Neutral Citation Number: [2022] EWFC 104

Case No: FD22P00445

IN THE FAMILY COURT
SITTING IN THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 July 2022

Before :

THE HONOURABLE MRS JUSTICE ROBERTS

- -

Between :

J **Applicant**

- and -

Respondent

R

(HABITUAL RESIDENCE)

- -

- -

Mani Basi, counsel, (instructed by Dawson Cornwell) for the Applicant
Peter Wareing, counsel, instructed on a direct access basis by the Respondent

Hearing dates: 18 and 19 July 2022

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JUDGMENT

Mrs Justice Roberts :

1. The court is concerned with a four-year old child, H. H travelled to this jurisdiction with his mother (R) in mid-May this year. This is an application by H's father (J). Pursuant to

the 1980 Hague Convention, he seeks the summary return of his son to Spain which is where the family had been living since they left England the previous year in May 2021.

2. Those basic facts are not in dispute. The issues which I have had to determine in the context of the father's current application are (i) whether at the time he was removed from Spain or retained by his mother in this jurisdiction against his father's wishes, H was habitually resident in England & Wales. If he was, that removal or retention would not be considered 'wrongful' in Convention terms regardless of any breach of his father's rights of custody; and (ii) if the child had by that stage acquired habitual residence in Spain, whether the mother can avail herself of a defence under Art 13(b) of the Convention so as to give this court a discretion as to whether a summary return should be ordered.

3. A significant electronic bundle of material has been put before the court for the purposes of this hearing. Both parents have filed written evidence and exhibited to their statements a quantity of documents through many of which I was taken during the course of counsel's submissions yesterday. I have read the entire bundle and I have listened carefully to what has been said on behalf of each of these parents. I am grateful to Mr Basi and Mr Wareing for the assistance they have given me during this hearing.

Background

4. In order to give context to the legal arguments, I propose to say something briefly about the background to this litigation. For these purposes I propose to refer to the parents as "the father" and "the mother".

5. The father is 42 years old. He was born in Spain but has since acquired dual British nationality having worked for some time in the international hospitality sector. The mother is 33. She was born in Serbia where members of her family still live. She, like the father, has pursued a successful career which has seen her working in several different jurisdictions. She is now a national of Great Britain and Hungary as well as retaining her nationality of birth. She works as a self-employed marketing consultant and, like the father, has had some notable success in her career. She recently secured a Masters degree. H is clearly a much-loved child and he is fortunate indeed to have two devoted, intelligent and professionally successful parents. On behalf of his client, Mr Wareing described both as "responsible, caring parents".

6. The father came to live and work in London in 2002. Six years later, the mother moved to this country. They met in 2014 when they were working at the same restaurant and a relationship developed between them. By the Spring of 2015 they were cohabiting. In 2017, the mother became pregnant. It appears that by that stage their relationship was committed, happy and stable. H was born in 2018. He has British nationality. Whilst he was still a small infant, his parents began to discuss the prospect of leaving England to make a home together in Europe. In the early part of 2019, the father had been approached with a view to securing employment in Ibiza where he was negotiating with potential employers in relation to a job running a theatre and restaurant on the island. That

opportunity went no further and, in 2020, he was in discussion with a group of investors about a potential move to Madrid. These negotiations were fairly advanced but the project was delayed as a result of the pandemic. In the meantime it seems that the discussions between these parties about a move to Spain continued. The father saw greater employment opportunities in that jurisdiction and both appeared to have been attracted by the lifestyle options available to the family if living at a location close to the coast. The mother does not dispute that these preliminary discussions took place but her case is that there was never a plan for permanent relocation to Spain. She accepts that their plans to relocate were motivated by the father's need to find alternative employment when he was made redundant from his role as the general manager of a well-known restaurant in central London.

7. As the evidence before the court confirms, there came a point when there was a consensus between them to leave London and make the move to Spain. It was a natural point of gravitation for the family since the father had family members in that city (his mother and two sisters) who would be available to offer support following the family's arrival. Arrangements were made to let the London apartment which had been the family's home up to that point. The tenancy agreement initially ran for 12 months from 1 April 2020 and was subsequently renewed for a further 12 months. In the early part of 2020, their plans to leave London for Spain had to be put on hold as a result of the global pandemic. Travel arrangements for April 2021 were postponed and the move eventually took place at the beginning of May 2021.

8. At the time of the move, they shipped some of their belongings, including some office furniture, to Spain, other pieces of furniture and winter clothes being placed into store in London and Spain as surplus to their immediate needs and requirements. There appear by now to have been financial constraints on the couple. The father sold a small 2 bedroomed apartment which he owned in Spain in order to give them some working capital as they made the move. The mother had secured some consultancy work in London which she was able to undertake remotely from Spain.

9. Having spent several weeks staying with the father's sister in Spain on a temporary basis, they moved into their own accommodation at the beginning of September 2021. The house which they rented after some weeks searching for the right property was a fairly substantial home with four bedrooms, three bathrooms and all the usual amenities of a family home. Following the move into that property, the father has not returned to England. The mother has returned with H on three occasions where she was able to spend time with her family who live close to central London. It is a close-knit extended family and I have no doubt that both she and H took much pleasure from those trips.

10. It seems that difficulties in the parents' relationship began to surface towards the end of 2021 but they remained together as a couple for several more months. By March this year (2022), they had reached a decision to separate. The mother travelled to England over Easter that year. Having returned to Spain, she informed the father that she wished to make a further trip to England for her sister's graduation event. When the father objected

to H leaving Spain, the mother indicated that she would travel by herself. On 14 May 2022, the mother contacted the father by telephone to inform him that she and H had travelled together to England but that they would be returning to Spain by the end of the month. Three days later, on 17 May 2022, she called to say that, having sought legal advice locally in England, she had decided not to return and would be remaining in England permanently with their son.

11. By that stage there were parallel proceedings ongoing in the domestic courts of both jurisdictions. The mother had by then issued proceedings in a London Family Court for a child arrangements and prohibited steps order. Those proceedings were stayed by order of Mr Justice Peel on 16 June 2022. For his part, the father had issued his own application in the Court of First Instance in a city in Spain. There have been two hearings in those proceedings. On 6 May 2022 the Spanish court accepted jurisdiction and he was given permission to proceed with an application "seeking measures to avoid an abduction" of their son. At a subsequent hearing on 31 May 2022, the father's application was extended to include a request for guardianship and custody of the child. The mother was directed to respond to his application within 20 working days. She tells me through her counsel that she has not been formally served with those proceedings. I am proceeding on that basis for the purposes of this hearing. She accepts that she is aware of the proceedings having now had an opportunity to see the orders flowing from each of the two hearings in the local Spanish family court.

12. That is where matters stood when this matter came before me yesterday for the final hearing of the application brought by the father pursuant to the 1980 Hague Convention.

The Law

13. There is no issue as to the law which I must apply in this case. Art 3 of the 1980 Hague Convention defines the wrongful removal or retention of a child for the purposes of engaging the summary jurisdiction of contracting states as one where such removal "is in breach of rights of custody attributed to a person … either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal." For these purposes, those rights of custody must be being exercised, either jointly or alone, at the time of the child's removal.

14. Pursuant to Art 12 of the Convention, if a court finds that such a wrongful removal has occurred as defined by Art 3, the relevant contracting state is *obliged* to order the return of the child forthwith unless a period of more than a year has elapsed since the date of the wrongful removal or retention. The obligation on this court is thus mandatory unless one or more of the following applies:-

    (i) this court finds that the child was not habitually resident in Spain immediately before his removal on 13 May 2022; or

(ii) there is a finding that the father was not exercising legal rights of custody immediately prior to that date; or

(iii) the mother can establish a defence to summary return (in this case under Art 13(b)) which displaces the mandatory obligation on this court and replaces it with a discretion in relation to whether a return should be ordered.

15. In this case no point is taken on behalf of the mother in relation to the father's rights of custody. By the date of the alleged wrongful removal, the father had already instituted proceedings in the local family court in Spain. He was plainly exercising those rights and, quite properly, the mother takes no point that he was not.

16. Thus the first question to be addressed in the context of whether this was a 'wrongful removal' in Convention terms is this: where was H's place of habitual residence as at 13 May 2022 when he travelled with his mother to London.

Habitual residence: a question of fact

17. The essence of the mother's case as it is advanced by Mr Wareing is that the 12 months which H spent with his parents living in Spain from 1 May 2021 did not fracture the continuum of the habitual residence which he had established in this jurisdiction prior to the family's departure from England on that date.

18. As I made plain during the course of argument yesterday, I have no doubt that the correct legal analysis of the position up to that point of time is that this little boy was habitually resident in England & Wales. Mr Basi, on behalf of the father, does not seek to say otherwise. He was born here and had made his home throughout with his parents here. He travelled with is parents to Spain shortly before the celebration of his third birthday. I need no persuasion that, up to 1 May 2021, the child was habitually resident in this jurisdiction. Much of the mother's evidence in terms of the fabric of their son's life in the London community up to that point in time in not controversial. I accept her evidence from childminders, friends and family that he had established strong links in his local community. If the judicial enquiry was focussed on the period from 2018 through to the Spring of 2021, I would have no hesitation in finding that this child was habitually resident in England. That aspect of the case I can take very shortly.

19. The issue then becomes this: having moved to Spain and having spent the next 12 months living in that jurisdiction, albeit with trips back to London to see the extended maternal family, did that position change ? On behalf of his client, Mr Wareing places significant reliance on the subjective intentions of H's mother who never intended the family's relocation to be permanent. As I pointed out during the course of argument, the parents may well have had different subjective intentions both at the time of the original relocation and subsequently as their relationship broke down. Those intentions are only one aspect of the enquiry which the court is obliged to undertake.

20. Mr Wareing has described H's sojourn in Spain for those 12 months as no more than "an experience" for this child. That definition finds no reflection in the language of the 1980 Convention and thus it is my task in these proceedings to look at all the circumstances of this case in order to reach a conclusion as to the simple factual determination which must be addressed: where was H habitually resident when he travelled to London on 13 May 2022 ?

21. The law in relation to habitual residence is now settled. One of the most recent, and often cited expositions, is that of Hayden J in *Re B (A Child) (Custody Rights: Habitual Residence)* [2016] 4 WLR 156. Essentially, the task of the court is to look at the facts in a straightforward way without applying any legal sub-rules or glosses. The court has to ask to what extent a child has integrated into the social and family environment of his or her new circumstances in the second jurisdiction. The focus in this context is on the manner in which the child is actually experiencing his or her life and the degree of integration into the experience of childhood and family life in that new jurisdiction. No one factor in the overall assessment is determinative: the evaluation which the court conducts is an holistic enquiry into all the child's and his parents' circumstances as they present in the context of family life. The focus of the enquiry is on the child himself although the younger the child, the greater the likelihood that his or her habitual residence will be the same as the parents who are caring for him. In this context the law does not recognise a state of hiatus where a child has no habitual residence. In the usual course of events, a child will lose a former habitual residence as he acquires a new one. The court will frequently look to the analogy which Lord Wilson gave us in an earlier case of *Re B* [2016] UKSC 4 of the see-saw. It is a simple analogy but it is a good one. His Lordship said this:

> "As, probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new state, up will come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it …".

22. So, here, my focus must be on *H's* life as he lived it for the best part of a year whilst he lived in Spain. How did he experience day to day life in his home with his parents, at his nursery and being cared for by others when his parents worked and during times of relaxation and play with his family and friends he had made in that jurisdiction ? As is clear from *Re B*, there does not need to be full integration into a new jurisdiction before the court can properly make a finding that a child has acquired a new habitual residence. There does, however, need to be a *sufficient* degree of integration such that a child's residence can properly be characterised as 'habitual': see Baroness Hale in *Re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] AC 1038 at para [60].

23. It is not without significance that Spain was a country which was already familiar to H when the family left England in May 2021. He had grandparents living in both jurisdictions but had made at least four trips to Spain to see his paternal grandmother and

members of the father's family prior to that date. The parents having taken the decision to move, they began to make the usual arrangements in relation to leaving the home in London and arranging for the transportation of their belongings to Spain. I accept that this was not a relocation which involved the severance of all their ties with London. Their home was rented out, as I have said, and some of their belongings placed into storage. I am satisfied that the day-to-day paraphernalia of family life and all the clothes and toys which would have been familiar to H accompanied them on their move. The father contacted the Spanish Embassy in London in order to remove himself from the register of Spanish nationals paying national insurance in this jurisdiction.

24. As for H, the parents registered their son at a local nursery school in Spain within a week of arriving in Spain. He was enrolled in an after-school club where activities were available after the school day until his parents were free to collect him and take him home. It appears that the rhythm of his weekdays involved attendance at the nursery from Mondays to Fridays from 9am to 2pm and thereafter until about 5.30pm when he would be collected from the after-school club. There are no reports in the evidence of his being unsettled or unhappy with these arrangements and it is reasonable to suppose that, as a bright young child, he soon became acquainted with the teachers and staff who cared for him there prior to returning to the home he then shared with both of his parents each evening. There are in the bundle many photographs depicting time away from school or nursery spent in the company of young friends having fun in the way any young child might enjoy time at weekends. I have no doubt that this is the way this happy little boy lived his life both in Spain and in England. He appears to have had a secure attachment to each of his parents and he was growing up and learning to socialise and experience life in both jurisdictions.

25. Whilst in Spain, H shared the property which his parents had chosen and rented together. All three were registered formally as legal residents of Spain. Whilst it appears that he remained registered at his former GP's surgery in London, it seems he visited, and was treated, by doctors locally in Spain on three separate occasions in 2021 and 2022. On the father's case his proficiency in spoken Spanish improved as he spent time in the local community with his family. It is the father's case that he attended all the usual birthday parties when invited by his school friends and was enrolled in a form of 'summer camp' for part of the school summer holidays in 2021. The father has produced evidence that, as he was due to move from nursery school, H was subsequently registered for a place at a local Spanish primary school. The mother disputes that she signed those registration forms. That is not a dispute which this court can resolve.

26. This canvas of H's experience has to be tested against the mother's case that the family was only in Spain because of the pandemic and that, from time to time, travel restrictions were in place which would have prevented the family from returning to London. That position is aligned closely with her case that the move to Spain was only ever intended to be temporary. On her behalf, Mr Wareing has described it in his skeleton argument as "a temporary 'decamping' to Spain". I note from the declaration in relation to international

travel which she signed prior to the move on 1 May 2021 that the purpose of such travel was "moving to Spain" and "work" but I accept that not much turns on that statement since it could be said to support both a temporary and permanent move. In contrast, when the father completed contemporaneously a similar document, he gave as his reasons for travel "moving to Spain for good".

27. She points to the fact that she continued to work remotely from Spain in her consultancy work which was essentially work she had procured in England. Her work required her to return to England from time to time although she acknowledges that the father was reluctant to disturb H's routine in Spain so as to enable him to accompany her on those occasions. To use another, and different, analogy, I accept the mother's evidence to the effect that, when the family left England in 2021, they did not entirely 'pull up the drawbridge'. The father retained property in this jurisdiction albeit that it was let to tenants. Some of the previous aspects of family life in London remained as a matter of record, such as H's continuing registration at his previous doctor and dentist. He had extended family in London. Through his mother, he may have had some ongoing indirect contact with friends he had left behind when the family moved to Spain in May 2021. She continued to maintain a bank account in this jurisdiction and the flow of UK child benefit into that account was uninterrupted.

28. Of H's integration into social life in Spain, the mother's statement paints a picture of a rather isolated little boy who did not go on play dates or to birthday parties as the language barrier prevented him from making friends. This is in direct contra-distinction to the many photographs which I have seen of this happy little boy enjoying time with his peers in a number of different settings. As everyone accepts, these are good and committed parents. I find it difficult to conceive of circumstances where this mother would have countenanced a situation where, for the best part of a year, their child was socially isolated from children in the local community and the evidence which is available suggests he was not. Where there is a dispute between these parents, I look to the availability of independent third-party evidence. I have in the bundle a certificate of attendance produced by the director of the school which H attended. That certificate confirms the child's regular attendance through the 2021/2022 academic year, as the director of the school puts it, "attending regularly from Monday to Friday from September according to the school calendar, leaving in June". As we know, and as the director of the school may not have known, H left in May this year when he travelled to England with his mother. It does not appear to be in dispute that he had previously attended at a nursery from 8 May 2021 and thereafter at summer camp through July 2021. Thus, it seems to me that there is reliable evidence before this court that H was indeed a pupil, and regular attender, at his local nursery/school where he spent the majority of his day before moving on to the after-school club. It is very difficult to conceive of circumstances where he did not acquire a degree of integration into his nursery/school life. He was travelling to and from those establishments every weekday during term times with the support of his parents who no doubt delivered and collected him on a daily basis for these purposes.

29. The mother further takes issue with the father's description of the family as having been "registered as residents in Spain". She maintains in her first statement that such registration did not confirm 'residency' but rather assigned to the family members as foreigners a unique personal number confirming their status and entitlement to remain in Spain for "economic, professional or social reasons". In other words, she describes this process as akin to securing an identity card rather than conferring formal residency status.

30. Whatever the technicalities of that registration, it does not absolve the court from looking at the realities of those twelve months from the child's perspective. The essence of the mother's case as advanced on her behalf by Mr Wareing appears to be that (i) H was habitually resident in this jurisdiction prior to 1 May 2021; (ii) the mother never intended the move to Spain to be permanent; (iii) she left Spain with H, without the father's permission, as she accepts, a year later to return to London; and (iv) both she and H have now resumed their previous life and there has been no wrongful removal. As Mr Wareing puts it in para 31 of his skeleton argument:

> "The reality is that rather than "wrongful removal" for reasons she sets out in her statements; she simply came home with her child to their habitual residence…"

31. It seems to me that this formulation ignores the important policy considerations which have for many years underpinned the 1980 Hague Convention and Brussels IIA whilst the United Kingdom was a member state of that latter Convention. The starting point of the legal analysis is that both these parents had, and were throughout exercising, rights of custody in relation to their child. Neither parent is entitled to act unilaterally in terms of important or significant decisions for a child and that includes decisions in relation to where a child should live. If there is disagreement, this becomes a welfare decision which will ultimately lie with a court for determination. The 1980 Convention provides a means for ensuring that, in cases which involve an international dimension or a movement of a child or children between two different member states, there is a swift mechanism for ensuring that it is the courts in the country of the child's habitual residence which will determine that dispute. As I have said earlier in this judgment, in this context, a removal will be 'wrongful' once it is established that (i) the child concerned was habitually resident in a particular jurisdiction and (ii) his removal from that jurisdiction breached the 'left behind' parent's rights of custody. It is not open to a parent to take unilateral action simply because her relationship with H's father had broken down and she felt herself to be "an emotional hostage" to that relationship.

32. What has helped me most to penetrate the subjective accounts of these parents are the records of the contemporaneous WhatsApp and other exchanges between them. These were written prior to the launch of the current litigation and they appear to me to provide a line of sight into what was actually in the parties' respective contemplations at the time.

33. It is quite clear that, in early August 2021 and at a time when the relationship between these parents appeared strong, each was fully invested in, and excited by, the prospect of moving into a new home in Spain. It is clear that the father was delegated to view various

properties. He obviously kept the mother informed of how the search was progressing. She was clearly enthusiastic about the property into which they eventually moved On 6 August 2021, at a time when the mother appears to have been visiting her own family in Serbia, she wrote this in response to his description of the viewing:-

> "House will give us so much more, and I feel H will be much more comfortable. H will have his space to play and I can do things. When its super hot we have a pool. [When] I am working from home I can work from garden."

34. In another message she spoke of her excitement at having the space to entertain "lots of people". She referred to wanting to "have her life back" and "spending time in a space that I will love". When the father sent her links to two properties he was considering, she described one particular house as "amazing". The parties discussed the respective merits of properties in terms of location, cost and distance to H's school. There is no suggestion in any of those messages that the mother was urging caution in their planning because of an imminent or early return to London. I suspect that, as is so often the case, her unhappiness in relation to their living arrangements in Spain did not emerge until her personal relationship with the father began to break down.

35. Perhaps the most compelling piece of evidence in terms of the mother's position shortly before she returned with H to London was the lengthy message which she sent to the father on 24 April 2022 about three weeks before she left. It does her much credit and it displays a significant amount of insight into the pressures on their relationship at that point of time and her proposals for addressing those issues. She was clearly concerned about the effects upon H of these difficulties. She had clearly not resolved at that point of time to separate permanently from the father. She spoke of her love for him and for their child. She described feelings of being "overwhelmed, scared and tired". She said she wanted all three of them to be "well, happy and thriving". She made a proposal to the father that she should be allowed some time to return to London and Serbia with H. She proposed to spend some holiday time in Serbia. He, in turn, should take some time whilst they were away to think about what he wanted to do about his own employment situation. She suggested a number of options he might consider. She said "Let us please take a break from everything ….. let me be for some time in the country where I have my family and friends with H and to give you time to refocus on yourself and your life." She concluded her message with these words: "I know this is a solution that will benefit us all. And that we will be in much better positions to decide on where we want to live and how".

36. Thus, in the days immediately prior to her removal of the child to England, it is plain to me that the mother was effectively asking for time and space to reconsider her position and find solutions to the existing pressures on family life. There was no suggestion in that communication that she regarded the fracture in their relationship as permanent and/or that she then had a fixed intention to live permanently in England. If such an intention existed in her mind at that time, it was not communicated to this father. She plainly regarded herself as having a home in Spain but it was a home in which she then felt very unhappy.

37. Standing back from this entire canvas of evidence, I have no difficulty in finding that, as at 13 May 2021, this child had acquired a sufficient degree of integration into his home, school and social life in Spain as enables me to find that he had acquired habitual residence in that jurisdiction. Within a brief few weeks of the family's arrival, they had moved into a spacious family home. It was a home about which the mother was clearly enthusiastic. She reflected in her texts to the father all the amenities which it had to offer them as a family. H settled into that home with his two parents. The rhythm of his life over the coming months reflected a perfectly normal routine for a child of this age. He went to nursery and school. He spent time outside school at an after-school club before returning home each evening with his two parents. Whatever the mother now seeks to say about his social isolation over those twelve months, there is ample evidence in the material before the court that he was a happy, engaging child who enjoyed spending time with family and friends taking trips to the beach as both parents intended he should. Their home had been chosen with access to the coast very much in mind. The mother wanted him to grow up in "green spaces" as her messages show and that is the lifestyle which his parents provided for him.

38. In my judgment, his integration in his new surroundings in Spain is likely to have occurred fairly rapidly after the family moved into their new property. They continued to provide his sense of security and stability as they had done previously in London. Over the early summer months, as he became familiar with his new nursery/school environment and spent time with his peers, the "see-saw" moved swiftly, to adopt Lord Wilson's analogy. He lost his old roots in London and acquired fresh roots in Spain. Certainly by May this year, after 12 months in that country, he had acquired a new habitual residence in Spain, and I so find. Given that there is no issue but that his removal by the mother to England on 13 May was in breach of rights of custody which the father was exercising at that time, such removal was 'wrongful' as a matter of law in Convention terms.

39. In these circumstances, this court is under an obligation to order the child's summary return to Spain unless the mother establishes a defence under Article 13(b) of the 1980 Convention.

Article 13(b)

40. Art 13(1)(b) of the 1980 Hague Convention provides that a member state

> "is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that 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."

41. The risk of harm relied on in this case by the mother flows from what she alleges to be the father's excessive use of alcohol and other illegal substances. She seeks to run that defence to a summary return even though she acknowledged in her lengthy text to the father of 24 April 2022 that *"H will always be your son and you can always be with him"*. There was

no suggestion whatsoever in that communication that she regarded this father as posing any risk to their child. Despite her current stance in her representations to this court, she stated in her first written statement that she was not seeking to deny the father access to their son.

42. In terms of my approach to her allegations of inappropriate substance misuse, I can make no determinations at all in this context. These will be matters for the court which is eventually seised of welfare determinations for H. The principles to be applied in the context of a potential Art 13(b) defence are now well known and clearly established: see *Re E (Children)(Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 and *Re S (Abduction: Article 13(b) Defence)* [2012] 2 AC 257. As was made clear in para 36 of Baroness Hale's judgment in the Supreme Court in *Re E*:

> "The exceptions to the obligations to return are by their very nature restricted in their scope. They do not need any extra interpretation or gloss. … Where there are disputed allegations which can neither be tried nor objectively verified, the focus of the inquiry is bound to be on the sufficiency of any protective measures which can be put in place to reduce the risk. The clearer the need for protection, the more effective the measures will have to be."

43. In line with the court's established approach when considering allegations of domestic abuse, I propose to begin by assuming that the allegations are true and thereafter look to the extent to which any risk to the child can be obviated by the protective measures offered.

44. For these purposes I have borne clearly in mind the Guide to Good Practice under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Part IV, Article 13(1)(b) ("the Guide to Good Practice"). That Guide invites the court to consider the types of risk which may be presented to the court:-
    (i) a grave risk that an order for return would expose the child to physical harm;
    (ii) a grave risk that the return would expose the child to psychological harm; and finally,
    (iii) a grave risk that the return would otherwise place the child in an intolerable situation.

    These requirements have been considered recently by Hayden J in *Re GP (Wrongful Removal)* [2017] EWHC 1480 (Fam) and, most recently, by Theis J in *B v N* [2022] EWHC 1429 (Fam).

45. From those two authorities, I collect the following propositions of law:-

(i) The burden of establishing the defence lies on the person who opposes the child's return, here, the mother. The standard of proof is the normal civil standard of the balance or probabilities.

(ii) The risk of harm to the child must be "grave". It is not enough for that risk to be "real". The cases speak of evaluating risk of death or really serious injury as a potential consequence. The risk must be 'real' and reach such a level of seriousness to be properly characterised as 'grave'.

(iii) The assessment of that risk for the purposes of the Art 13(b) defence is focussed upon the circumstances which will confront the child upon his or her return. It should not be confined to an analysis of the circumstances which existed prior to his removal but on the situation for the child when, and if, he is returned to the country of his habitual residence.

(iv) In terms of "intolerability", the situation which presents itself must be such that the child should not be expected to tolerate a situation were it to arise in the particular circumstances of this case.

(v) The court's starting point for these purposes is to consider whether the assertions made are of such a nature, and of sufficient detail and substance, that they can be said to amount in reality to a 'grave risk' to the child. If so, the court then moves on to evaluate the precise nature of the evidence put before the court so as to reach a conclusion as to whether or not, in this particular instance, the risk has been made out in relation to this particular child. It is at that point that the court moves on to consider the efficacy of the protective measures offered by the other party. Access to the courts in that jurisdiction is an important consideration in this context. A Judge has to look critically and "examine in concrete terms" what the situation would look like on the ground for the child concerned and ensure that basic arrangements are catered for, such as what happens when the abducting parent steps off the plane. Where would they go and how would they meet living costs ?

(vi) Policy considerations remain an important consideration in the court's assessment. It is assumed for these purposes that the best interests of a child are met by a return to the country of their habitual residence following a wrongful removal.

46. In this case, Mr Basi submits on behalf of the father that there is no prior evidence in this case of police or social work involvement in the family home either in London or Spain. He points to the fact that H was often left in his father's care for periods of time and, on the mother's own case, she recognised the strength of the bond between father and son and promised prior to her departure that she would not seek to prevent any obstruction of that relationship in the future.

47. Turning to examine the substance of the mother's case as it advanced in her witness statements, she says this:-

> "… our relationship deteriorated due to the respondent's drinking habits and drug usage and also his extremely volatile temper which can be scary to witness. He also became very controlling especially if I needed to come to London for work commitments. Due to this issue and the fact that the respondent worked nights meant he could never care for our child in a way that meant I could leave our son in his care or trust him to stay sober and not use drugs whilst caring for him during my returns for work in the UK."

48. She has further produced a witness statement from a friend, HS, who came to stay with the parties in their home in Spain in October 2021. In circumstances where the parties' relationship was already acknowledged to have broken down, that individual deposes to having observed the mother making a video recording (presumably on her mobile telephone) of a bag of marijuana in the father's possession in a bathrobe in the family bathroom. This evidence is exhibited independently to the mother's second witness statement. HS further deposes to personal knowledge of the father's drug use.

49. She also seeks to rely on a statement made by the paternal grandfather who knows this couple well. He speaks of having travelled to spend Christmas with the parties and H in 2021 at a time when his daughter was raising concerns about the father's substance abuse. He says that he challenged the father directly over this and was told by the father that he was "clean". He states that he observed the father drinking more than usual over this period and smoking marijuana.

50. That appears to be the full extent of the evidence relied on in support of the Art 13(b) defence in this case. It has to be contrasted with the subsequent lengthy text which the mother sent to the father on 24 April this year in which there is no mention of substance abuse or any risk to H. There is expression in that evidence of the mother's apparently genuine concerns for the father's emotional wellbeing and an expression that she wanted him to take care of himself because "you will then be best for your child too". I have already commented upon the insightful commentary in that document which appears to have been written out of a genuine desire to address the difficulties in their relationship.

51. Taking all the evidence at its highest, I am not persuaded that the mother has made out a defence in this case in relation to a grave risk of sufficient magnitude to this child at the hands of his father to bring it within the intended scope of Art 13(b). I do not consider that threshold has been reached. However, even if I had taken a contrary view, I would nevertheless have had to consider the position as it would be on the ground for the child in the event of a summary return. The mother has accepted without reservation that she will return to Spain as H's primary carer if the court orders the child's return to that jurisdiction. In that event, the father has undertaken to move out of what was their family home to enable her and H to return. He offers them exclusive occupation for a period of a month during which he will meet all the financial outgoings. He envisages moving out and living

for a temporary period in one of his family member's properties. In the longer term, he proposes to rent accommodation of his own. In these circumstances, the mother and H would be in a position of returning to a four-bedroom property which is already familiar to them both and where many, if not most, of their personal belongings and effects are still in place. The father is currently in receipt of an income of €1,800 per month. The mother has the ability to work remotely as she has demonstrated throughout several months of the last year. The financial arrangements to be put in place after that initial period will be a matter for the local Family courts. In this context I am satisfied that, with ongoing proceedings already established in that jurisdiction, both parties will have ready access to the court as soon as the mother and child have returned to that jurisdiction.

52. In addition the father has offered a wider raft of undertakings which are designed to afford this mother and H a "soft landing", both in financial and other terms, on their arrival back in Spain. He has agreed that no steps will be taken to remove H from the primary care of his mother. He offers to underwrite the cost of their return travel and thereafter to provide child support at the rate of €150 per month for H pending further consideration by the Spanish courts. I would wish to see these arrangements in relation to both the former family home and child support in place for at least the period it takes to bring this matter back to the court in Spain. If that means that he has to use savings to fund any shortfall, then so be it.

53. Thus the order which I propose to make is that H should be returned to the jurisdiction of Spain on a date to be agreed. I will hear further submissions about what that date should be in due course but she should have time to make appropriate arrangements here before she is required to travel. I will record the father's undertakings by means of a schedule attached to my order and I will direct that he should be required to ensure that both my order and those undertakings are registered in an appropriate way, whether by way of mirror orders or otherwise, with the Court of First Instance in the local court in Spain.

54. The mother will be entitled to representation in those courts. I fully expect her to make an early application within those, or parallel, proceedings for interim relief which may include an application for permission to relocate with H to this jurisdiction. I appreciate that this will be a matter for the judge in that jurisdiction who is charged with making best interest welfare decisions for H from the foot of representations made by each of these parents. Having found that H was habitually resident in Spain as at 13 May this year and that his removal was wrongful because it was in breach of the father's rights of custody, I am bound to order a summary return at this juncture in circumstances where the mother's Art 13(b) defence is not made out.

55. Mr Basi has given this court an assurance that his client's undertakings in relation to a so-called "soft landing" are offered regardless of the court's findings in relation to that defence and I accept them as binding obligations on the father's part.

56. I appreciate that my decision will come as a disappointment to the mother and to her family. I appreciate that her father, H's grandfather, may find it difficult to understand why

the court has taken this course when what he sees is a happy grandson who is thriving and largely reintegrated back into the life he left before these parents took the decision in 2021 to move to Spain. Whatever the current wishes of his daughter, H's mother, in relation to the future, these are decisions which should properly be made by the courts in the place where H was last living before he was wrongfully removed to this jurisdiction. There are important and wider policy considerations behind these matters. Parents who share responsibility for their children are not entitled to act unilaterally and international conventions, such as the 1980 Hague Convention, have operated successfully over many years to ensure that children's lives are not disrupted in this way without local court sanction.

57. That is my decision.