IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2020] EWHC 2479 (Fam)

No. FD20P00080

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 4 June 2020

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985
AND IN THE MATTER OF THE SENIOR COURTS ACT 1981
AND IN THE MATTER OF COUNCIL REGULATION (EC) No. 2201/2003

Before:

MRS JUSTICE LIEVEN

(**In Private)**

B E T W E E N :

AL — Applicant

- and -

SM — Respondent

ANONYMISATION APPLIES

MR J EVANS (of Counsel instructed by Crosse and Crosse LLP) appeared on behalf of the Applicant.

MR H KHAN (of Counsel instructed by Gillian Radford & Co) appeared on behalf of the Respondent.

J U D G M E N T

MRS JUSTICE LIEVEN:

1 This is an application by AL, the father, for the summary return under Brussels II R and the Hague Convention of NG, aged four, to Slovakia. The application is resisted by NG's mother who I will refer to as "the mother". The father was represented before me by Mr Evans of counsel and the mother was represented by Mr Khan of counsel. I am very grateful to both of them for their submissions.

2 The hearing was conducted remotely and both parties agreed that it should go ahead remotely. Both parties were assisted by interpreters. The mother does, however, plainly speak a good deal of English, the father no English, and I am very grateful to both interpreters, but particularly Ms Dendis who worked very hard on the remote hearing to manage the simultaneous translation.

3 Neither of the parents gave oral evidence and no order for oral evidence had been made by the judge at a preliminary hearing, Knowles J, and I agreed no oral evidence was necessary. I did hear oral evidence from Ms Teresa Julian of Cafcass, and I will refer to that below.

4 At the start of the hearing, the mother resisted summary return on the grounds that NG was settled in the United Kingdom, that the father had not exercised rights of custody, that the father had acquiesced in NG's removal and finally, that Article 13B applied, intolerability. At the start of the second day, Mr Khan, on behalf of the mother withdrew the ground of defence that the father had not exercised rights of custody.

5 The factual background is as follows. The parents began a relationship in Slovakia in 2010. The father was at that time married and remained married throughout the relationship. The parties never did marry. NG was born in March 2016 in Slovakia and the father was named on the birth certificate and, as such, has parental responsibility in Slovakia.

6 There is a good deal of evidence before the court as to the background of the relationship and the problems it suffered. Most of that evidence is of no relevance to the matters before me. The mother's case is that the relationship had ended in 2015 when she was pregnant with NG. She says the relationship had been in difficulties for some time, in large part because of the father's financial abuse of her, and that they completely separated in late 2016.

7 The father's case, as originally set out in a statement filed on his behalf by his solicitor, was that the relationship had ended in 2018. However, when he filed his own statement somewhat later, he said that the relationship, as a relationship, ended in mid to late 2016.

8 In any event, by the time of NG's birth, the parties had little contact. That diminished further after the birth. The father says that he visited the mother's flat on occasions and saw NG on a limited number of occasions. The mother says it was only a handful of times that the father saw NG in 2016 and each time was for approximately five minutes. The father says there were more visits and they were for longer. Again, this is not a dispute which is critical to the findings I need to make and, therefore, I simply record both sides' evidence. I bear closely in mind that this is a summary process and it is not for me to make findings of fact, save where strictly necessary.

9 What does appear to be clear from both sides is that in early January 2017 the mother broke all contact with the father. The father says he went to her flat on 4 January 2017 and the mother refused to open the door or perhaps was not there. The father says, and the mother

agrees, that the last time he saw NG at all was in early January 2017. The father says that he did seek to continue to have contact with NG but the mother refused to answer his messages.

10 I have seen a series of WhatsApp messages in January 2017 between the parents. The ones that I have seen which were produced by the mother do suggest that the father had an equivocal attitude to NG and to his parenting of her. However, I do accept what Mr Evans has said to me, which is that I have not seen all the messages, and it is quite difficult to get an overview of the father's attitude to NG. Therefore, yet again, it is not a matter which is critical to my decision, particularly as Mr Khan has withdrawn his argument about the father not exercising rights of custody, and I am not going to rely on the WhatsApp messages to reach any conclusion as to the father's approach to his parenthood of NG.

11 The factual position continues that on 8 September 2017 the mother sold her flat in Slovakia. She, the father and both sets of grandparents live in a town in Slovakia called X, which, I think, has a population of something like eighty thousand people, so a relatively small town. Shortly after the mother had sold her flat, on 27 September 2017, she and NG moved to the United Kingdom. Her sister lives in the United Kingdom and the mother says that she moved, in large part, to get away from the father, from his financial abuse and from (what she describes) as his intimidation of her.

12 The mother says, and I will come back to this later, that it is inevitable that the father would have known that she had sold the flat, not least because the father's wife lives in a flat in the same apartment block. I asked Mr Evans about this and he said on instructions that the father had said he had not lived in that flat. I understand from the mother that in the past the father had lived in the flat. In any event, this is a relatively small community where it does seem quite likely that knowledge of what was happening, at least to some extent, may have been passed around the community. The father's position is that he did not know that the mother and NG had left Slovakia. He says that he had asked about her whereabouts but no one would tell him where she was.

13 This is an important point when it comes to the question of the degree to which the mother concealed where she and NG were and also goes, to some degree, to the question of acquiescence. I note at this point that throughout the relevant period the father had the mother's email address, as he accepts, and that it was an email address which, ultimately, he gave to his solicitors in January 2019 and which the mother responded to. The email address therefore did not change throughout the period. The only evidence that the father tried to contact the mother between January 2017 and January 2019 was one text which the mother refers to on 23 January 2018 when he asked for contact with NG. Apart from that, he does not appear to have made any attempt to directly contact the mother.

14 The father also accepts that he saw the mother on one occasion when she returned from England to X in 2018. The mother's evidence is that she returned on four occasions, I do not think precise dates matter. There was no dispute that on the occasion when the father did see the mother in X, he did not seek to contact her and he did not seek to have any contact with NG.

15 The mother also says that a mutual friend of hers, whom I think is NG's godparent, told her that in December 2017 the father had indicated that he was aware that NG was in the United Kingdom. It is difficult to put very much weight on this evidence given that it is hearsay and the godparent/friend has not put in a statement. I note at this point that in one of the documents from the Slovak social services department, and I will call them that for lack of a detailed title, the father is recorded as saying that the mother went abroad without his knowledge.

16 Trying to pull these pieces of evidence together about the degree of the father's knowledge of the mother's location, I have not heard oral evidence from the parents and it is not possible to draw any absolute conclusions. However, it seems to me likely that the father had a very strong suspicion that the mother and NG had gone to England, particularly given that he knew her sister lived there. There is no doubt that the father did not know the address of the mother and NG. It is possible, although I cannot know, that the father was not certain they were in England.

17 In any event, whilst in England the mother has worked as a cleaner primarily if not exclusively. She and NG have moved house four times in the period they have been living here, initially into what the mother describes as temporary accommodation, which I think was shared accommodation and then into other accommodations. Currently, they live together in a one-bedroom flat with an assured shorthold tenancy, which I understand is for three years. The arrangements are that NG has her own room and the mother sleeps on a mattress on the floor in the sitting room.

18 Ms Julian, the Cafcass officer described the flat because NG had given Ms Julian a video tour of it when Ms Julian was carrying out an interview with her. She described it as a large flat. I suspect that is a relative term, but certainly it is not a particularly small flat. She said that NG's bedroom was very well and appropriately decorated and that they appeared to be well settled in the flat.

19 NG has, since September 2019, attended nursery. I believe she has a place for five days a week but was only attending for two days. I am sure that she has attended much less, if at all, for the last two or three months, given Covid-19, but she was in nursery. I will come back, in a moment, to the Cafcass officer's report.

20 In terms of the father's actions once the mother had left Slovakia, I have referred to the text in January 2018, asking for contact. That text, the mother accepts, she ignored. In January 2019, the father contacted the Slovakian lawyer. I did ask Mr Evans what triggered that contact, and he said that he, even having taken instructions, was not very clear on that issue. It appeared that that was the point where the father felt that he knew (I am not sure why) that the mother was in England.

21 In March 2019, the Slovakian lawyers wrote to the mother, although more precisely they wrote in January, but it reached the mother in March 2019. In August 2019, the father made a Hague Convention application in Slovakia. It was referred to ICACU in September 2019, and the Hague application in England was made on 20 February 2020. There are two relevant points about these dates.

22 An issue was raised by Mr Khan about the father's delay or the delay, whether by the father or otherwise, between effectively January and August 2019. The father says that this was whilst the papers were being put together and there were legal delays. Ultimately, in my view, this period of delay is not, in any sense, critical to the decision I need to make. It may be that there was an element of tardiness on a number of people's part. Much more importantly there is very little explanation, and I will return to this, as to why the father took no action between January 2017, when contact ended, and January 2019, when he approached his Slovakian lawyer.

23 The other relevance of these last dates is that in terms of the question of whether NG is settled in England, the relevant date is 20 February 2020 when the Hague Convention application was issued in England.

CAFCASS OFFICER'S REPORT

24 Ms Julian of Cafcass met NG and the mother over a video link and spoke to the father by telephone. She makes it clear in her report that normally she would meet children face to face and normally she would observe both contact with the mother, the relationship between the mother and the child directly and also try to observe NG at the nursery. Direct contact has, of course, not been possible for the last few months in the light of Covid-19. However, Ms Julian is a highly experienced Cafcass officer, and I put the maximum weight upon her evidence.

25 She said that it had been very clear to her that the mother had been very concerned that the father did not know where she was living. There had been some difficulties, initially, over setting up the interview, because the mother was so concerned about keeping her location secret from the father.

26 Ms Julian says in her report that NG presented as a delightful little girl. She talked happily and confidently over the video link with Ms Julian and, as I have said, she took Ms Julian on a video tour of the flat. NG talked about her nursery and how she had lots of friends, both from the nursery, but also through adults that she and the mother knew in the area. She named various people, and she talked about various activities she had undertaken. I am told that NG speaks English and is not being brought up to speak Slovakian so she could communicate with Ms Julian very well.

27 Ms Julian was concerned and spoke to the mother about telling NG about her heritage and her father. The mother said that NG did not ask about her father but Ms Julian records that the mother became upset when speaking about the father and NG had to comfort her, which I have to note in parenthesis is a sad and rather upsetting situation.

28 Ms Julian also spoke to the father over the phone, and he told her about how he would like to have contact with NG. It is clear from her report that the father wants NG to return to Slovakia so that he can have more contact with her and more contact than if she stayed in England. I will read paragraph 30 of Ms Julian's report:-

> "If NG remained in the UK, the father would like to meet her. 'I would like to meet her, I don't have a problem coming to see her in the UK'. He spoke about the need for progression of contact from a few hours to a day before moving to overnight. He said he could also see NG when her mother visits to see her parents in Slovakia. She was here a few times. I asked how he knows this. The father replied, 'I saw her once, and some people were saying that they saw her at the GP as well'. I commented that I do not think I noted this in his statement, although I'm aware that the mother refers to visiting Slovakia on four occasions in her statement. The father replied that, 'Nobody asked me that. I don't think it's relevant. She was here several times. I saw her once'. I asked why he'd not visited Anna during this visit, he replied, 'Well, she (I took this to be the mother) wasn't talking with me, so it would be pointless'.
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> 31. I asked about the father's older two children's contact with their half-sister. I was told they had not met her. I asked why that was, to which the father replied, 'because they (the half-sister) left'. I wondered why they had not met in the first year, when he says he was with the mother. The father replied, 'I don't know. We were not thinking about it yet'. I

> asked if he planned to introduce them, he replied, 'Yes, of course, but then I haven't seen her'."

29 Ms Julian then went on to consider settlement in some detail, and her conclusion is a clear one; NG is settled in England. She refers at paragraph 35 to the fact that NG and her mother have moved between accommodations, but she records that each move would appear to have been to improve the family's circumstance and that the mother's last move had been specifically in order to assist NG going to nursery. She says in relation to the impact of these moves on NG's settlement in the UK:-

> "In any event, children of NG's age see past the physical environment they find themselves in. To them, home is where they feel safe and cared for. It's the stability and security that comes from the people around them. Of much less importance are the four walls that surround them or how long they've lived in their home. From my, albeit limited observation, I have no reason to believe this is any different for NG. She presented to me as being comfortable in her environment with her mother close by."

30 Ms Julian then refers to NG's relationship with people in the community. She does then say the following in paragraph 39:-

> "But sadly, such ability [this probably ought to be stability] is not all that is necessary for a successful as well as a happy and contented future life. I observe that NG's long-term psychological wellbeing is not only her lack of a relationship with her father and paternal family, but the way that her father is perceived by the mother. My fear is that in the future, this may lead NG to forming her own negative view to her father before she had the opportunity to form her own relationship with him. In all other ways, the mother presents as a caring parent who has sought to provide for her child's needs, and I have little doubt in this regard she continues to feel that she is doing what she thinks is best. Barring that her extremely strong negative feelings regarding the father, whether justified or not is clouding her judgment when it comes to her daughter's knowledge of and/or relationship with the father."

31 In her conclusions, Ms Julian refers again to the need for NG to develop her relationship with her father, but concludes that NG is settled in England, despite her (Ms Julian's) concern about her long-term psychological needs.

SETTLEMENT

32 I will deal with the various arguments raised under each of the different headings, rather than setting out all the law and all the submissions. Starting with the law on settlement, Article 12 relies:

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

33 The two leading cases on settlement under the Hague Convention are *Cannon v Cannon* [2005] 1 FLR 938, and a decision of the House of Lords, *Re M (Abduction: Rights of custody)* [2008] 1 A.C. 1288. In *Cannon*, a decision of the Court of Appeal where the leading judgment is given by Thorpe LJ, there is consideration of the legal approach to settlement. I need to read various passages, because they are central to this case:-

> "50. There must be at least three categories of case in which the passage of more than twelve months between the wrongful removal or retention and the issue of proceedings occurs. First, there are the cases demonstrating, for whatever reason, a delayed reaction, short of acquiescence on the part of the left behind parent. In that category of case the court must weigh whether or not the child is settled and whether, nevertheless, to order return having regard to all the circumstances, including the extent of the plaintiff's delay and his explanation for delay. On the other side of the case there may be no misconduct on the part of the defendant beside the wrongful removal or retention itself.
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> 51. In other cases concealment or other subterfuge on the part of the abductor may have caused or contributed to the period of delay that triggers Article 12(2). In those cases, I would not support a tolling rule that the period gained by concealment should be disregarded and, therefore, subtracted from the total period of delay in order to ascertain whether or not the twelve-month mark has been exceeded. That seems to me to be too crude an approach, which risks to produce results that offend what is still the pursuit of a realistic Hague Convention outcome."

34 I interpose there that Mr Evans told me the position in the United States, or at least some of the states in the United States, is that they take a strict tolling or off setting approach to any time that the child has been concealed. It is clear from this passage that that is not the approach to be taken in England and Wales:-

> "56. This brings me to the second factor, namely the impact of concealment or subterfuge on an assertion of settlement within the new environment. The fugitive from justice is always alert for any sign that the pursuers are closing in and equally in a state of mental and physical readiness to move on before the approaching arrest.
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> 57. This consideration, amongst others, compels me to differ from the opinion of the Full Court in Australia rejecting the previous acknowledgment that there were two constituent elements of settlement, namely a physical element and an emotional element. To consider only the physical element is to ignore the emotional and psychological elements which, in combination, comprise the whole child. A very young child must take its emotional and psychological state in large measure from that of the sole carer. An older child will be consciously or unconsciously enmeshed in the sole carer's web of deceit and subterfuge. It is in those senses that Mr Nicholls' proposition holds good.
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> …
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> 60. I accept that Singer J was entitled to reject a fourteen-year current of domestic authority, since no single case was binding on him in a strict

> sense. But that current was well established, well recognised and generally followed, not only throughout the United Kingdom but throughout the common law world. Furthermore, it was sustainable on the basis that it supported the objectives and policy of the Convention and conferred upon judges a discretion that increased their prospects of achieving supportable outcomes in individual cases.
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> 61. Departure from that current of authority, although open to him, was bold and, in my judgment, unwarranted. I would unhesitatingly uphold the well-recognised construction of the concept of settlement in Article 12(2): it is not enough to regard only the physical characteristics of settlement. Equal regard must be paid to the emotional and psychological elements. In cases of concealment and subterfuge the burden of demonstrating the necessary elements of emotional and psychological settlement is much increased. The judges in the Family Division should not apply a rigid rule of disregard, but they should look critically at any alleged settlement that is built on concealment and deceit especially if the defendant is a fugitive from criminal justice."

35 The principle focus in ***Re M*** was on the issue of whether when a child was found to be settled in England and Wales the court retained a discretion to return the child. The judge in ***Re M***, the first instance judge, had found the child was settled, but held that because there were no exceptional circumstances to justify not returning under the Hague Convention, that he should follow the normal approach under the Hague Convention, or a strong presumption, and return the child.

36 The Supreme Court held that there was a discretion to return, despite the fact the child had been found to be settled, but went on to hold that there did not need to be exceptional circumstances in order not to return the child. I need to read two passages, paragraphs 52 and 54 in the speech of Baroness Hale:-

> "52. Mr Gupta argues powerfully on their behalf that the "child-centric" exceptions of settlement and objection have been analysed more from the parents' perspective than from the children's. The comparative moral blameworthiness of mother and father has had an effect upon the judgments in both of the courts below."

Lady Hale then refers to some of the facts of the case and says:-

> "What were the children to do during all this time? They settled down and got on with making their lives here, where they are happy and have become fully integrated in their local church and schools. They feel fully settled here whatever the court may think."

37 She then goes on to consider further what she describes as the child-centric factors, both of the children now being integrated or settled into life in the United Kingdom, but also the context of what would happen to them if they were returned to Zimbabwe, particularly given political strife in Zimbabwe. She says:-

> "54. Against all this, the policy of the Convention can carry little weight. The delay has been such that its primary objective cannot be fulfilled. These children should not be made to suffer for the sake of general deterrence of the evil of child abduction worldwide. I would

> therefore allow the appeal and dismiss the father's Hague Convention proceedings, without prejudice of course to his right to bring any other proceedings to resolve his dispute with the mother."

38 Both of those decisions were considered in some detail by Black J, as she then was, in the case of ***F v M & Anor*** [2008] 2 FLR 1270. She deals with settlement from paragraphs 63 onwards. I will not read all these paragraphs because they are, to a great degree, analysing the case law that I have already referred to, but I will read parts of paragraph 71.

39 Paragraph 71 has been the subject of some debate in this case, because it is important to make clear that in paragraph 71, Black J is not dealing with discretion, she is dealing with the question of whether or not a child is settled:-

> "71. The fact of the matter is that M's whereabouts with N remained unknown to F for a considerable period of time. She indicated clearly to him within a short time after leaving Poland that she did not want to be found. She certainly did not volunteer where she was, but she was discoverable quite easily when these proceedings were begun."

Further down paragraph 71, Black J refers to ***Re M*** and she says:-

> "The comment of Baroness Hale at paragraph 52 in *Re M* comes to mind, albeit that it was made in the context of a consideration of what is a slightly later stage in proceedings, when the court decides how its discretion should be exercised once settlement has been found. She remarked on the considerable time that elapsed before the father in that case commenced proceedings."

She then referred to the paragraph I have already outlined and continues:-

> "Mr Harrison makes the important point that M's actions have deprived N of her relationship with her father with whom, I accept, she previously had a close relationship and with whom, at times, with M's undoubted consent, she had spent significant periods of time in the six months before coming to England. He submits that in the light of this, it would be wrong to find that N is settled. I have taken this aspect of N's life fully into account, but whilst extremely important, it does not, in my view, prevent her from becoming settled in her new environment. All the other indicators are that she is so settled. That is what I find in this case."

40 Black J then goes on, quite separately, to consider the issue of discretion and whether or not she should exercise a discretion not to return the child, despite the fact she was settled and not to exercise that discretion.

41 Having considered those cases, Mr Khan extracted nine principles. I am going to set out those principles, which I accept, with some tweaking and reordering as I see the principles to be relevant –

1. Under the Convention at Article 12, "The court shall return the child, unless settlement is established". It therefore follows that the burden on establishing settlement is clearly on the abducting parent.

2. Second, in deciding whether the child is now settled, the relevant date is the date of commencement of proceedings in England and Wales. (See ***F & M*** at paragraph 65) Therefore, in this case the relevant date is February 2020.

3. The court should not take an overly technical approach (see paragraph 66 of ***F & M***) and I do say, with respect, that that may be relevant to some of Mr Evans' arguments.

4. Each case is fact-sensitive. What I take that to mean in practice, is that there are no absolute legal rules that lead to one definitive result. What is necessary is to look closely at the facts of a particular case and then apply the relevant law to them.

5. The court should take a broad and purposive approach. (See ***Cannon***, paragraphs 53 and 57). It is relevant at this point to have close regard to both the purposes of the Convention, which are summarised by Baroness Hale at paragraph 11 of ***Re M***, but also what Baroness Hale said at paragraph 54 of ***Re M***. It is generally the case that it is in the best interests of the child for them to be returned to the country from which they were abducted, so that that country and the judicial system of that country can determine where and with whom they should live, and what contact they should have. However, it is important also to bear in mind what Baroness Hale said at paragraph 54, that in a case where there has been a lengthy delay, the purposes of the Convention may no longer be possible to meet in the same way as would be the case in a "hot pursuit" case.

6. The question of whether a child is settled involves consideration of three elements. Physical, emotional and psychological settlement. (See ***Cannon***, paragraph 71). However, it is, in my view, important to have in mind the reality of the situation, which is that those three factors may well inter-relate, particularly between the emotional and psychological factors. It is necessary to take a holistic view of settlement, rather than try to apply three separate legal tests, or three separate issues. Each must be taken into account, but how they are then assessed and what weight is given to evidence between the three factors, must be one for the judge on the facts before him or her.

7. The court must take a child-centred approach. The issue is what is the child's perspective on whether they are settled or not.

8. Related to that, the emotional and psychological state of a principal carer will be highly important as to whether the child is settled, particularly when one is talking about a young child. (See ***F & M*** paragraph 70, and ***Cannon*** paragraph 57). That leads me to expand on the point that it may, for a young child, be very difficult to separate the emotional and psychological elements of settlement, to the degree that they are settled at all.

9. I come to the issue of concealment. In cases of concealment, the burden on the abducting parent is increased. It is important to understand why this is the case and refer back to ***Cannon*** at paragraph 53. As I understand the position, there are really two reasons why the burden has increased on the abducting parent. If the child has been actively concealed, then the court should be slow to give great weight to the delay by the left behind parent in taking any action. Because otherwise the abducting parent gains a benefit by their misconduct. The second factor is that where the abducting parent has created a (I use Black J's words)

> "web of deceit and subterfuge", then it may be more difficult and often will be more difficult to show that a child is emotionally and psychologically settled.

42 In my view, it must be the case that there is a sliding scale of concealment, and also a sliding scale of burden on the abducting parent. The sliding scale of concealment goes from the parent who is on the run, the true fugitive who changes names and hides the child, to the parent at the other end of the spectrum, who simply does not tell the left behind parent that they are leaving. Therefore, as a generality, the greater the level of the concealment, the more difficult for the abducting parent to show that the child is truly settled.

43 Finally in respect of the law on settlement, even if a child is settled in England and Wales, there remains a discretion not to return. This is dealt with in ***Re M***, in particular Baroness Hale at paragraphs 43 and 47. It is important to have regard to the fact that Baroness Hale had started with setting out at paragraphs 11 and 12 the objectives of the Convention.

44 Mr Khan argued that it would be unusual to return a child who is settled. I am not sure the caselaw establishes that there is any presumption, but it must be the case that if the child is settled in England and Wales then normally when exercising discretion, the rights and welfare interests of the child will militate in favour of not returning. Each case necessarily involves looking at its own facts.

45 Turning then to Mr Evans' argument on settlement and as to why he says the child here is not settled in England and Wales. He starts by making the legal point that Baroness Hale in ***Re M*** at paragraph 52 was dealing with discretion and not with the question of settlement itself. As I understand his submission, he is arguing that to the degree to which Black J in ***F & M*** incorporated those considerations of the child centric approach into settlement, she should not have done so.

46 Secondly, he says this is a clear case of concealment. He says the mother was and remains extremely keen that the father does not know where she went and still does not know her location. It is plain from the evidence that the mother is highly fearful of the father, as has been shown throughout this litigation, and that she would go to any lengths for him not to know where she lives. He points to the fact that she did not answer his texts in January 2018. The evidence suggests that she either did not tell her parents where she was, in order to ensure that they could not tell the father, or that she persuaded her parents and, indeed, her grandparents, to lie to the father about the fact that she was living in England and where she was living. He says that the factual evidence is that she was concealing her and NG's location and the fact that they left Slovakia from the father. He points to the fact that she says in her statement that she had cut contact with friends and relatives in Slovakia, precisely so the father would not know where she was.

47 Mr Evans says that to the degree Mr Khan relies on the fact that the father took very limited steps to find the mother or NG, and did not try to email her or do anything very much between January 2017 and January 2019, that does not matter, because it is plain that whatever the father had done, the mother was not going to tell him where she and NG were. In those circumstances, Mr Evans' argues that there is a very high burden on the mother to prove settlement because this is a very clear case of concealment.

48 In terms of settlement, Mr Evans argues that NG is not settled. He says that I should not afford Ms Julian's evidence weight or not follow it because she did not properly weigh up the issues. She did not take into account the higher burden by reason of the concealment,

and he also says that Ms Julian failed to give equal weight to the lack of psychological settlement.

49 Turning then to the substantive issues on settlement, he says that NG has not achieved physical settlement in the UK or is not fully physically settled in the UK. He points to the fact that the mother and NG have moved four times in the time they have been in the UK, and he also points to the fact that the mother is sleeping on a mattress in the accommodation. Both in respect of physical and psychological settlement, he says that Ms Julian failed to place sufficient weight, and that I must place sufficient weight, on the fact that settlement looks to the future and not just the present and that NG's physical settlement in the UK is uncertain because of the uncertainty as to her accommodation.

50 He says that NG is not psychologically settled in England and Wales because of the matters raised by Ms Julian, namely the fact that mother has not told NG about her father, has not allowed any contact with her father and has, effectively, broken NG off from her Slovakian heritage and any relationship with her paternal family. He says that the mother has created an artificial world for NG by excluding the father and that that undermines any concept of psychological settlement because Anna will not have a long-term stable psychological position in England and Wales.

CONCLUSIONS

51 I have no doubt that NG is settled in England and Wales within the terms of the law and the Hague Convention. She came here in September 2017, by the time of the father's application to the court in England she had therefore been here for well over two years out of a lifespan of only something like four years. It is clear to me that she is physically settled in England, happy here and this is what she would perceive to be her home. She has spent the majority of her conscious life here.

52 Although she has moved house on four occasions, there is nothing particularly unusual about her moving house. Although the first accommodation she lived in was temporary, for somebody who has moved from another country, that was a very normal situation. The accommodation she is in now is a three-year assured shorthold tenancy. The fact that the mother is sleeping on a mattress seems to me to be wholly irrelevant. It is important to bear in mind the reality of people's financial situation.

53 It is very clear from Ms Julian's report that NG is happy here, she has a happy relationship with her mother in the flat, she goes to nursery (or she would if it was not for Covid-19). She has friends. She knows people in the local community. In physical terms, this is a little girl who is settled in the UK. The fact that her friends might change is completely normal for a four-year-old and does not take the matter any further forward.

54 In terms of her emotional and psychological settlement, she plainly is happy here, happy in the community, happy with her mother. There is nothing to suggest any emotional or psychological turmoil at the present time. As Thorpe LJ said in *Cannon*, a young child's emotional and psychological settlement is likely to be closely tied to their principal carer, in this case the sole carer, the mother.

55 In terms of psychological settlement, I reject Mr Evans' attempt to draw a bright line between emotional and psychological settlement, particularly for a child of this age. They are intimately connected. In terms of the legal approach, it is important that this area of law does not go even further into becoming a legal obstacle course of which both judges and

Cafcass officers are tripped over by various legal hurdles. The approach that seems to me to be appropriate is to take a holistic one to settlement and to look at all three factors, as *Cannon* tells me to; emotional, physical and psychological, and then consider the evidence in order to reach a holistic conclusion.

56 Ms Julian took into account all three factors and I take into account all three factors. All three factors are important, but they are not some kind of arithmetic exercise by which one has to consider each in its separate silo.

57 To the degree that there are psychological concerns raised by Ms Julian about NG's long-term psychological wellbeing if she does not know anything about her father and has no contact with him, in my view that is having no impact on the issue of NG's settlement in the UK at the moment. It might, in the long-term, have a psychological impact on NG, but I am not at all sure that those are likely to be psychological impacts relevant to the issue of settlement. Like any child, it would be best for her to know both parents and to understand her background and heritage. That is a matter that could be fully considered through a Children Act application, and does not, in any way, in my view, impact on the issue of settlement under the Hague Convention.

58 At the moment, NG's stability and her settlement comes from being with her mother and from being in a happy and content environment where she is living. Equally, the concerns raised by Ms Julian about her heritage have no impact on the degree of her settlement in England. There are millions of people who live in England who are not English or British by heritage and it makes them no less settled when they live here. I think there is an element of unreality in Mr Evans' approach.

59 The suggestion that NG cannot be settled because the mother has created an artificial world for her is, effectively, the same point. She is a four-year-old child who is plainly settled at the moment. There is no reason to believe that she will not continue to be so.

60 Additionally, in my view, this is not a case of concealment, or if it is a case of concealment, it is at the lowest end of the spectrum. It is true that the mother did not tell the father she was leaving Slovakia, but she took by no means great efforts to hide the fact that she had left. She did, after all, go back four times in the following year, or perhaps just over a year.

61 This is far from a case of subterfuge. There is no question of changing her name, she did not even change her email address. She was not, apparently, afraid to go back to X, a small town with (I think) NG and see her parents.

62 It is, in my view, relevant to the question of concealment that the father saw the mother in X on one of these visits. He did not seek to contact her or NG. There is no evidence he actually asked her parents where she was. He did not apply to the Slovakian Court for contact, he did not approach a lawyer.

63 That is not reversing the burden of proof onto the father or reversing the burden of having to take action, it just explains that on the facts, this is not a case of the mother going to great lengths to ensure the father did not know she was in England. What is clear is that the mother has gone to great lengths to ensure that the father does not know where she is, in the sense that he does not know her location in England. That, in my view, is a wholly different situation. It is often the case that a parent does not want the other parent to know their address. That is not in itself a matter of concealment under the Hague Convention, certainly not on the facts of this case.

64 In any event, if there was concealment within the meaning of the Hague Convention, it is at the lowest end of the spectrum. Further and in any event, if it were higher up in the spectrum, in my view, the evidence of settlement here is so clear and unequivocal, that even if the burden was very high on the mother, she would, in my view, pass it.

65 Finally, under the heading of settlement, I turn to the question of discretion. In my view, it is not appropriate to exercise my discretion to return her, despite the fact that –

MR EVANS: My Lady, the mother appears to have left the hearing. I have just seen the heading to say she left.
MRS JUSTICE LIEVEN: Oh, I am sorry.
MR KHAN: Sorry, I am just getting messages through from the mother right now, in fact saying that she cannot hear that much. She has just been disconnected and she cannot hear. So, I will just check if she can reconnect.
MRS JUSTICE LIEVEN: Oh, yes. Sorry, they are very difficult these judgments, because if I do not cover every point of law, I will be quashed in the Court of Appeal. But by covering every point of law, I make it almost incomprehensible for the parties to understand what is going on. In the long run, I think the Court of Appeal is more important than the parties, but in the short run, it is a very unfortunate circumstance.
MR KHAN: I think she has joined again. Can you see her? I cannot see –
MRS JUSTICE LIEVEN: I cannot see her yet.
MR KHAN: You might have to switch on her, she is coming up as SM.
MRS JUSTICE LIEVEN: Yes.
MR KHAN: I wonder whether she has switched on her camera.
MRS JUSTICE LIEVEN: Yes. SM, can you hear me again?
SM: Yes, my Lady, I can hear you, and I can see you.
MRS JUSTICE LIEVEN: Did you hear the last bit of the judgment that I just read, or at what point did you drop?
SM: I didn't hear maybe three last sentences.
MRS JUSTICE LIEVEN: All right. I just got to the point where I found that NG is settled in England and Wales, and I am just coming onto the sub-heading of discretion, all right. I am so sorry, I cannot read my notes and watch the screen, so if you drop out again, could Mr Khan or Mr Evans shout.

DISCRETION

66 In my view, it is not appropriate to exercise my discretion to return NG to Slovakia, even though she is settled in England and Wales. It would, I accept, be an unusual case where a child was settled to then order return. But in any event, here –

1. It is plainly not in NG's interest to return her to Slovakia. Her life is now in England, and it would be deeply unsettling for her and the mother to return.

2. It is in my view important that NG has some knowledge of her father, but what contact she has with her father is a matter that can be properly considered by the English Courts.

3. Her Slovakian heritage can and, doubtless, will become well known to her as time goes on, not least because her aunt and cousins live here, but also because there is no reason to believe once these proceedings end, that she cannot visit Slovakia with her mother and, indeed, perhaps in the future to see her father. That is not a matter for me and I am not going to express a view on it.

67 As I have already said, there are millions of people living in the UK whose heritage is not British and they do not need to be returned to their country of heritage in order to understand that heritage. In my view, there is no basis to exercise a discretion to return.

68 Those are my conclusions on settlement. I turn much more briefly to the issue of acquiescence. The mother accepts that the father never expressly acquiesced to NG being removed from Slovakia, and the mother accepts that the father had parental responsibility, and the argument about not exercising rights of custody has been withdrawn. Therefore, the burden is very clearly on the mother to establish acquiescence.

69 The leading case of acquiescence is *R H* [1997] 1 FLR 872, the speech of Brown-Wilkinson L, and the critical passage is at page 884, where he is dealing with the issue of acquiescence. I only need to read sub-paragraph 4:

> "There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child, and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."

70 What comes out of that passage is that the words or actions of the wronged parent must clearly and unequivocally show acquiescence. The mother's case, as put forward by Mr Khan, is that the father showed acquiescence by his lack of action in seeking contact with NG and his lack of effort in finding out where she and the mother had gone. He argues, and the mother says in her statement, that in reality the father knew that the mother had left Slovakia and gone to England and chose to do nothing about it. She points to the conversation with the godparent which, she says, indicates the father knew that she was in England and the other matters I have referred to already, such as him having her email address and not making any contact.

71 It appears from the case law that acquiescence is a high test, and as I have said, it must be clear and unequivocal. Although it may be possible that acquiescence might be found from sheer inaction, that would be likely to be an extreme case. In my view, on the evidence here, acquiescence is not made out. There is nothing clear and unequivocal from the father that he had acquiesced to the removal.

72 In my view, this is not the case, given that anything that I say about acquiescence will necessarily be obiter, to consider in detail what circumstances a failure to act might amount to acquiescence. I therefore do not find acquiescence on the facts of the case.

73 Finally, Mr Khan relies on Article 13B, intolerability. In my view, intolerability adds nothing here to the case, given that I found that NG is settled, and I found that it is not appropriate to exercise my discretion not to return her.

74 I think the only point that arises on intolerability that is truly different from the points that arise on settlement and discretion, are that the mother's fears about financial abuse. However, the evidence on that is hotly disputed, and if that had been an issue upon which the case turned, I would have had to hear or at least investigate the evidence on financial abuse in much more detail. It did not appear to me to be proportionate to do so given that I have found that NG was settled in England and Wales. I am therefore not going to accept the defence on intolerability but I make it clear that I have not fully examined the evidence on financial abuse.

75 As far as the impact on NG is concerned, the emotional and psychological impact if she had to return or go back to Slovakia, again, it does not appear to me that that goes any further than my findings on discretion under settlement, and I am not going to make separate findings in respect of that matter under the heading of intolerability.

76 For all those reasons, I am not going to make an order for summary return. I order a transcript of this judgment at the cost of public expense.

CERTIFICATE

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This transcript has been approved by the Judge.