure, which issue is not confined solely to the enforceability of the undertaking.
>
> iv) There is a need for caution when relying on undertakings as a protective measure and there should not be a too ready acceptance of undertakings which are not enforceable in the courts of the requesting State.
>
> v) There is a distinction to be drawn between the practical arrangements for the child's return and measures designed or relied on to protect the children

> from an Art 13(b) risk. The efficacy of the latter will need to be addressed with care.
>
> vi) The more weight placed by the court on the protective nature of the measures in question when determining the application, the greater the scrutiny required in respect of their efficacy.
>
> 33.With respect to undertakings, what is therefore required is not simply an indication of what undertakings are offered by the left behind parent as protective measures, but sufficient evidence as to extent to which those undertakings will be effective in providing the protection they are offered up to provide.

51. More recently, in *Re L (Article 13: Protective Measures)(No.2)* [2023] EWHC 140 (Fam) at [12], Cobb J endorsed the following approach to ensure that the proposed protective measures are:

> i) Forward looking to address the risk(s) which would otherwise exist if/when the child returns;
>
> ii) Effective to address the risk(s); exceptionally, this may involve undertakings or protective measures being in place and remaining in force for a period beyond the first hearing in the courts of the child's habitual residence;
>
> iii) Proportionate;
>
> iv) Appropriate and readily available (whether specifically facilitated by the left-behind parent, or under the country's own laws, or otherwise);
>
> v) Practical;
>
> vi) Focused on the child, and on the effect of the proposed arrangements on the individual child; the situation of the child has to be looked at in 'concrete terms'.
>
> While the court of the requested state will doubtless wish to scrutinise the protective measure proposals carefully by reference to the points which I have listed above, it has no role in micro-managing their realisation, nor will it seek to usurp the role of the court of child's habitual residence. A 'lighter touch' still will be applied where the court is considering the merely practical arrangements to achieve the child's return *S (a child) (Hague Convention 1980: return to third state) [2019] EWCA Civ 352* at §55)."

52. Whilst establishing the Article 13(b) defence theoretically gives rise to a discretion at large, Baroness Hale in *Re D (A Child) (Abduction: Custody Rights)* [2007] 1 AC 619 at §55 stated:

> "it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate".

Child's Objections

53. The principles to be applied when the court is considering the defence of child objections is set out in *V v C (A Child) (Wrongful Retention: Child's Objections: Discretionary Return)* [2023] EWHC 560 (Fam):

> "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.

54. 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 (i.e. if one of the Article 13 exceptions is made out), discretion is 'at large'. 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."

Expert Evidence: Mr Richard Harris

Rights of custody

55. Mr Harris, an attorney specialising in family law in Colorado, USA, prepared two reports dated 28 January and 16 February 2024. He gave oral evidence on 19 and 20 March 2024. Mr Harris stated as follows in his first report:

i) M was awarded care and control and sole decision-making responsibilities of the children (which expired on 29 June 2021).

ii) 'Parenting time' was ticked on the PPO, but none was in fact allocated.

iii) The granting of sole decision-making responsibility to M at the time the PPO was issued afforded her the right to remove the children (and obtain a passport without the consent of the father) but does not necessarily mean that a parent has the unilateral authority to remove a child from Colorado.

iv) In many cases an accompanying custody order prevents such a unilateral right, although there were no such accompanying custody order here and therefore no impact on M's right to remove the children.

56. Following further questions submitted by the parties, Mr Harris essentially came to the same conclusion in his second report but with some further comment:

> "*Mother's designation of sole decision-making authority likely gave her the right to remove the children…without the consent of Father. I use the term "likely" because no express order was in effect on 9/1/2020 permitting the removal. However, such authority is, in my opinion, presumed when a parent has sole decision-making responsibility. Under the terms of the PPO...Mother was granted both "care and control" and "sole decision-making responsibilities" of the minor children..."*
>
> *"Mother's allocation of "sole decision-making responsibilities" is the more pertinent provision here. Under Colorado law, decision-making responsibilities include the ability to solely decide all "major" decisions involving the children's upbringing. These decisions typically comprise areas such as the children's education, health, and religious upbringing. In my opinion, obtaining a passport is such a "major" decision as it might impact where the children might reside.*

57. Later in his report, Mr Harris added a caveat to his opinion:

> *"While Mother was not necessarily required to obtain permission prior to the removal, she was in violation of Father's rights at that time by doing so without addressing Father's court-order parenting time rights.*
>
> *On balance…I conclude that while Mother did not require Father's consent to remove the minor children from the State of Colorado, she did violate the Father's rights to parenting time at the time of the removal".*

58. At the time of writing his second report, Mr Harris had not seen a transcript of the PPO hearing. He was given time to consider it (and a copy of the *Abbott* decision) before giving oral evidence. Having done so, he noted that F had been given notice of the PPO hearing and an opportunity to participate, with counsel in attendance on his behalf; and that the MRO granted by the criminal court prohibited contact with P and Q, which meant that even though 'parenting time' had been allocated, there was no violation of F's rights by M's removal of P and Q, because the MRO remained effective and the PPO could not override it.

59. Mr Harris confirmed that there was 'no affirmative duty' on M to notify the court or F that she was planning to leave the USA and relocate to England before or after the PPO had been granted and there was no obligation to do anything about parenting

time where the box had been ticked on the PPO, but the MRO prevented contact. At most, he said parents have an 'equal responsibility' to work out the details of contact but there is no *obligation* to do so.

60. Ms Guha asked if F had a general right to prevent removal of P and Q from the USA. Mr Harris stated that whilst F did have such a potential right, a parent would have to file an application to exercise such custody rights or prevent removal, in the District Court, if they had concerns, usually in the context of divorce or separation. When cross examined by Mr Gration as to whether F had a right to veto the removal, Mr Harris told the court that F no longer had a right to prevent removal or make major decisions, including where the children should live. Furthermore, although parenting time or rights of access were 'allocated' in principle, the effect of the MRO rendered those rights entirely nugatory. Mr Harris confirmed that F retained the *potential* right to vary the PPO, but did not make any application to do so until 2 March 2022.

61. Ms Guha questioned why such a major decision as a permanent relocation to another country is not specifically referred to in the definition of decision-making responsibility. In his reports, Mr Harris referred to Colorado State law: "Colo. Rev. Stat. § 14-10-124 - Best Interests of the child" which defines *parental responsibility allocation* and *decision-making responsibility* and to the Uniform Deployed Parents Custody and Visitation Act which states as follows "*Decision-making authority" means the power to make major decisions regarding a child, including decisions regarding the child's education, religious training, health care, extracurricular activities, and travel*."

62. In oral evidence, Mr Harris agreed with Mr Setright that State law had not intended to provide a comprehensive list of all major decisions. He expressed a personal opinion, that there was a 'gap' or lack of clarity in the legislation but was firm in his answer that under the current law, decision-making responsibility would include an ability to decide to change country of residence even though not expressly referred to in any legal definition of a 'major decision'. Mr Harris said that a PPO hearing could thus have '*the ramification of determining relocation and residence, as an unintended effect*'.

Protective measures

63. Mr Harris stated that the Colorado courts have lost subject-matter jurisdiction in respect of P and Q as they have been absent for more than 6 months. Without P and Q being physically present or there being an emergency basis for exercising the court's jurisdiction, the parties would have to submit an agreement (a stipulation) in order for the Colorado court to act. If a return order were made, under the Uniform Child Abduction Prevention Act, a suite of protective measures and remedies would then be available to M in Colorado.

64. However, one of the protective measures sought by M is to not return to Colorado. Mr Harris is licensed to practise law only in Colorado, but explained that the parties could submit a stipulation consenting to the jurisdiction of that 'new' State. This could be sent in advance to the court for approval without the physical presence of M, F, P or Q. He warned that although it was an enforceable contract, it would be unwise to rely on it until approved by the court.

65. In summary, Mr Harris indicated that a return order from the High Court would, under the relevant State statute, be enforceable, and a request for the UK order to be given recognition for enforcement purposes could be made. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) is a uniform state law regarding jurisdiction in child custody cases, which specifies which court should decide a custody case and how the courts exercise jurisdiction, and most States have adopted this. Mirror (protective orders) made are enforceable before returning the child and parent, before they arrive in the jurisdiction.

66. In addition it was accepted that there exists a broad range of services and support including access to legal, financial and housing assistance, health services, shelters and other forms of assistance or support to victims of domestic violence, as well as responses by police and through the criminal justice system available and readily accessible in the State of habitual residence of P and Q (noting M's previous recourse to such services in other States in the USA). Moreover, as recorded in the Table of protective measures filed with the court, F has also made voluntary undertakings which meet M's primary requests.

The Guardian's evidence

67. ***Settlement:*** Ms Odze prepared two reports and gave oral evidence. She interviewed M, P and Q twice, spoke with F and social workers and the staff at school. As regards the defence of settlement, Ms Odze identified that:

    i) The children have endured circa ten moves of home and have been unable to feel settled in one place;

    ii) They are very fearful of F finding them. P reported that after one move, she had been very scared and so did not eat for days, and was unable to sleep;

    iii) They have experienced changes of school, with consequential loss of friendship groups and a possible impact upon their academic attainment;

    iv) The children are now known by assumed names;

    v) Within her second report, Ms Odze commented that the constant moving would have had a particular impact upon Q, bearing in mind his diagnoses of autism and ADHD and noted that they continued to live in fear of F;

As such, Ms Odze does not consider that the children can be said to be physically, emotionally or psychologically settled in this jurisdiction.

68. ***Article 13(b)***: The Guardian describes the allegations made by M, some of which are supported by P and Q, as 'extremely serious'. Significantly, in June 2020, P and Q say they witnessed M being physically and sexually assaulted and were subjected to physical abuse themselves. Ms Odze noted the inconsistencies in their evidence, but was struck by the consistency in relation to certain aspects of the incident, suggesting that M, P and Q were subjected to 'a very frightening incident' of sustained and serious domestic abuse, which on P's own account given *at the time* involved M being assaulted and the children being witnessing this. Based on the extrinsic information received from the State of Colorado, it is likely that P and Q have witnessed at least one incident of domestic abuse including, allegedly, the father holding a gun to P's head. If true, these are traumatic experiences the implications of which for the children and for M cannot be under-estimated.

69. ***Protective measures****:* Ms Odze accepted that the measures sought by M were "*entirely suitable as they cover all the requirements designed to safeguard the children's and M's anonymity and whereabouts*" but was concerned that in the Table of protective measures, F had requested to know to which State M, P and Q would relocate and details of the children's school. F subsequently withdrew this request and offered undertakings regarding anonymity. Ms Odze considered F's late concession to reveal a risk that the undertakings would not be sufficiently protective and possible future non-compliance by F. She added that the greater distance between the USA and UK, with increased complexity of travel, provided an additional layer of protection.

70. ***Objections***: Ms Odze describes P's 'clear objection' having interviewed her twice and is of an age and maturity which means they should be taken into account. In oral evidence Ms Odze said that P was objecting to going back to the USA and " *was not telling me like she was rehearsed or coached, it was her own experience*". In her first report, Ms Odze recorded P saying as follows: "*if I have to ever go to America to see him, I will just kill myself*". P's letter to the Judge is similarly strongly worded including: "*I never want to see that guy because he has beaten me up and touched my private parts ....that guy told me if I ever tell the police about what he did he will shoot me with his gun and he would cut our throats and throw us in key west"* (spelling corrected)

71. In relation to Q, Ms Odze had been unable to ascertain his wishes and feelings on her first meeting. However, prior to preparing her second report, she spent 2.5 hours during a second visit, and managed to interview Q, taking into account the difficulties around his diagnoses. Whilst it was difficult initially to engage with him, Ms Odze was able to elicit further information and told the court that he too objects to a return to the USA. Ms Odze has taken into account Q's age, and degree of maturity, which she says makes it appropriate for the court to take account his objection. Ms Odze

noted the chilling descriptions given by Q of '*killing F before killing us*' and that F is '*going to die*' which she says are "*strong and powerful sentiments and words which only serve to highlight a state of high psychological unrest and distress*".

72. She acknowledges that the lived experiences of each child are different but is clear that both strongly object (rather than expressing a wish or preference). Whilst Ms Odze could not rule out undue influence by M, she said it was unlikely and unwise to assume that P and Q have been coached or are simply parroting M's narrative. Ms Odze felt that both children gave authentic accounts, noting that there were evidential inconsistencies and issues which could not be resolved unless there was a fact-finding hearing. She noted that P and Q would have some 'shared lived experiences' with M who was their sole carer, but in her view, the objections of both P and Q were based on their lived experiences, some of which were corroborated by extrinsic evidence.

73. ***Discretion***: Ms Odze told the court that there were no welfare advantages if the children were returned. She was concerned that P and Q would not be returning to anywhere they knew, there was a significant risk of emotional harm in returning where both were extremely fearful of F and that he would find them. They would lose the 'bubble of security' they currently enjoy in the UK even if not settled, finding themselves in a new system of schooling and social services with no friends and family (no contact with F and paternal grandmother being conceivable until a fact finding hearing and decision in the family court).

74. Furthermore, even if it could be established at a fact-finding hearing that M had coached P and Q and alienated them from F, Ms Odze stated that the objections and views of P and Q were now so deeply embedded and they would have to be 'de-programmed' and/or undergo extensive therapeutic work, which she said ought not to be done after an enforced return of P and Q, given the extreme levels of fear they have about F and a return to the USA.

Analysis and conclusions

Rights of custody

75. Art. 3 of the Hague Convention means that I must consider whether the removal was in breach of the relevant rights of custody, i.e. those which arise under the law of the State in which P and Q were habitually resident immediately prior to the removal (Colorado). I also take into account Art. 5, which partially defines rights of custody as including rights relating to the care of the person of the child and the right to determine the child's place of residence.

76. I have followed the two-stage approach outlined by the Court of Appeal in *Hunter v Murrow* [2005] EWCA Civ 976, and Cobb J in *NT v LT* [2020] EWHC 1903 (Fam):

    i) What rights of custody does F enjoy under USA domestic law?

ii) Are those rights, under the autonomous law of the 1980 Hague Convention, rights of custody?

The burden is on F to establish that there was a breach of his rights of custody.

Rights of custody under USA domestic law

77. Ms Guha set out F's position at the conclusion of the evidence as follows:

i) F had a 'right to veto' a permanent removal of the children by applying to a Colorado court to prevent the same;

ii) F had a right to choose the place of residence for the children;

iii) Mr Harris changed his view on F's 'visitation rights', stating in his written reports that F had 'parenting time' rights allocated to him by the PPO which M violated by removal of the children, but in oral evidence he said that F had no visitation rights due to a MRO, and therefore, there was no violation by M; the suggestion being his evidence on this point is unreliable (although both M and the Guardian submitted the contrary);

iv) The PPO expired in June 2021 (it being valid for only one year) and that accordingly, the court in Colorado has rights of custody, even if F has not.

78. Ms Guha referred me to the decision of the Court of Appeal in *Re F (A Minor) (Abduction: Custody Rights Abroad)* supra. It is a case with some similarities but important differences, and I have had the distinct advantage of having an attorney from Colorado provide an expert opinion on domestic law in 2024 and in the specific context of this case. In *Re F* the order made by the court in 1995 was a temporary order providing care and control to the mother, not, as here, sole decision-making responsibility for all major decisions relating to P and Q. Moreover, since *Re F*, the legal landscape in this area has been further considered, notably by the House of Lords in *Re D: (A Child)* [2006] UKHL 51 from which the relevant principles on rights of custody within the meaning of the Hague Convention have been derived (see below).

79. Regarding the first stage of the test, I have had the benefit of written reports and hearing extensive oral evidence from Mr Harris, an expert on the domestic law applicable in Colorado at the time of removal. It is agreed that both P and Q were habitually resident in Colorado prior to their removal, so for the purpose of Art.3 of the Hague Convention, the question is whether F had rights of custody which were actually exercised, or would have been but for the removal.

80. Having considered the totality of Mr Harris's evidence, I conclude that F did not have rights of custody under Colorado domestic law at the time of removal. Mr Harris stated that in the absence of the PPO, which conferred on M sole decision-making

responsibility for all major decisions, both parents would have had an equal and separate right to make an application to the District Court for custody and to prevent removal. The PPO dated 1 September 2020 granted care and control, but more importantly, sole decision making responsibility to M, and she was entitled to make all major decisions for the children without involving F, including the decision to relocate to the UK. Mr Harris was clear that there was no legal requirement for M to inform F, or the court, in advance of her plan to relocate (even though in his own personal practice, he would advise his clients to do so). Accordingly, F had neither a right to determine their place of residence nor prevent the removal of the children.

81. In response to Mr Gration, Mr Harris clarified that F was neither able to make major decisions in respect of the children, nor to oppose those being made by M, and that F's case, taken at its highest, was no more than F having a *potential* right of veto by filing an application with the court. As Baroness Hale held in *Re D* at [38], a parent's potential right of veto, where for instance the parent had the right to go to court and ask for an order, would not amount to rights of custody:

> "*in other words, if all that the other parent has is the right to go to court and ask for an order about some aspect of the child's upbringing, including relocation abroad, this should not amount to rights of custody. To hold otherwise would be to remove the distinction between rights of custody and rights of access altogether, it would be also inconsistent with the decision of this House in Re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562… this was held not to amount to rights of custody within the meaning of article 5(a)*."

82. I have also considered whether the allocation of parenting time amounted to rights of access and/or rights of custody. F was allocated undefined parenting time, i.e. visitation, in the PPO hearing, but these were extinguished by the operation of the MRO granted by the criminal court that prohibited any contact between F and the children. The effect of the MRO was fully understood by the magistrate at the PPO hearing, (at which F's counsel was in attendance) as can be seen in the transcript. The option to appeal via the District Court was flagged. Mr Harris confirmed that the MRO could not be overridden by the county court dealing with the PPO but there were options open to F regarding the orders. I have seen no evidence that F sought to vary or enforce the order for parenting time with P and Q and F only applied to dismiss the injunction in March 2022.

83. Moreover, mere rights of access do not amount to rights of custody: *Re D* at [29], even where the rights of access are very extensive : *Hunter v Murrow*. Nor was there any '*ne exeat'* clause, which could confer custody rights, included in the PPO or any other court order which prevented M or F from removing the children without the consent of the other or an order of the court as in *Re P (Abduction Rights)* [2004] EWCA Civ 971, where a father had been given visitation rights but not custody, but it was determined that he had custody rights because of a '*ne exeat'* clause.

84. I should add that there is some debate about where F was living, and his involvement with, P and Q prior to their removal; in his evidence to the police in July 2020, he gave a home address in Miami, stating that he was 'keeping away' from M, and did not have a key to her home. M's account is that she had 'run away' and had not been involved with F until the evening of the alleged assault in June 2020, when F claims to have raised the issue of divorce. Whatever the factual position was, it is clear is that the PPO and MRO in force prior to removal from the USA, removed F's rights of custody and of access.

85. I accept that **if** F could establish that he had a right to veto the removal of children, and but for M's actions, that he would have exercised them, then he would have established rights of custody, even though he was incarcerated at the time: *Re A (A Child)(Abduction: Rights of Custody: Imprisonment)* [2004] 1 FLR 1 approved in *Re EE (Children)(Habitual residence)* [2016] EWHC 2263 (Fam). However, as Mr Harris clarified, the PPO had the effect of removing F's rights of custody, including the right of veto, and the limited rights of access (through allocation of undefined parenting time on the PPO) were also extinguished by the effect of the MRO.

86. Mr Harris had not seen the transcript of the PPO hearing at the time of writing his reports but having had the opportunity to do so, he revised his opinion. This was not unreliable or inconsistent evidence from the expert as Ms Guha suggests. On the contrary, both Mr Gration and Mr Setright submitted that it was a considered, reflective view, taking into account all the available evidence. I agree and found Mr Harris to be an authoritative and reliable witness.

87. Ms Guha on behalf of F submitted that, as in the case of *Re F*, I should take into account the actions of M to remove the children, against the wishes of F, without his consent or knowledge and further, that I am not bound by M's rights to unilaterally remove the children under Colorado law, but should adopt a purposive approach to F's rights of custody in keeping with the autonomous concept of the Hague Convention: per Butler-Sloss LJ at p.231 paras. D-E:

> "In applying the convention we are not bound by the mother's right under Colorado law to remove the child from the United States and that information is in my judgment irrelevant to the decision the English court has to take whether the removal from the United States was wrongful. We are concerned with the mother's unilateral decision to remove the child without the consent of the father and with the knowledge that if he knew he would have opposed her removal of the child. By the removal she frustrated and rendered nugatory his equal and separate rights of custody, in particular that the child should reside in the United States. In so doing she was in my judgment in breach of the father's rights of custody under the convention and the removal was wrongful."

88. Although there was no obligation on M to inform F of these plans according to Colorado State law, M concedes that she concealed her plans to remove the children

from the USA from F, alleging that this was due to F's conduct and her fear for herself and the children's safety, albeit it is also clear that M did not conceal her relocation plans from the children's school for example, prior to leaving, and has informed various State agencies in England & Wales, including the SSHD of her location and domestic circumstances.

89. I have considered the later House of Lords decision in *Re D*, in particular, paragraphs 8-10 per Lord Hope, and its relevance to this case. I find as follows:

i) The evidence on domestic law in this case has been authoritative and sufficient to show that none of the rights that were granted at the PPO hearing (limited to inchoate parenting time, incapable of being put into effect) or those in existence absent any court order, gave F a right of veto or to decide the children's place of residence [para.8].

ii) The expert evidence in this case is to be treated as conclusive as to the parties' rights under the law of Colorado. Only if the characterisation of the parent's rights is clearly out of line with the international understanding of the Convention's terms should this court decline to follow it: *Re D* at [8], *H v M* [2005] EWCA Civ 976, [2005] 2 FLR 1119. I am satisfied that F's rights, limited to (nugatory) rights of access did not amount to rights of custody within the autonomous meaning of Art.3 and Art.5.

iii) For Convention purposes, a right to grant or withhold consent to the children's removal from Colorado is a right of custody. The absence of a right of veto here is, then, decisive in this case [para.9].

90. Finally, as regards Ms Guha's last submission, that the county court granting the PPO in Colorado retained rights of custody and as such was an institution or 'other body' within the meaning of Art. 3: Mr Harris stated that the county court in Colorado would have been seized only if M or F had made an application in respect of the decision-making responsibility or parenting time provisions in the PPO (which they did not) or a separate application had been brought to the District Court (F did not appeal the decision and almost 18 months later filed his first application to dismiss the injunction).

91. Mr Harris clarified that the PPO made in September 2020, at the time of the removal of P and Q, was a <u>final</u> order, against which there was a right of appeal to the District Court and that the involvement of the county court in Colorado ended with the making of this final order. I have considered the case of *Re H (A Minor) (Abduction: Rights of Custody)* [2000] 2 AC 291 which established that once seized, the court's jurisdiction is invoked *until the application is disposed of*. Mr Harris says the proceedings were disposed of in September 2020 and a right to make further applications to vary the final order does not amount to the court being seized of the matter on an ongoing basis (noting that the order for parenting time and sole decision-

making responsibility expired in June 2021). Accordingly, I am satisfied that the court in Colorado did not have rights of custody within the meaning of the Hague Convention.

92. I should add that in their closing submissions, leading counsel for all the parties commented on the availability of a request for an Art. 15 declaration as a means of clarifying any uncertainty in the domestic laws in Colorado. However, they were unanimous that this was not appropriate in the present case, and no party invited me to adjourn or pursue such a request. In any event, as I have already said, Mr Harris' evidence was thoroughly explored by three eminent senior practitioners in this field, which process elicited his clear conclusions on the key issues and there was no necessity for this court to go down the Art. 15 route.

93. For these reasons, I dismiss the proceedings, on the grounds that F did not have rights of custody for the purpose of the Hague Convention when P and Q were removed to this country in September 2020, that accordingly the removal was not wrongful under Art.3, and that no obligation to return the children arises under Art.12. That is all that need be said to dispose of this application. But many other matters have been canvassed before me in this hearing and in deference to the extensive arguments I have heard in relation to the other Convention defences, I address them below.

Settlement

94. This is an unusual case in that the children have now been in this jurisdiction for 3 ½ years. This does not of itself produce settled status although it is a relevant factor. Art. 12 of the Convention provides that where a child has been wrongly removed, if proceedings for recovery of the child have been commenced within a period of less than one year from the date of wrongful removal the court must order the return of the child forthwith. Proceedings have been commenced long after the expiration of the relevant period, and so the issue of whether P and Q are now settled in this "new environment" falls to be considered. In calculating the period of time from when "*the proceedings have commenced*", I have followed Theis J's approach in *R v P* [2017] EWHC 1804 (Fam) at §111 (the relevant date being when proceedings were issued here).

95. M contends that despite there having been at least ten moves, this must be viewed in the context of a number of relevant factors. First, all but two of these moves were made on the advice of the SSHD, allegedly for child protection reasons and for the safety of M, although this cannot be verified as the SSHD records have not been made available.

96. Secondly, there was a period of over two years (the Guardian suggests 15 months) up to August 2023 in which M says there was a degree of physical, emotional and psychological settlement. By comparison, the family led a peripatetic lifestyle in the USA. M argues that if P and Q were returned to the USA, they would not return to the

same State, school, community or friends they knew over three years ago, as such they have more stability and are now settled and engaging with the school, health and social care systems here.

97. Thirdly, M alleges that she, P and Q have been ‘on the run' from F since 2017. Although it might be said that they remain potentially ‘on the run' in this jurisdiction, Ms Odze describes them being in a ‘bubble of security' at a far greater distance with the added complexity of travel and new identities, making it difficult for F to find them. M claims this means they are effectively ‘settled'. I am not persuaded that is right although it might have been relevant to wider welfare issues in the event that I had been required to exercise my discretion.

98. Finally, M concedes that where there has been concealment, ‘it can be difficult to argue settlement'. I have reflected on paragraph [54] in *Cannon* where Thorpe LJ made clear that: “*concealment or subterfuge in themselves have many guises and degrees of turpitude. Abduction is itself a wrongful act, in that it breaches rights of custody, but the degree of wrong can vary from case to case*” noting that whilst the court may be critical if the abducting parent is a fugitive from criminal justice, M was not in this category and sought leave to remain in this jurisdiction as a victim of domestic violence, which was received sympathetically by the SSHD.

99. I have considered all the evidence on the issue of settlement and in particular, Ms Odze’s detailed and helpful evidence. I note F’s position is aligned with the Guardian. I have in mind the case of *Re H (Abduction: Child of Sixteen)* [2000] 2FLR 51 and *Cannon* supra, at [61] where Thorpe LJ stated that it is not enough to have regard to the physical characteristics of the child’s settlement; equal regard must be paid to the emotional and psychological elements and that, in cases of concealment and subterfuge, the burden of demonstrating these necessary elements is much increased. Undoubtedly, P and Q have moved location, home, school and community many times, including very recently and there are vivid descriptions of the impact on both children. On balance and looking critically at any alleged settlement that is built on concealment and deceit, I am not persuaded that the evidence would have demonstrated the necessary elements of settlement, and I accept the views of the Guardian.

100. I have also considered the different view expressed by Mostyn J in *ES v LS* [2021] EWHC 2758 (Fam), i.e. that the court should look at whether P and Q are settled *at the date of the trial*, and not the date the application was issued. Even if I were to adopt this approach, it is apparent that P and Q have not settled, not least because they have endured yet further moves (in July and December 2023). Although they may have adjusted to their new environment in recent months, and enjoy some degree of security and stability, essentially P and Q have had to ‘start again' in a completely new physical environment which encompasses place, home, school, people, friends, activities and opportunities. Having regard to these factors and the emotional and

psychological constituents of settlement, the defence would not have been made out, assuming that I had determined that F had had Convention rights of custody.

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

101. It is argued that a return to USA would expose both P and Q to the grave risk of psychological and physical harm and/or an intolerable situation. It was submitted by Mr Setright that there are no sufficient protective measures that could be put in place to manage this. Ms Guha invited me to find the children have been coached by M and/or alienated from F and have fabricated their accounts at M's behest. I do not discount their allegations on this basis and whilst I accept there have been evidential inconsistencies and some concerns at how the accounts have subsequently developed, I remind myself I am not conducting a fact-finding hearing. I have summarised the evidence and disputes on multiple issues and do not intend to repeat it.

102. One particularly harmful incident is that which occurred in June 2020, where it is alleged that F put a gun to P's head, and that the children witnessed F assault M. These were particularly serious allegations documented contemporaneously by the police in Colorado. Officer McCormack provided a comprehensive account of these events including the physical assault of M and the use of a gun to threaten, by F. There are other extrinsic records within M's medical records including a sexual assault examination and Human Services reports.

103. On an evaluation of all the evidence against the civil standard of proof, I accept that there is a grave risk of psychological harm to both P and Q on return to the USA when these allegations are taken at their highest, without having made any findings of fact. I am not required to determine the veracity of the matters alleged, but I cannot confidently discount the possibility that they give rise to an Art. 13(b) risk. Moreover, I am satisfied that they are of such a nature and of sufficient detail and substance (see Guide to Good Practice, paragraph 40), that they could constitute a grave risk to P and Q**.** In this context, the assumptions I made with respect to the maximum level of risk are reasoned and reasonable: *Re A (Children) (Abduction: Article 13(b))* [2021] 4 WLR 99.

104. Psychological/emotional abuse of this nature can cause lasting emotional harm and there is a grave risk of the same. Physical chastisement is also likely to be harmful and emotionally damaging. Separately, I note the evidence around the allegation of sexual abuse of P (by F and paternal uncles) and gang membership is thin, as is the evidence around the alleged anal rape of Q. I treat these allegations, all denied by F, with some caution, given their emergence later.

105. However, the court's focus is on the future risk of harm and the concrete situation that P and Q will face on return. Protective measures exist within the American administrative and judicial system to protect P and Q from any psychological or physical harm. The allegations which have now come to light in these proceedings are

capable of being provided to the relevant authorities. Mr Harris outlined the arrangements that could be made, including mirror orders and stipulations being filed in advance of any return. 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 P and Q.

106. I also note the suite of protective measures set out in the Table, in respect of anonymity, providing funds for accommodation, and not separating the children from M until a decision is made by the family court have been agreed. F initially sought details regarding the whereabouts of M, P and Q and of any proposed school, pending resolution by the family courts of the factual disputes and welfare issues between the parties. However, at the hearing, through Ms Guha, he withdrew this request and confirmed his willingness to offer the undertakings regarding anonymity. Although the Guardian expressed concerns that F had made these concessions late, she accepted that the measures sought by M (and offered by F) were "*entirely suitable as they cover all the requirements designed to safeguard the children's and M's anonymity and whereabouts*". I agree.

107. I have considered submissions on behalf of M that she does not have any home or family in the USA and measures cannot be put into place which give her the protection she seeks. I reject that submission. The relevant authorities could be informed in short order to make necessary arrangements if a return were ordered, and I draw a distinction between practical arrangements for the children's return and the measures outlined above and in the Table which are designed to protect P and Q from the Art. 13(b) risk. I have checked this conclusion against *Re A* supra, 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.

108. In addition, having in mind the decision of Cobb J in *Re L*, effective protective measures available include continuation of the undertakings offered by F or protective measures to remain in force for a period beyond the first hearing in the court in the State where P and Q return. Looking at all the evidence and assuming a competent level of State protection in the USA, as I am entitled to, even without further expert evidence on the legal system in the State where M elects to return, I am on balance satisfied that it would have been possible to put protective measures in place to prevent the grave risk of harm, assuming that I had concluded that the removal was in breach of F's rights of custody.

The Children's Objections

109. I have taken into account the relevant principles set out by Williams J in *Re Q & V* supra, noting that at the gateway stage, whether a child objects is a question of fact and I am required to undertake a straightforward and fairly robust examination of

whether the terms of the Convention are satisfied. Having regard to the Ms Odze's assessment, I find that P and Q are expressing their objections to a return to the USA, rather than mere preferences, without applying an over-prescriptive or over-intellectualised approach to the word 'object', which is to be discouraged, per Black LJ in *Re F* [2015] EWCA Civ 1022 at [33] and "*the exception is established if the judge concludes, simply, that the child objects to returning to the country of habitual residence*" at [35].

110. As observed by the Ms Odze, P is of the age (now 11 years old) and has attained a degree of maturity such that the court must have regard to her wishes and feelings. It would be wholly improper to ignore them. In respect of Q, Ms Odze noted in her first report: "*I have no doubt that he too would object to a return to the USA, given his presentation and vulnerabilities*" although she had not been able to interview Q, as he had been reluctant to engage. In oral evidence, Ms Odze stated that Q objects and although not as articulate as P, he had attained an age (9 years old) and a degree of maturity (mindful of his diagnoses of autism and ADHD), at which it is appropriate to take into account his views. I would have had no difficulty concluding that both P and Q object to a return.

111. Having established that the threshold for the objection defence has been met, the court must turn to the discretion stage. There is no exhaustive list of factors and discretion is at large and I am entitled to consider welfare factors, *Re M (Abduction: Zimbabwe)* [2007] UKHL 55, [2008] 1FLR at [46], including whether the views expressed are authentic.

112. In respect of P, it is a strong and consistently held objection which Ms Odze considers to be authentic. Although she could not rule out that P might be influenced by M, Ms Odze's view was that P had described her own views based on her own lived experience. Ms Guha challenged Ms Odze on this, suggesting that M had coached P and Q, fabricated the evidence and alienated them from F. Ms Odze did not accept this, referring to the accounts given by P and Q separately to the authorities in June 2020, which confirmed that they had witnessed domestic violence. Ms Odze went further, stating that some 'sharing' of M's narrative with P and Q is unsurprising given that M has been their sole carer for 3.5 years. The views held by P and Q are embedded and strongly held, regardless of whether they have arisen from a mixture of their own lived experience or shared experiences with M. Nevertheless, they are now their own authentically held beliefs and can only be disentangled by a fact-finding hearing to understand to what extent, if any, M had alienated P and Q from F. I find this to be an insightful characterisation of their objections.

113. I have also read a letter written by P 'to the Judge' set out in full in the Guardian's report. I need not repeat it here, but the nature and strength of P's objections are clear and notable, including in the following comments P made in her interview with Ms Odze: firstly "*to keep that guy away from me and never make me see him in my life*"

and secondly: "*if I have to ever go to America to see him, I will just kill myself*". Both P and Q now call F '*that guy*'. P told the Guardian that she does not want to go back to USA "*even if the father says that he will not go near them. This was because "I am scared because he lives there*". I remind myself that an objection to a return to a parent may be indistinguishable from a return to a country (*Re Q &* V at [51]).

114. In respect of Q, Ms Odze's second interview is informative. Having drawn a picture of his family, Q stated "*me and my family killed that guy…we killed that evil guy"*. Q then took a crayon and wrote *"that guy is going to die*". Ms Odze considered this to be a clear indication of Q's views and stated that *"these are strong and powerful sentiments and words which only serve to highlight a state of high psychological unrest and distress*". Ms Odze's view was that Q's objection is genuine, whether this arises from a mixture of his own and M's shared narrative rather than as a result of coaching or the influence of M. I accept Ms Odze's assessment and would have found that Q objects to a return. It is also likely that Q may not be able to distinguish between a return to F and the USA.

115. I acknowledge the policy behind the Hague Convention that wrongful removals must be discouraged and a parent that engages in such actions should not be rewarded, easily or at all. 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 would have weighed heavily in the discretionary balance.

116. I have recounted the steps taken in these proceedings. 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. Cafcass have met P and Q two times. 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.

117. I must also acknowledge that P and Q have been resident in this jurisdiction for 3.5 years now. I need not rule on whether or not P and Q are now habitually resident in England and Wales to exercise my discretion under the Convention. There has been a degree of stability, security and adjustment in 3.5 years. This results in my placing less weight on the need for a swift return that should normally take place. The further away one gets from a speedy return, the less weighty the general Convention considerations must be: *Re M (Abduction: Zimbabwe)* at [44] and further at [47] per Baroness Hale:

> "*The object of securing a swift return cannot be met. It cannot any longer be assumed that that country is the better forum for the resolution of a parental dispute. So the policy of the Convention would not necessarily point towards a*

> *return in such cases, quite apart from the comparative strength of the countervailing factors, may well, as here, include the child's objections as well as her integration in her new community*".

118. I accept that P and Q are not 'settled' within the meaning of Art.12 as was the case in *Re M,* but I would have taken into account the 'bubble of security' Ms Odze has described, as I am entitled to do, in any exercise of my discretion. I have of course recognised that a degree of subterfuge was involved in M's removal of the children, but I have also had regard to Ms Odze's observations that there appears to be no welfare benefit to the children of a return to a new State in the USA, with which they have no familiarity, no friends, no family and would have to engage with new health and social care professionals, and new systems. This is particularly concerning where, I am told, P has had recent involvement with mental health services, having previously expressed suicidal ideation. Similarly, I note Q's particular vulnerabilities and recent diagnoses, that were not apparent in the records disclosed from the agencies in the USA, and which have required input from health and education services here.

119. I bear in mind the case of *Re C (A Child)* [2006] EWHC 1229 (Fam) at [58] and consider that similarly, in the instant case, the position has been reached whereby the court to whichever State in the USA M might return is no longer in a noticeably better position than an English court to decide welfare questions concerning the children, given that the past 3.5 years have been spent under the auspices of the health and social care agencies here.

120. There are additional concerns. Ms Odze highlights that if the children have been 'coached' by M, they would need to undergo extensive 'de-programming' and in her view, this work could only be undertaken after a fact finding hearing (and only if the facts establish M has influenced P and Q). A return to the USA prior to any fact find and 'de-programming', would put the children at risk of emotional harm. I can see the force in that argument. Ms Odze urges the court not to make a return order in this case.

121. I do not make any findings as regards alienation of the children by M, but from a welfare perspective, and in the context of their strongly held objections, I would have weighed in the discretionary balance the fact F has had no in person contact with the children since their removal and reflected on M's allegations of domestic abuse as part of the overall picture. They are of a very serious nature. It is likely if not obvious, beyond this summary application, this issue will need to be considered by the family court.

122. I have also reflected on the different way in which the objections of P and Q have been expressed. In P's case, her objection is strong, clear and consistent congruent with many of her welfare interests, and authentically her own; in Q's case whilst less

clearly articulated, they are nonetheless the established objections of a child who, as Ms Odze submits, is of an age and level of maturity at which such views should be taken into account. In any event, it would be impossible to imagine Q returning to the USA alone without acknowledging that would place him in an intolerable situation. All these issues considered together point clearly towards refusing return. I would have reached a clear conclusion, taking the discretion in the round and having regard to all the circumstances, that if F had been able to establish rights of custody, the objection defence for each child would have been established and neither should be returned summarily to the USA.

123. I am grateful to both leading and junior counsel for their helpful submissions and ask that they draft an order to give effect to this decision.