



Neutral Citation Number: [2019] EWHC 435 (Fam)

Case No: FD18P00309

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2019

Before :

THE HONOURABLE MRS JUSTICE ROBERTS

Between :

SR

Applicant

- and -

MA

Respondent

(Temporary Leave to Remove from the Jurisdiction)

Mehvish Chaudhry (instructed by **International Family law Group LLP**) for the

Amy Stout (instructed on a pro bono basis) for the Respondent

Christopher Osborne (Cafcass Legal) for the child's Guardian, Janet Sivills

Hearing dates: 18th, 19th and 25th February 2019

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I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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

in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Roberts :

1. This is an application by a mother, SR, who seeks from the court various orders in respect of her child, M, who was born on 30 March 2009, and will celebrate his 10th birthday in a little over a month's time. The central thrust of her application relates to her request for permission to remove M temporarily from the jurisdiction of England & Wales for the purposes of spending holiday time with her at her home in Brazil.
2. The respondent is M's father, MA. These parents met whilst the father was living and working in Brazil. They were never married to one another although they did share a home together for a brief period whilst they were in a relationship which began mid-2008. At that point in time, the mother was living in her mother's home together with her child from a previous relationship. The mother moved into the father's home when she was about 6 or 7 months pregnant. M was born prematurely with certain respiratory problems which, from time to time, required hospitalisation when he was very young. They separated when M was only a few months old although it is the father's case that their personal relationship had ended before the mother became aware that she was pregnant.
3. The mother is a Brazilian national who is now 32 years old. The father is a British citizen. He is 48. For the last few years, he has lived with M in this jurisdiction. The mother continues to live in the environs of Sao Paulo in Brazil. She has recently married and shares her home with her M's half-sibling, a daughter who is now 16 years old, and her husband's two daughters, who are 16 and 13 years old. M is his father's only child.
4. Initially, the mother was M's primary carer when the parties separated in August 2009. They agreed that the father would see M on alternate weekends. Much to her credit, the mother subsequently decided to improve her situation by studying for a degree at a local university. She intended thereafter to find better accommodation for herself and M. The father was then working part-time as an English teacher and they agreed that he would take over the responsibility of looking after M whilst the mother completed her studies. Thereafter M spent weekends and holidays with his mother and weekdays in the care of his father.
5. The mother completed her studies towards the end of 2014. She approached the father with a view to resuming full-time care of their son. By that stage, he had bonded very closely with their child and was unwilling to change the arrangements which were then in place. The mother agreed, albeit reluctantly, on the basis that they would continue to share a parenting role albeit that M would make his primary home with his father.
6. In 2015 the father secured employment in England. The mother gave her agreement to him taking M to live in England. The parties give very different accounts of the circumstances of this move. The mother maintains that this was never intended to be a permanent move but a six-month period of temporary employment following which M would return to live with his father in Brazil. The father disputes this account and maintains that he secured the mother's consent to M living with him in this jurisdiction and that such permission was not time-limited in the way the mother describes. In June 2015, the parties entered into a formal "Parental Responsibility

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Agreement” which had been drawn up under English law in standard form under s 4(1)(b) of the Children Act 1989.

7. The mother flew to England in 2016 and 2017 and spent time with M. She continued to press for the child’s return to Brazil. In May 2018, having taken legal advice, she issued proceedings pursuant to the 1980 Hague Convention whereby she sought an order for the child’s summary return on the basis of a wrongful retention by the father in this jurisdiction since January 2016. In the evidence which she filed in the context of that application, she produced a transcript of some text messages which the parties had exchanged in November 2016 which she says support her claim that this was a wrongful retention.
8. Her application was strenuously resisted by the father. He denied much of the factual content of the mother’s evidence and maintained that she had acquiesced in the English arrangements for M. Furthermore, he maintained that their son was now settled in this country, attending school and that it would not be in his best interests to move.
9. I do not need to rehearse the progress of that litigation in any further detail save in relation to two aspects of the evidence-gathering process. First, Ms Janet Sivills was appointed as M’s Guardian. She prepared a report for the court. In that report, Ms Sivills stated that M had adjusted positively to life in England. He was settled here and was a confident and happy child who had expressed a wish to see his mother in Brazil for holidays but who said he would be sad if he had to return to live in that country. Secondly, the court gave permission pursuant to Part 25 of the FPR 2010 for the appointment of an expert witness in relation to Brazilian law. Mr Sergio Botinha, a Brazilian lawyer with expertise in international children matters, was appointed and asked to deal with a series of questions which were designed to inform the court of the legal remedies available to the father under Brazilian law if M were to be wrongfully retained by the mother at the conclusion of a period of holiday contact in that jurisdiction.
10. When the matter returned to court on a directions hearing in August last year (2018), and having absorbed the impact of M’s wishes and feelings as reported by the Guardian, the mother made the exquisitely difficult decision to abandon her application for M’s summary return to Brazil. She accepted that M was happy and settled in England with his father and that he should continue to be raised in this jurisdiction in his father’s care. Having had the opportunity to observe her and hear her evidence as she gave it from the witness box, I am entirely persuaded that she took this decision not through any lack of commitment to these proceedings or her clear wish to secure M’s return to Brazil but because she was able to put her own wishes and feelings to one side for the sake of what she perceived to be M’s own best interests. In this context it is difficult to contemplate a greater act of maternal love or devotion to a child and I recognise the full extent of the personal sacrifice which this mother has made at the expense of her own wellbeing and happiness.
11. The withdrawal of her application for M’s return to Brazil brought to a conclusion the court’s jurisdiction under the Hague Convention but the parties were unable to agree in relation to what was to happen in relation to holidays in Brazil. Neither of these parents enjoy the sort of income which would enable them to afford regular air travel between the two countries. Indeed, their financial circumstances are such that neither

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is realistically in a position to make any substantial contribution to the cost of facilitating time for M with his mother in either jurisdiction without resorting to loans and credit cards. The financial disclosure which each has made demonstrates that there is virtually no surplus capacity in either home, the entirety of their incomes being absorbed by their day to day living costs.

12. On 16 August 2018 the mother's English solicitors issued her current application for private law orders under the Children Act 1989. The reach of that application extended to a number of aspects of parental responsibility, including schooling, passports and maintaining M's ability to speak Portuguese (the mother's first language). Many of these aspects are now the subject of agreement between the parties. The main target or focus of the application was the arrangements for M to spend time with his mother during school holidays, whether that time should be spent at her home in Brazil, and, if so, whether he should be permitted to travel with an international airline carrier on an unaccompanied basis.
13. Over the course of two days, I have heard evidence from both the mother and the father. The Guardian, Ms Sivills, has also given evidence having had the benefit of listening to the parties' oral evidence. Through a video-conference link with Brazil, I have also heard evidence from the single joint expert, Mr Botinha. Within the written material in the court bundle, I have read the parties' statements with their various exhibits, including the evidence which was filed in the original Hague Convention proceedings. I have also read the three reports which the Guardian has filed and the report, with the addendum, which Mr Botinha has prepared in relation to local domestic law and procedures in Brazil.
14. In the context of securing M's return to this jurisdiction in the event the court were to authorise travel to Brazil either now or in the future, it appeared to be agreed in principle that mirror orders should be obtained and registered in the appropriate courts in that jurisdiction prior to any travel. Initially, the mother was agreeing to provide one half of the costs which had been estimated at just under £2,000. The father maintained that he was unable to make any contribution to those costs and required the mother to meet that expense herself.
15. Further developments occurred during the course of the hearing as a result of revised positions adopted by each of the parents. As matters currently stand, these can be summarised thus.

The mother's position in relation to travel to Brazil

16. The mother seeks contact with M in Brazil over Christmas this year (2019). In order to meet the father's, and M's own, concerns about travelling for 12 hours on an unaccompanied basis without either of his parents, she offers to divert the funds she would be contributing towards obtaining a mirror order and pay, instead, for a return ticket for the father. He would travel with M on the inbound and outbound flights, staying locally with friends in Brazil for the duration of the holiday. She proposes a repeat of those arrangements in 2020, over either of the school Summer or Christmas holidays. In 2021, when M will be 12 years old, she believes that he will be able to fly by himself. She makes no proposals at that stage for any mirror orders but offers undertakings to the court that she will return M to his father's care in this jurisdiction at the end of any time she has with him in Brazil.

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17. Over the summer holidays, she seeks five weeks in Brazil. If she is to see M over the Christmas holidays this year, she accepts his stay should be limited to a fortnight.

The father's position in relation to travel to Brazil

18. The father is adamant that the court should not authorise any travel to Brazil unless and until there is a mirror order or orders in place whether or not he is to accompany M on the flight. Whilst his primary position was that there should be no foreign travel before M's 13th birthday, his position (as it emerged during the course of his oral evidence) was that he will agree to accompany M to Sao Paolo to see his mother in the summer of 2020 (i.e. next year) on the basis that she meets these costs. The following year (2021), he proposes that she should fly to England and see M in this jurisdiction. In 2022, when M will be 13 years old, he agrees their son will probably be sufficiently mature to undertake an unaccompanied flight to and from Brazil. However, this is all dependent upon mirror orders being secured locally in Brazil. He maintains that he is not in a financial position to make any contribution to the costs of flights or securing the necessary orders in Brazil although he accepts that if he were to travel to Brazil with M, he himself would have no accommodation costs locally since he maintains a circle of friends in the Sao Paolo area and will be able to make his own arrangements in this respect without incurring hotel or other expenses.
19. In terms of when any contact in Brazil takes place and its duration, the father would prefer it to take place over Christmas rather than in the summer holidays. He is only able to take leave from his employment during August and wishes to enjoy some holiday time with M in England. He accepts that any contact over the Christmas period should be for two weeks.
20. His final position encapsulated within Miss Stout's written closing submissions was that M could travel unaccompanied to spend time with his mother in Brazil when he is 13 years old (from the summer of 2022) for four weeks. Prior to that date, he would not object to contact between them in Brazil on the following conditions:-
- (a) The father would travel with M on both the outbound and inbound flights;
 - (b) Mirror orders are in place in both the local and Federal courts;
 - (c) M's passport is retained by the father throughout the time M spends with his mother;
 - (d) The mother provides a pre-signed authority to travel before M leaves this jurisdiction;
 - (e) The costs of flights and securing the mirror orders are met by the mother although he will contribute if he can;
 - (f) The mother must recognise that any trips he is invited to make with M to Brazil will be subject to his securing leave of absence from his employment.

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21. In this respect, it appears that the earliest date on which he is likely to be in a position to travel with M to Brazil is for two weeks in the Summer of next year (2020).
22. As I have said, there are other ancillary matters which are not yet agreed and I shall come to these in due course. For present purposes, I propose to set out briefly the law in relation to an application for permission temporarily to remove a child from the jurisdiction for the purposes of a holiday, or spending time with the other parent, outside the jurisdiction of England & Wales.

The Law

23. The application with which I am dealing must be determined from the perspective of the child's welfare and those matters set out in the welfare checklist in s 1(3) of the Children Act 1989. Counsel have provided a very full analysis of the relevant law in their respective skeleton arguments and, in addition, I have had a bundle of authorities to consider. Whilst I do not rehearse the law at length for the purposes of what is essentially an ex tempore judgment, I would wish them to know that I have read and taken full and proper account of each of the authorities to which my attention has been drawn.
24. Most of the cases cited in the advocates' skeleton arguments concern applications for temporary leave to remove a child to a country which is not a signatory to the 1980 Hague Convention. This is because it is generally accepted that a country's membership of the Convention will, in the normal course of events, provide the 'left behind' parent with a swift and unequivocal means of securing the child's return in the event of a wrongful retention in that foreign jurisdiction.
25. Brazil is a signatory to *the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. However, the thrust of the evidence which I heard from the single joint expert, Mr Botinha, was that as a Member state it has a poor record of timely compliance with its treaty obligations. That evidence is supported by an independent report produced by the Department of State for the United States of America. In its annual report produced in April 2018 on "International Child Abduction", it refers to Brazil within a section headed "*Countries Demonstrating a Pattern of Non-Compliance*". Having recited the fact that the Hague Convention has been in force in Brazil since 2003, it continues thus:

"In 2017, Brazil demonstrated a pattern of non-compliance. Specifically, Brazil's judicial branch regularly fails to implement and comply with the provisions of the Convention. As a result of this failure, 35 per cent of requests for the return of abducted children under the Convention remained unresolved for more than 12 months. On average these cases were unresolved for five years and 11 months. Brazil has been cited as noncompliant since 2006."
26. The key element here, as in so many cases, is the balance of risk to the child in terms of his welfare and wellbeing in the event of a wrongful retention at the end of a period of holiday contact. In this case, as I have already indicated, I have formed the clear view that this mother has no current intention of securing from this court permission to see her son in Brazil with the specific intent of keeping him there at the end of any

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authorised holiday period. I accept her evidence that she intends to ensure his safe return to his father's care in England at the end of any prescribed period of time he is permitted to spend at her home in Brazil. The risk here, which the father feels keenly, is that, once M has arrived and has been welcomed back into life with his mother and his extended family members, she will change her mind or will be persuaded by her family not to return M to England.

27. On behalf of the father, it is submitted that Brazil's status as a full Member of the Convention offers little tangible protection in the event of a wrongful retention by the mother in that jurisdiction. Miss Stout invites me to proceed on the basis that M will be travelling to a non-Convention country which may not recognise and/or implement the principle of summary return in the event of a wrongful retention in circumstances where the retaining parent issues an application based upon fresh material or allegations.
28. In *Re N (Leave to Remove)* [2006] 2 FLR 1124, the Court of Appeal allowed a child to spend time with a parent in Slovakia, a state which was a member of both the 1980 Hague Convention and a BIIA state. In that case, Thorpe LJ stressed the importance of looking at the balancing exercise which the court had to undertake through the eyes of the child. The concerns of the parents had to fall into this exercise in terms of an objective risk assessment but the court must equally weigh in the balance the particular needs of the child with whom it is dealing.
29. In the later case of *Re R (A Child)* [2013] EWCA Civ 1115, Patten LJ said this at para 23 in the context of removal to a non-Convention country:

“The overriding consideration for the court in deciding whether to allow a parent to take a child to a non-Hague Convention country is whether the making of that order would be in the best interests of the child. Where (as in most cases) there is some risk of abduction and an obvious detriment to the child if that risk were to materialise, the court has to be positively satisfied that the advantages to the child of her visiting that country outweigh the risks to her welfare which the visit will entail. This will therefore routinely involve the court in investigating what safeguards can be put in place to minimise the risk of retention and to secure the child's return if that transpires. Those safeguards should be capable of having a real and tangible effect in the jurisdiction in which they are to operate and be capable of being easily accessed by the UK-based parent. Although, in common with Black LJ in *Re M* we do not say that no application in this category can proceed in the absence of expert evidence, we consider that there is a need in most cases for the effectiveness of any suggested safeguard to be established by competent and complete expert evidence which deals specifically and in detail with that issue. If in doubt the Court should err on the side of caution and refuse to make the order. If the judge decides to proceed in the absence of expert evidence, then very clear reasons are required to justify such a course.”
30. Thus there are three related elements which I have to consider in this case. First there is the magnitude or extent of the risk of wrongful retention and breach of the court's order for return on a specific date at the end of any period of holiday time spent with the mother in Brazil. Secondly, I have to assess the consequences for M if that breach

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were to materialise. Thirdly, I have to consider what arrangements can or should be put in place as safeguards and pre-requisite conditions before any permission is given to authorise M to leave this jurisdiction to spend time with his mother in Brazil. In this case, I have had these three factors very much to the forefront of my consideration of what is in this child's best interests.

31. In this case, and from the foot of the expert evidence which is before the court from Mr Botinha, I am asked to consider carefully whether Brazil's membership of the 1980 Convention is a reliable and effective protective measure and one which will ensure that there is a mechanism for a swift and summary return of M to England should the mother's present intentions change once he has spent time with her in her own country surrounded by his wider family members. I accept that Brazil has a fully developed legal system and that, in terms of its family jurisdiction, it has at its heart the principle of a child's best interests. One of the issues which was identified by Mr Botinha during the course of his oral evidence was the internal tension under domestic law whereby the demands of the Convention are competing with a constitutional right enshrined in law which obliges the local and Federal courts in Brazil to consider wider elements of welfare before ordering the return of a child who has been retained in that jurisdiction.
32. Further, a very significant difficulty in this case in relation to protective measures and/or safeguards is that neither of these parents has the means to put up a financial bond which the father might use as a legal "fighting fund" in the event of a retention by the mother in Brazil. They barely have the means between them to fund the cost of a return air ticket for M. Miss Chaudhry, on the mother's behalf, has drafted a series of recitals which she proposes should be incorporated into any order which this court makes. These recitals set out the legal framework which will underpin any permission given to the mother in respect of holidays in Brazil. They record, amongst other things, the father's legal status in this jurisdiction as a parent who has the court's endorsement through a specific order as the parent with whom M is to live. They record the parties' agreement that the courts of England & Wales should have exclusive jurisdiction in all matters relating to the exercise of parental responsibility in relation to M. They record formal undertakings given by the mother to this court that she will not initiate proceedings in Brazil in relation to the future arrangements for M, nor will she seek to retain him in that jurisdiction at the end of any period of holiday contact. There is written confirmation of her acceptance that M lives in England and should continue to reside with his father here on the basis that he is the child's primary carer. She is also willing to confirm as part of any order I might make that she would have no substantive defence under Article 13 whether on the basis of consent, acquiescence, any risk to the child of harm or the existence of an intolerable situation arising in the event of a return to his father and/or any objections M himself might have to such a return.
33. In essence, Miss Chaudhry asks rhetorically: in the circumstances in which this mother finds herself, what else can she do to provide reassurance for the court and the father ?
34. In this context, much depends on my assessment of these individual parents and, in particular, the evaluation of any risk of harm to M in the event that he was not returned to his father's care if permission were to be given for holidays with the mother in Brazil.

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35. As in so many of these cases, the trust between these parents has broken down completely. Notwithstanding that they have attempted to engage in some form of mediation as a result of this court process, the father continues to mistrust the mother's intentions. He plainly adores his son and anticipates with very significant anxiety the prospect of losing him to a long and expensive legal battle in Brazil which he can ill afford to fight. He worries that M's presence in that jurisdiction over an extended period of what could be years in the event of a wrongful retention will eliminate altogether the prospect of any court in Brazil ordering his son's return to England. I believe that he harbours an anxiety that, once back in Brazil – a country which was his home until 2015 – M will be persuaded that life is somehow better or more fun than the life he left behind in England with his father. He anticipates that, if M himself were to express a wish to remain in that country, the mother would find it impossible to abide by any undertakings she were to give to this court to ensure his return without engaging the family courts in Brazil. I was able to watch the father over the course of a fairly lengthy cross-examination. I observed his body language and I could see for myself the agony he feels when he contemplates the prospect of losing such a cherished child who is such a significant part of his day to day existence. He told me candidly that, if he were the mother, he would have no qualms whatsoever about retaining M in Brazil, such is the love he has for their son.
36. In this respect, I believe that his fears are subjectively grounded in his own mind. This is not a father who is resisting the mother's application out of spite or a wish to deprive her of the opportunity to spend meaningful time with M. He readily accepts that the court will make appropriate provision for that to happen in this jurisdiction and has made a number of proposals as to how that time can be facilitated in terms of accommodation arrangements. Whilst he clearly sees himself as M's main and primary carer, he does not say that she should play no further part in M's experience of life as a child of separated parents. Whilst his acknowledgement of her role in their child's life appears to have been grudging at times, I have no doubt that this was a result of what he perceived to be an entirely hostile application which she brought, as he sees it, in the face of a clear agreement they had as parents that M should live with him in England. Each has a very different account of how and why these arrangements were put in place and it will do nothing to assist the future relationship between these parents in terms of their ability to rebuild a measure of trust and consensus over matters which relate to M if I descend into some form of fact-finding process so as to resolve these factual disputes.
37. Ms Sivills has spoken at some length in her report about the father being emotionally distant from M in a number of respects. She told me during the course of her oral evidence that she felt he was less emotionally available to M than his mother. I suspect that this is in large part a result of the impressions she had formed when meeting with, and speaking to, these parents. I shall return to this aspect of their different parenting styles shortly. For present purposes, it is right to acknowledge the very full commitment which this father has made to his son's happiness and wellbeing. I am satisfied that M's life in England with his father involves a number of stimulating activities with his father who supports the friendships which M has made at school. It is a fact that the father does not have a wide circle of family members to whom he can look for support in caring for M. Having lived in Brazil for a number of years, he came to England to look for employment so that he could

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provide M with a better future and a sound education. There is no doubt in my mind that he has done both.

38. This evidence from the Guardian will have been difficult for the father to hear because he went to significant lengths during the course of his own evidence to impress upon me the depth of the attachment which he and M share. I am entirely persuaded that he has done all he can in terms of reorganising his own life to accommodate the needs of their son ever since he took over primary responsibility for caring for him when he was a very young child. He has had to sublimate his career prospects to an extent in order to ensure that he is available to work around M's needs during school terms and in holiday periods. I am entirely persuaded that M is safe and happy in his father's care in England; that he loves his father dearly and that his love is reciprocated; and that a fracture in their relationship at this juncture would have very serious consequences for his future psychological development and wellbeing.
39. Where I believe Miss Sivills' concerns to have some traction in this case is in relation to the father's ability to acknowledge, in turn, the very real importance to this child of maintaining a full relationship with his other parent. The development and maintenance of that relationship has to be seen through the prism of the practical difficulties which geographical distance and the lack of financial resources bring to this situation. As the father himself acknowledged, if he was in a position to travel regularly with M to Brazil for holiday periods and return with M at the conclusion of those visits, we would probably not be in court over – now – three days as we have been.
40. That said, I do not consider that he has taken fully on board the very positive aspects of parenting and the contribution towards M's experience of life as a child which this mother has to offer. Notwithstanding her understandable anxiety when she was giving her evidence last week, I was able to see much of her personal character traits shine through when she was speaking about M. She has an emotional warmth and openness which was not immediately apparent to me in the father. That is no criticism of him: as I have said, he has for understandable reasons adopted an entirely defensive position in this litigation and has what I have found to be subjectively genuine concerns about the risk of a retention in Brazil.
41. Furthermore, I find that this mother has a degree of insight into M's emotional needs and the relationship which he has with his father which is not entirely reciprocated by Mr A. There were various instances during the course of the written and oral evidence where I found myself looking for a more child-centred focus of approach from this father. For example, I accept that it has often been difficult for the mother to engage M's attention during periods of indirect contact through Skype or Facetime. There is, in my judgment, nothing significant about this in terms of his obvious wish to have a relationship with her. He is a young boy who is not yet 10 years old and, in circumstances where the mother has no direct experience of his daily life at home and at school with his friends, she does not have the platform from which to share his day to day experience of life as he lives it. In my judgment the father could have done more to make this type of indirect contact a more meaningful way for M to experience his mother's presence in his life. Simply telling a child that he has to speak to his mother is not sufficient: M has to believe that his father positively supports and encourages that contact. However, it is not a substitute for the benefits which would

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flow from a normal pattern of spending regular time in the company of his mother. I am satisfied that his engagement with his mother would be very different were he to spend time with her in her own home environment where she would be available to him in every sense of that word, both practically, physically and emotionally. I did not have the impression that this father fully appreciated all that she has to offer their son in terms of what she will bring to M's life as his mother. Her involvement in their child's life needs to be both consistent and committed. As he matures and develops, I am satisfied that he would adapt to commuting between their two homes, albeit in different countries; that he would benefit enormously from the very different cultures to which he would be exposed; and that he would come to appreciate and value the different personalities and the love which each of his parents has to offer him. Once M and his mother are able to share time spent together in Brazil and as memories and experiences are shared over the passage of time, the means by which they maintain their relationship during time apart will inevitably become easier.

42. One of the most positive factors in this case is the fact that, notwithstanding the difficulties in the present arrangements, M has clearly retained the strong attachment he has always had towards his mother. I can see for myself from the photographs I have in the bundle and from the accounts I have heard from the mother and Ms Sivills that M is overjoyed to see her whenever they are reunited and has no difficulty in demonstrating his pleasure through both physical and emotional interaction.
43. I need little persuasion in this case that this mother has much to offer M in terms of his psychological development into adolescence and full maturity as an adult. In terms of his heritage, he has both a Brazilian parent and a recent connection with that country which was his home before coming to England in 2015. Already there are signs that he is losing fluency in Portuguese which is the language which he and his mother use to communicate with one another. She speaks some English but is not sufficiently fluent to converse with M in the way in which his father can when they speak English in the home here. There appears to be no communication between these parents as to what, if any, steps the father is taking to encourage M to speak Portuguese whilst he remains here in England.
44. The father told me that this is "a hard issue" for him to deal with since he and M have only ever spoken English together and that M resists engaging in a conversation in Portuguese. This situation may well change in the future if M is to spend more time with his Brazilian family where he will be regularly conversing with both adults and children in his mother's first language. I am told that her husband, R, speaks virtually no English at all. He is regarded highly by the father as an individual who has stepped in to take on responsibility for caring for his own two children in circumstances where their mother could not. He has no criticism to make of R. In this context, I have a separate statement from R which has been translated into English for the purposes of these proceedings. In that statement, R tells me that he would not condone any attempt by the mother to keep M in Brazil at the end of a holiday. He says, "*Just as I understand his need to be with his mother and family, I also understand that he has already established himself in the new country, and also needs and values the company and care of his father*". That statement was prepared in September 2018. I have not had the opportunity to assess the reliability of that statement of intent as it was agreed that I would not hear live evidence from the mother's husband. However, it is there as a statement of intent and comes from a man

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in whom the father appears to repose some confidence albeit that, during the course of his oral evidence, the father told me he suspects that R's love for the mother is sufficiently great to fall in with her were she to decide on a different course of action. Nonetheless, he was prepared to accept that R was a father himself to two children and may well provide a degree of protection against the risk of retention in Brazil. In her written closing submissions Miss Stout submits that R is not a protective factor. She points to the fact that he offered no resistance to her previous application for M's summary return to Brazil. I accept that the court has had no opportunity to assess the underlying credibility of R but I note that his credentials as a parent appear to be well-grounded. At the end of the day, I have no basis for believing that he would do anything positively to encourage the mother to keep M in Brazil but I bear in mind the possibility that he may be unable to change her intentions were she to seek to retain him in that jurisdiction contrary to the assurances which she currently offers to this court.

45. Further, notwithstanding what I have already said about the extent of this father's commitment to M, I have the impression that he and the father live a somewhat insular existence in this country in terms of access to a wide and extended network of friends and family. That is not a criticism of the father but more a statement of fact. In Brazil, M would be able to spend time with his half-sibling, the mother's husband's children who live in the same household and an extended network of relatives, all of whom are anxious to see him and welcome him back into the family fold.
46. Having listened very carefully to the mother's evidence, I am satisfied that she has genuine insight into the benefits which flow for M as a result of his settled life with his father in this jurisdiction. She spoke sincerely about the significant advantage he has in terms of an English education in which she, like the father, sets great store. M is an intelligent and academically gifted pupil who is already performing at the top of his class. Those achievements have been recognised by the mother who appears to receive accounts of his academic progress with much pleasure and pride. She acknowledges all the positive benefits which the father has provided for M in terms of the home in which they now live and the quality of life he enjoys in England. She acknowledges that he has always been a good father to M and has provided not only care and a safe home environment but a great deal of love and affection. She acknowledges that he has "everything he needs to have a good life". She accepted that were M to be deprived of that care by his father, it would be extremely damaging given the love which M has for his father. She told me that there was no reason for there to be any fracture in that relationship and that she would never seek to retain their son in Brazil.
47. I am satisfied that M would undoubtedly be harmed by such a separation from his father and that the mother herself recognises the potential harm which any such actions on her part would cause. As the father told me, he could not afford to retain a lawyer were M to be retained in Brazil. He could only fight for his son's return by selling his possessions and moving out of the flat he rents which is M's primary home in England. He told me,

"Financially, I could not deal with it. Emotionally it would be heart-breaking for M and for me."

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48. On balance, I am quite clear that the mother's application for permission to spend time with M in Brazil is an entirely genuine request on her part which, if granted, will bring many positive benefits for M in terms of his future development as a child from a fractured family. Perhaps the greatest benefit amongst many is the ability he will have to know and love his mother in an environment in which she will be free to be a parent to him without the somewhat artificial constraints which the current arrangements in England inevitably bring. In this jurisdiction, she is obliged to spend her time with M either in a hotel or in accommodation which has been made available to her in the home of the father's aunt. Whilst I recognise the generosity of this provision and the commitment which his aunt has demonstrated to facilitate contact between mother and son, it is an entirely unsatisfactory arrangement for obvious reasons. The mother has to find ways of keeping M entertained on a very limited budget. I am satisfied that M's experience of his mother as a parent is very different from the experience he would have of her were she in her own home with her husband and the other children for whom he and she care.
49. The father has raised some additional concerns about M's physical safety given the high risk of crime from which parts of Sao Paulo suffer. The mother's home is some distance away from the main city in what she describes as a "much safer and tranquil" area which has not been impacted by the recent political instability which she accepts her country has experienced. She points to the fact that she has taken, and continues to take, very good care of her 16 year old daughter and would care for M in the same way.
50. It is obvious from the evidence I have heard from each of these parents and from Ms Sivills that M loves his mother very much. He has had no hesitation in expressing his views about his wish to see her in Brazil although he has some concerns about the travel arrangements if he had to travel without either of his parents. That concern is entirely understandable and may well have been reinforced in part by the anxiety he will undoubtedly have picked up from the conversations he has had with his father about these arrangements.
51. Thus, I conclude that, in terms of his general wellbeing and welfare, he has much to gain from spending holidays in Brazil with his mother.
52. What then of the magnitude of the risk to his welfare were the mother to breach the court's order (and the undertaking she offers) for return to this jurisdiction at the end of any such holiday ?
53. I am satisfied that spending time with his mother in Brazil would not expose M to any unacceptable risk on the basis of any geo-political concerns or as a result of exposure to any criminal activity. To be fair the father himself does not attach much significance to this limb of his case since, were he in a financial position to accompany M for holidays in Brazil, he regards his presence as a sufficiently protective factor to enable contact to take place in that jurisdiction.
54. Notwithstanding the fact that Brazil is a signatory to the 1980 Hague Convention, it is accepted that I should nonetheless proceed with an evaluation of risk to M in the event that he were not to be returned to his father's care in England.

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55. It is in this context and the evidence which I heard from Mr Botinha that the risk to M emerges as a serious factor to be weighed in the balance in terms of the mother's present application. It seems to me that there are two elements to this risk and that each has to be assessed separately. First, there is a need to evaluate the risk that the mother's position may change once she has the opportunity to spend time with M in her home. Secondly, there is an evaluation of the perceived risk that the local and/or Federal Courts in Brazil may not react with sufficient speed to an application for summary return to this jurisdiction and/or that they may proceed to instigate a full welfare assessment in *that* jurisdiction rather than this if substantive defences were to be raised in relation to M's own wishes and feelings or an alleged change of circumstances in terms of the father's ability to care safely for M in this jurisdiction.
56. In terms of the mother's position, I have assessed her as a credible witness and I have found that she was being truthful in her evidence to me that she fully intends to return M to this jurisdiction in the event that he is allowed to spend holidays with her in Brazil. I accept as genuine the sentiments she has expressed about his settled life here with his father and the benefits he derives from the education he is receiving. Where I consider she may struggle is in a situation where M himself were to express a wish to remain with her and the family in Brazil. He has not yet had the positive experience of an extended period in his mother's sole care in a settled family environment in Brazil with all the fun and excitement which I am sure such holidays would present. I can readily anticipate a situation where, as time went on, he might feel conflicted in terms of his loyalties to each of his parents. Any such expression of wishes by him would not necessarily amount to a rejection of the care his father had consistently been providing up to that point. However, it may be interpreted as such by his mother, particularly in circumstances where M was displaying signs of distress at the prospect of leaving her at the end of his holiday.
57. The father told me in evidence that he was confident that if M were to say to his mother that he wanted to return to England to be at home with his friends, he would have the ability to say so regardless of any wishes which his mother might have to keep him in Brazil. However, I suspect that it is the possible scenario I have outlined above which really terrifies this father. In my judgment, he is only too well aware of the qualities which this mother will bring to M's experience of her if he is allowed to spend holidays with her. He confirmed in his evidence to me that she was a very sweet, softly-spoken woman who was entirely family-orientated. He told me that he had never seen her behave aggressively towards anyone. He acknowledged she was responsible and had always held down a job to provide properly for her family. In my judgment she is likely to make M's time in Brazil a fun, loving and child-focused experience for him. I suspect that he knows full well what a positive experience M will enjoy if he travels to Brazil to spend a proper amount of time rebuilding his relationship with his mother. In acknowledging that M should be permitted to travel when he is older at the age of 13, I suspect that the father is in truth seeking to postpone the inevitable resumption of what he foresees will be a very important relationship for M and one which he has not yet experienced in the context of his parents' separation. It is a relationship which is recognised by Ms Sivills as a basic need which M has.
58. I have considered very carefully whether this mother has the emotional capacity to recognise that any such expression of wishes by M in the context of the end of his

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holidays with her should not be permitted to override the stability and continuity of his family life at home in England with his father. It will be hard for her to ignore M's distress, if that is what occurs. She may find it very easy to convince herself that, notwithstanding the promises she gave this court, M's expressed wish to stay was indeed in accordance with his best interests.

59. In this context I have considered the potential effect on M were he to be retained in Brazil for any length of time. I am satisfied that even a short period of retention would not be in his best interests because of the escalation of parental conflict which such a move would produce. Were the retention to involve a longer period of separation because of the domestic processes of the Brazilian courts, the damage would be even greater. I am wholly persuaded that this father would fight for the return of his son and this may well involve the loss of his current employment and/or his inability to sustain the home which is M's settled base in this country.
60. When she gave her oral evidence about the harmful effects for M were he to be retained in Brazil, Ms Sivills declined to adopt Miss Stout's description of those effects as "devastating" for M in the sense that he would retain a sense of being looked after by someone, albeit not his father. She did accept that he would be worried and anxious about his father and probably more so than for himself. Whether or not one adopts descriptions such as "devastating" or "catastrophic" to describe the effect on M in the event of a non-return, I am satisfied that any retention in Brazil would be highly deleterious in terms of his emotional wellbeing. Not only would he be deprived of all the benefits which his settled life in England with his father has brought over the last five years; he would also carry the burden and distress of anxiety about the renewed conflict between his parents and the effects of that on his newly established ability to spend time with them both.
61. What has ultimately persuaded me that the mother is unlikely to take that course is this. I am persuaded that this mother is fully committed to her role as M's mother. She is determined to play a part in future as his parent. She wants to be involved in decision-making for the child she shares with the father. She is sufficiently intelligent to know that, were she to engage the jurisdiction of the Brazilian courts and lose, that would effectively bring to an end any prospect of further contact in Brazil for several years to come. I have reached the conclusion that she values the prospect of spending time with her son in Brazil sufficiently highly that she is unlikely to take steps to jeopardise that prospect. I believe that she has the insight as a parent to be able to explain to M that he has to return to his father's care in order to be able to enjoy time again with the family in Brazil. I believe that, in this scenario, she would have the skills to reassure him that he would soon return and that, in the meantime, they would continue to see and speak to one another by all the modern means of communication available to separated families in this day and age.

The evidence of the single joint expert, Mr Sergio Pereira Diniz Botinha

62. Mr Botinha is a lawyer who has had considerable professional experience of litigation concerning children which has an international element and particularly those involving the practice of the Brazilian courts in discharging its obligations as a signatory Member to the 1980 Hague Convention.

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63. In addition to informing the court about the empirical evidence which is available to demonstrate Brazil's non-compliance with its treaty obligations, Mr Botinha has set out in his written evidence the protective measures and safeguards which might be put in place to ensure M's return to this jurisdiction. He has confirmed that a foreign court order can be registered and enforced in Brazil under the so-called "mirror order" procedure. Under domestic Brazilian law, Mr Botinha has set out the procedure which would be involved in securing a "mirror" order. The procedure takes about four months to complete and it is likely that two registration fees of c. £1,850 each would be incurred in registering an English order in both the Superior Tribunal of Justice located in the capital of Brazil and in the family court for the area in which the mother was living. (Pausing there, Miss Chaudhry's closing submissions made reference to registration in the local family court costing less, a sum of £750. I accept that this was a figure to which Mr Botinha referred during the course of his oral evidence.) In the event of a wrongful retention by the mother, it would be open to the father to engage the Brazilian court's jurisdiction by an application for what he referred to as the "search and seizure of a minor" (*Busca e Apreensão de Menor*). He confirmed that such an application can be made either by the father or through the Central Authority. It appears that the father would have access to representation through a state appointed attorney for these purposes. However, he described compliance with the Convention within that jurisdiction as neither "stable" nor "solid". In support of this contention he gave examples of instances where the courts in Brazil were prepared to examine allegations made against the "left behind parent" much more readily than in other jurisdictions which had accepted Member status. When he was asked to expand upon this aspect of his evidence, he identified both procedural issues and problems flowing from Brazil's interpretation of its Convention obligations. In relation to the former, he explained that it can take months, if not years, for such applications to reach a conclusion in the Brazilian courts with delay an inevitable part of the system. Once an allegation is made, the court is likely to be willing to hold some form of fact-finding enquiry to establish its truth and/or relevance. Unlike the English approach, issues concerning a child's welfare are not necessarily approached on the basis that such disputes are better conducted in the courts of the child's habitual residence. There is enshrined in the Brazilian constitution a principle which elevates the best interests of a child above all other considerations, including obligations under international treaties. As to the latter, he explained that a Brazilian court would be much more open to embracing a general welfare approach in any consideration of an article 13 defence which alleged a "grave risk of harm". In circumstances where a child was found to be settled in Brazil, the principles of preserving that position if it were found to be in his or her best interests would be likely to override any obligations under the Convention to secure the child's summary return.
64. The risk inherent in the need for registration in both the higher Federal and local state courts is that the procedural delay may lead a Brazilian court to conclude that a summary return is not in M's best interests. He accepted that registration locally would provide the father with an additional layer of protection but it would not eliminate the problem of delay. In his personal experience, cases could indeed take up to five years to conclude. At one point he appeared to be suggesting that five years was the average length of time for a case to reach a final conclusion. If the services of the Public Defender's Office are used so as to avoid hefty legal costs, the initial process of registering a mirror order can take almost double the time, i.e. up to 8

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months. It is apparently not possible for this type of application to be made in person. However, access to free representation in the local family court is restricted by means-testing. The current position appears to be that an income of more than £620 per month would preclude any free legal representation at a local level. Mr Botinha told me that if he were asked to represent a client privately in these circumstances, he would be quoting fees of some £5,000 per month to run the case.

65. He was positive about the potential protection afforded by the detailed preamble and recitals which had been drafted by Miss Chaudhry. I have set these out earlier in my judgment. He was able to suggest a different wording to one of the clauses which was, in his opinion, likely to offer better prospects of persuading a Brazilian court to order a swift return in the event of a wrongful retention. His advice was to include within the body of any order permitting contact in Brazil as many layers of protection as possible. In his expert opinion, registration in both the Federal and local courts provided the optimum prospect in terms of securing compliance.

My conclusions

66. I would wish both these parents to know that I have given this matter much consideration and I have reflected over the weekend on everything which I have heard and read. On balance, I am persuaded that the potential benefits to M of spending time with his mother in Brazil outweigh the potential risks of a wrongful retention by her provided that the “layers of protection” referred to by Mr Botinha are in place before M travels. Undoubtedly, it is in M’s best interests to develop a full relationship with his mother in the context of spending time enjoying ordinary day to day experiences of family life in her home in Brazil as well as the more exciting outings which I have no doubt she will wish to plan. In this context I have endeavoured to consider the position from M’s perspective and from all that I know about this child’s clearly expressed wishes to spend holidays with her in Brazil. His love for and attachment to his mother are self-evident from the photographs I have seen and from all that Ms Sivills has told me about that important relationship. I have no doubt that, without the opportunity to spend time together in her home country, M will be deprived of the opportunity to develop psychologically in the full knowledge that he has two parents who love and care for him. The contact arrangements which can be put in place in this country are such that meaningful contact in the terms I have described is very unlikely to happen. In this event, M’s experience of his mother as a parent will be very different and this cannot be in his best interests.
67. In the event of a wrongful retention, the risk of which I consider to be low or, at least, manageable given the protective measures which are available, I have taken on board and carefully considered everything I have heard about the process which would be involved in the local Brazilian courts, including the potential cost and delay of securing M’s return to this jurisdiction. Mr Botinha agrees that the raft of recitals and agreements proposed on behalf of the mother are comprehensive and likely to be influential in determining the court’s approach even if they cannot be said to be determinative of a summary return. However, those safeguards together with my assessment of the mother’s trustworthiness combine to provide me with reassurance that M will be adequately protected against the risk of a wrongful retention. I am satisfied that the raft of recitals and undertakings which will form part of my order will have a real and tangible effect in the event that, contrary to my clear expectation, the mother were to seek to engage the jurisdiction of the Brazilian court to support an

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attempt to keep the child in that jurisdiction. I shall also direct that, in the event of any application by the mother in Brazil, a copy of my judgment is to be lodged with the Central Authority for onward transmission to the judge who deals with the application. In addition, I am going to direct that, in this event, there shall be communication between the two jurisdictions through the Office of International Family Justice which is based here in the Royal Courts of Justice.

68. I am entirely satisfied that mirror orders need to be in place before there is any question of M leaving this jurisdiction to travel to Brazil. Those orders must be registered in both the Federal and local courts. The cost of securing mirror orders will have to be met by the mother given the evidence which I have in relation to the father's financial situation. I am satisfied that he is not in a position to make a material contribution to this cost unless he were to move to significantly cheaper rented accommodation and I do not regard that major upheaval to be in M's best interests at the present time.

The timing of the first holiday period in Brazil

69. Much will depend upon the time it takes the mother to raise the necessary finance in relation to both securing the mirror orders and paying for the flights. She told me she has already approached her family about raising loans and they are supportive to the extent they can be. I accept that her own financial situation is such that it would take her a long time to make savings from her income for these purposes. In due course, it may be that the father is in a position to make a financial contribution. For present purposes, I accept that he is not. The parties had agreed some time ago that the mother would not make a financial contribution towards child support for M in England on the basis that she would be making whatever savings she could to support the costs of spending time with him.
70. Subject to mirror orders being in place and on the basis that the mother is able to secure the necessary funding to cover travel costs in addition, I am prepared to make an order permitting M's temporary removal from the jurisdiction for the purposes of a holiday in Brazil over the summer holidays next year (i.e. 2020). By that stage he will be 11 years old. I accept the Guardian's evidence that, with appropriate encouragement and preparation from both his parents, he will be sufficiently mature to travel on an unaccompanied basis provided that he is looked after during the flight on the basis of one of the schemes operated by the major international carriers who offer "unaccompanied minors" care. I had some evidence of the facilities provided by one of the international carriers to Brazil and these appear to me to be representative of the majority of such schemes which are very familiar to English judges who deal with these types of applications.
71. Thereafter M will spend regular holidays with his mother in Brazil for up to four weeks at a time.
72. I have borne well in mind the father's concerns about M's ability to travel safely and happily on his own without the reassurance of the presence of either of his parents. In an ideal world, I would have liked him to have experienced at least one return journey in the company of one of his parents before embarking on travel by himself. If the mother can find the resources to come to England to collect M next summer, even if he has to return to England alone at the end of his holiday, that would in itself provide

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the father with some reassurance. However, I am not going to make that a condition of spending time together in Brazil next year because I believe the mother will struggle to accommodate the costs of registering the mirror orders and paying for M's air travel. In my judgment the positive benefits to M of spending time in Brazil with his mother outweigh by a significant margin the father's understandable concerns. M presents as an intelligent and inquisitive child whose horizons and ability to learn and experience life are expanding all the time. I agree with Ms Sivills that by next summer he will cope with the journey. In due course, I suspect that the prospect of these flights to Brazil and the adventures they will bring will only add to the rich experience he will have of travelling between his parents' homes together with the love, time and attention he will receive from each of his parents.

73. As to the duration of his holidays in Brazil, these will be limited to four weeks on each occasion. I intend that the father will have at least a fortnight during the summer when he and M can enjoy time together in the school holidays.
74. To the extent that the mother is able to travel to England during the rest of the year, she shall be entitled to spend time with M in this jurisdiction on the basis of the arrangements which are currently in place. I accept that she will not wish to stay in the father's flat even if he is prepared to vacate the property whilst she is here. To the extent that both parents are dependant upon the invitation which has hitherto been extended by the father's aunt, I accept that this arrangement can only continue for so long as Aunt Joy is willing to assist. However, I would be reassured if the father was prepared to give an undertaking to use his best endeavours to do what he could to ensure that the offer of accommodation remained open to the mother in the event that she can find the funds to make a trip to this jurisdiction at some point in the year in addition to her summer contact with M. I am not going to be prescriptive about these arrangements because I recognise the financial impediments in the mother's path. Rather, I propose to leave the parties to agree the precise mechanics of any additional contact in England in addition to holiday contact in Brazil.
75. With those issues resolved, the remaining aspects of the mother's application are by and large agreed. There will of course be indirect contact between M and the mother whilst he is with his father in England. Both parents (but particularly the father) must recognise the importance to M of regular telephone calls, emails and Skype or Facetime sessions. I hope that with the pressure of this litigation lifted and orders in place which are designed to reassure both parents about the regime which is to be put in place for the future, he will see the many benefits for M of regular indirect contact in between his holidays with his mother. As M gets older, he will be psychologically more resilient and better able to accommodate the necessarily prolonged absences of his mother from his day to day life. Especially whilst he is younger, he needs to be encouraged to maintain regular contact with her by these means even when other distractions surface. That is part and parcel of the father's function and obligations as M's primary carer. He has been entrusted by the court with that role and with the pleasure he undoubtedly derives from that role come parallel responsibilities to ensure that M has a consistent and ongoing relationship with his mother.
76. Unless there are specific aspects on which counsel wish to make submissions, I propose to leave them to draw a comprehensive order reflecting my judgment which will include the detailed provisions which have been scrutinised and approved by Mr Botinha.

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Order accordingly