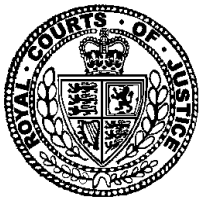

Neutral Citation Number: [2021] EWHC 2184 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before:

Mr Justice Poole

- -

Between:

Re: P and Q (Hague Convention: Consent)

- -
- -

Andrea Watts (instructed by **Shepherd Harris & Co.**) for th**e Applicant Father**
Cliona Papazian (instructed by **Brethertons LLP**) for the **Respondent Mother**

Hearing dates: 20th to 22nd July 2021

- -

JUDGMENT

Mr Justice Poole:

Introduction

1. Even the most caring and able parents may struggle to protect the welfare of their children during a family breakdown. If that breakdown is then complicated by a parent wishing to move abroad, with the result that the children will live in a different country from one of their parents, the struggle can become overwhelming. International relocation almost inevitably comes at a cost and often involves a significant sacrifice for at least one of the parents. In this case two responsible, intelligent, and caring parents have had to confront both the breakdown of their relationship and relocation of the mother abroad. The children travelled with her and the father was left behind. The parents sought to resolve matters between themselves, but ultimately one of them has turned to the court for resolution.

2. This is the father's application for the summary return to the United States of America under the Hague Convention 1980 or under the inherent jurisdiction, of his daughters P, age 12, and Q, age 11. The respondent is their mother and she opposes the application. The father is a 51 year old US citizen who lives and works in the USA for the US Government. The mother is a 39 year old US citizen who also works for the US Government and currently lives in England with the parties' daughters. They came to England on 16 August 2020. The father contends that they were wrongfully removed from the USA because his ostensible consent was acquired by duplicitous means or when he was not fully informed. Alternatively, he argues, the children were wrongfully retained in England on or around 7 October 2020, or at the latest, 5 January 2021. They were at all relevant times habitually resident in the USA. If the Hague Convention does not apply the father seeks an order for return under the inherent jurisdiction. The mother's case is that the children were removed from the USA to England by consent, that there was no wrongful retention, that they were habitually resident in England at the time of any retention, that the defences of child's objections and grave risk of harm or intolerability apply to both children, and that they should not be returned under the inherent jurisdiction, it being in their best interests to remain with her in England until the end of her posting here.

3. At the final hearing I heard oral evidence from Ms Huntington, of the Cafcass High Court Team, the mother, and the father. Ms Huntington had reported on the children's wishes and feelings and whether they objected to return to the USA. Oral evidence from the parents was confined to the issues of consent and whether the mother would return to the USA with the children if return were ordered. A bundle of documents was provided which included witness statements, email and message exchanges, some photographs, and written agreements between the parties.

4. The issues for the court to decide are as follows:

    a. Did the father give his consent to the children being removed from the USA to England on 16 August 2020? Was his consent unequivocal and informed or was it obtained by duplicitous means or misinformation, and therefore vitiated? If the father consented to the removal of the children should I nevertheless exercise my judgement so as to order their return to the USA.

    b. Alternatively, did the mother wrongfully retain the children in England on 7 October 2020, alternatively on 5 January 2021?

    c. In the alternative case that there was wrongful retention, where were the children habitually resident as at the date of any retention? There is no dispute that the children were habitually resident in the USA when they travelled to England on 16 August 2020.

    If the children have been wrongfully removed without the father's consent, or wrongfully retained in a jurisdiction other than that of their habitual residence:

    d. Do the children, or either of them, object to return to the USA and have they attained an age and degree of maturity at which it is appropriate to take account of their views?

e. Is there a grave risk that the children's return would expose either or both of them to physical or psychological harm or otherwise place them in an intolerable situation?

If either of those defences at d) and e) is made out, should the court nevertheless exercise its judgement to order return of the children to the USA?

If the Hague Convention 1980 does not apply:

f. Should the court order return of the children to the USA under the inherent jurisdiction?

The burden of proof is on the mother in relation to issues a), d), and e), and on the father in relation to b), c) and f). The civil standard of proof, on the balance of probabilities, applies.

Although applications under the Hague Convention are intended to be dealt with summarily, this case, as with many other similar cases, involves consideration of a number of issues and the application of legal principles that have often been considered at appellate level. Regrettably, therefore, this is a long judgment.

Background

5. The parties married on 22 November 2008. The children were born in 2008 and 2010 respectively. The parties and the children lived in the USA until the events of 2020. The mother works as an IT manager. The father is a computer scientist. The marriage broke down and the parties separated in November 2019. Prior to then, the mother had applied for a temporary detail in England. The proposed relocation to England was initially due to begin in June 2020 but this was delayed to August 2020 due to the Covid-19 pandemic. It was to be for a period of two years with an optional extension of one further year, but by the time the mother left for England in August 2020, she, the children, and the father knew that her station here would be likely to be for three years.

6. Following their separation, the parties discussed a draft formal Separation Agreement [C164] which included financial provisions but the father disagreed with the children relocating temporarily to England with the mother. The father arranged for a counsellor to see the children in early 2020 because he was concerned that their expressed wish to go with the mother to England was not authentic or was being influenced by the mother. The counsellor reported that the children were fully aware of the implications of a move to England and were content. A family meeting, which included the children, took place on 16 July 2020. The parties discussed the possibility of the father being named as a "dependant" on the mother's "orders". The significance of this would have been that the father would be afforded certain entitlements to which the dependent children would enjoy. He would be well placed to obtain work, housing, travel allowances, and other benefits.

7. Following the family meeting, the mother wrote to the father by email on 17 July 2020 [C181],

> "I am unable to put you on my orders as a dependent. To mitigate this, before you obtain a full-time position, I am open to discussing options to fund your visits to the UK during school breaks, holiday, and other times throughout the year. Also open to exercising the TQ option to allow you to see the area, and potentially their school although we will be stuck in the house, not really able to do any sightseeing. Per your request, I've updated the draft agreement to reflect you receiving 100% of the proceedings of the house … if you agree to allow the girls to reside overseas. We will continue to work options for you to be in the UK while we are there."

8. The father replied later that evening

> "Not really sure what's going on … it appears you don't want me in England on your orders. So why would I send our daughters with you alone …? Explain to me why you don't want me on your orders? Why do you HATE me so much?"

The mother replied the following afternoon [C183]:

> "Let's be civil and stay focused on the facts:
>
> 1. I will be travelling to the UK to fulfil a work assignment that I committed to…
>
> 2. Our children have expressed their desire to be in the UK.
>
> 3. You are the only one that is making it a mandate that in order for the girls to be in the UK it has to be a package deal that includes you.
>
> 4. As a result of #3 I have come to terms with the unfortunate circumstance that you will not allow the girls to accompany me in the UK.
>
> 5. … we need to develop a transition plan for the girls being with you full-time. A custody agreement will be needed to incorporate into the final divorce decree …
>
> Regarding the orders, you are on the orders as a separated spouse, which means you are eligible for a passport and that we live apart (different countries). I cannot change it to you being listed as residing with me if the divorce isn't final and so many other things are unresolved. That jeopardises my career as I can

> get sent home immediately, charged for fraud, and discharged from my employer."

9. On 27 July 2020 the mother messaged the father [C36]

> "If you are insistent on being on my orders, and me supporting you while I'm England, sign the separation agreement, list the house immediately, give me 100% of the proceeds less any taxes of yours. I will initiate the request when I return to the office on Tuesday."

10. The father responded later on 28 July 2020 [C37]

> "I suppose you can put me on your orders as "delayed". I remember G doing that for AN with the idea I will be there permanently in January. Could use my Use/Lose leave between September-December to visit while still looking for my own orders if nothing comes up by December 31st hopefully you can find in your heart to house me and we figure it out all while still filing for divorce and selling the house over the next 5 months. Still split the proceeds and do a lot of praying that I can find my own orders. This is the best I can do.. you have to meet me halfway on this for the girls."

11. The mother replied that she thought this was a viable option. The father said he was glad and asked the mother to "add me to your orders today as mentioned above and please have my Passport processed."

12. The mother replied that "I will see what I can get from my processor today in terms of documentation, other than an email. I do not know how formal it will be…" The text exchange ended at 3.59 (pm) on 28 July 2020, or so it appears on the screen shot. The mother told me that this was her last full day at work. She was anxious to finish as many tasks as possible. Her due departure date for England was 16 August 2020.

13. There was then an email from the mother to the father dated 28 July 2020 at 4.56 pm GMT from the mother [C40]:

"Busy working on tying up loose ends and items we discussed over text.

1. You are already counted as a dependent on my orders. I just got off the phone with the center and they confirmed that there are three (3) dependents – spouse and two children on my orders from an internal component (my bureau) perspective. I will print the screen that reflects this and show you this evening.
2. Since you are not officially relocating at this time, my processer recommended waiting until I get to Station to have the official paperwork updated. You have up to one year to relocate with us.
3. You will need to provide a copy of your latest physical, to get medically cleared before the orders will be further updated. I will provide a new copy of the documents you need to fill out …

4. …. For now you will be able to travel to the UK on your tourist passport since you are only planning to stay for a short while.
5. …
6. I think your approach might be the best option. If the girls decide they do not like the UK and your orders are not finalised, it would be easier for them to come back to the US with you at that time."

14. The mother told me that she produced the printed screen shot referred to in paragraph 1 of her email and showed it to the father. He told me that he saw it and saw his name included on it, but the mother would not give it to him. It has not been produced in the proceedings.

15. The parties then entered into an agreement which they both signed before a notary on 28 July 2020 which reads:

> "[The father] consents to both minors [P and Q] residing and traveling abroad with their mother … for employment and/or leisure purposes. As such, [the mother] will assume primary physical custody on 01 August 2020 of both minor children…" [C196]

16. On 3 August 2020 they signed a Separation and Custody Agreement [C108] by which they agreed to joint legal custody of the children, that the children will live primarily with the mother and that in the event that she should reside outside the US for employment purposes, the father allowed the children to accompany the mother and attend school where the mother was stationed on a full time basis. A schedule of contact was agreed, including for as and when the mother and children were to reside overseas. This agreement was entered into when both parties knew that the mother was imminently to travel to England with the children.

17. On 16 August 2020 the mother and children moved to England. Text exchanges between the parties after the move show that the father set about trying to sell the family home in the USA. The father wrote [C51], "So again things will start ramping up here with this house, trying to find somewhere to stay for the next month… NO clue what the outcome will be with any of this, but your participation concerning temp quarters, forwarding address & whatever else I need to get me there by Nov 20 would be appreciated."

18. The father had already visited England from 20 August 2020 to 7 September 2020. He stayed in accommodation with the rest of the family separated by a lockable door. He then returned to the USA. He managed to find a buyer for the house there and the sale proceeded.

19. On 7 October 2020 the father emailed the mother to say "It's been two months now since you sent me the email below concerning my Medical Records and Orders. What's the latest b/c I'm excited about moving to England next month with the family, plus I have a really good chance to get a new federal government job in England, just need my orders.,, Hopefully you are working really hard at finding out what's the hold up on my orders…"

20. The mother responded on the same day that she was "baffled and concerned". She continued,

> "As previously discussed, given our separation that started on 9/29/2019, I am not able to place you on my orders and as such you cannot leverage any benefits that would normally be afforded a spouse (residing in government housing, using government funds to cover travel expenses, applying for EFM jobs etc.). Furthermore, after HR and Security inquired about all that's been going on with inquiries from the team in London, they indicated that it is not legally possible to add you to my orders as we have had separate residences for over 90 days and have been separated over 12 months, confirmed by my work records which indicate my change of address months ago. I did initially think it would be possible to include you as a caretaker for P and Q but have since been counselled by the aforementioned parties that is not feasible… It would be beneficial for you to secure your own orders to facilitate your relocation to the UK if that's your intention. I am happy to work with HR here to put in a favourable recommendation along with the sense of need and urgency to assist in obtaining the position you referenced in a separate email."

21. There followed a series of email exchanges dealing with practicalities. The father's emails at that time did not express surprise or protest at her email of 7 October 2020. The father went on to finalise the sale of the house on or about 9 October 2020. He continued to try to find work in England.

22. The father then travelled to the UK, as planned, on 19 November 2020. The parties exchanged emails in advance about transport, restaurants and other arrangements. After the father's arrival there are further email exchanges about the father seeing the children, including over Christmas. The exchanges reveal tensions between the parties. The father made plans to leave his job and to move to England, writing on 18 December 2020, "Regardless of what employment path I take, I will be moving into an apartment in the town on February 1st."

23. On or around 5 January 2021 the father flew back to the USA but he returned to England later that month.

24. Whilst in the USA the father wrote to his managers on 11 January 2021,

> "Unfortunately, with my kids school being closed in England because of Covid-19 it looks like I'm going to have to return to England to help with their online learning. My wife has to go into the office 3-4 days a week which makes it tough for her to monitor the girls. Obviously I am not allowed to telework

> permanently or adhoc from there, so I will be resigning effective January 28th 2021."

The father told me that soon afterwards he was told that he could in fact work remotely and did not resign.

25. After he had flown back to England the father texted the mother on 28 January 2021 [C83]

> "We're both living in the town now, so things will change. Not to mention the PM is saying schools maybe close until March. A homeschool plan thought or idea is not about just next week, it's a new normal. It's time to start working with me concerning the well being of the girls not against… Since our separation hasn't been legally recorded in the State we are technically still married until 2022 or 2023 (whichever you choose) so let's try to make the best of this for the girls sake."

26. On 5 February the mother told the father that

> "Also, note that since we are now separated, the Department will not put you on my orders, so as I mentioned before, you can leverage my information to justify our daughters being in the UK and your desire to assist in their care, therefore necessitating your need for the telework agreement."

On 10 February 2021 the mother wrote a formal email to the Department to assist the father in his attempt to be provided with Orders allowing him to stay in England. [C94]

27. The father made his application to the Central Authority in the USA on 5 March 2021 with information provided by him on 22 February 2021. He was then still in England. When the matter came before the High Court for the first time on 30 March 2021 it was as a without notice application for a Location Order. In fact, the father was even then still in England, living in the same town as the mother and children, who were living at their same address. If he did not know they were still there, he could easily have confirmed that they were. The first the mother and children knew of his application for a return order was when police officers entered their house to seize their passports.

The Law

The Convention

28. Article 1 of the Hague Convention states that its objects are:

> (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

> (b) to ensure that rights of custody and access under the law of one Contracting State are effectively respected in other Contracting States.

29. Baroness Hale, in *Re D (A Child: Abduction Rights and Custody)* [2006] UKHL 51, at para.48, said:

> "The whole object of the Convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their 'home', but also so that any dispute about where they should live in the future can be decided in the courts of their home country, according to the laws of their home country and in accordance with the evidence which will mostly be there rather than in the country to which they have been removed."

30. By Article 3 of the Convention the removal or retention of a child is considered to be wrongful if,

> "(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

31. Article 12 of the Hague Convention provides that:

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding para., shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

32. If the children were habitually resident in England and Wales at time of their removal or retention, then the Convention has no further application, and the father's application for return under the Convention would fall to be dismissed. The father does however contend for a return order under the inherent jurisdiction, see *Re KL (A Child)* [2014] 1 FLR 772. If, on the other hand, the children were habitually resident in the USA at the material time then it is necessary to go on to consider whether the case falls within one

of the recognised exceptions under Article 13 which provides so far as is relevant to the present case that:

> "13. Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:
>
> (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."

33. If one or more of the Article 13 exceptions is made out, the court does not have to order return of the child and may exercise its judgement not to do so. This is commonly referred to as the exercise of the court's discretion. When considering the principles under the Hague Convention, it is not the role of this court to determine the longer-term arrangements for these children or to make a detailed welfare assessment. However, welfare considerations will apply to the exercise of the court's discretion if that arises, and to the exercise of the inherent jurisdiction.

Removal and Retention

34. Removal and retention are mutually exclusive concepts. Retention is a specific event. Lord Brandon of Oakbrook in *Re H (Minors) (Abduction: Custody Rights)* [1991] 2 AC 476, at 78 – 79 held that:

> "…. Once it is accepted that retention is not a continuing state of affairs, but an event occurring on a specific occasion, it necessarily follows that removal and retention are mutually exclusive concepts. For the purposes of the Convention, removal occurs when a child, which has previously been in the State of its habitual residence, is taken away across the frontier of that State; whereas retention occurs where a child, which has previously been for a limited period of time outside the State of its habitual residence, is not returned to that State on the expiry of such limited period."

35. In *In the matter of C (Children)* [2018] UKSC 8 Lord Hughes explained the concept of wrongful retention and how it might arise before an agreed return date: [42] to [45]

> 42. …If there is no breach of the rights of custody of the left-behind parent, then it is clear that the Convention cannot bite; such a breach is essential to activating it, via articles 3 and 12. It is clearly true that if the two parents agree that the child is to travel abroad for a period, or for that matter if the court of the home State permits such travel by order, the travelling parent first removes, and then retains the child abroad. It is equally true that both removal and retention are, at that stage, sanctioned and not wrongful. But to say that there is sanctioned retention is to ask, rather than to answer, the question when such retention may become unsanctioned and wrongful.
>
> 43. When the left-behind parent agrees to the child travelling abroad, he is exercising, not abandoning, his rights of custody. Those rights of custody include the right to be party to any arrangement as to which country the child is to live in. It is not accurate to say that he gives up a right to veto the child's movements abroad; he exercises that right by permitting such movement on terms. He has agreed to the travel only on terms that the stay is to be temporary and the child will be returned as agreed. So long as the travelling parent honours the temporary nature of the stay abroad, he is not infringing the left-behind parent's rights of custody. But once he repudiates the agreement, and keeps the child without the intention to return, and denying the temporary nature of the stay, his retention is no longer on the terms agreed. It amounts to a claim to unilateral decision where the child shall live. It repudiates the rights of custody of the left-behind parent and becomes wrongful.

Habitual Residence

36. The Court of Appeal has most recently considered the concept of habitual residence *in M (Children) (Habitual residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105 and I have regard in particular to paras. [42] to [64] of the judgment of Lord Justice Moylan in which the significant authorities on the issue are reviewed, and the following principles are extracted:

    a. Habitual residence is an issue of fact. Lady Hale observed in *A v A* [2014] AC 1 at [54] that it is an issue which "s*hould not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.*"

    b. The correct approach to the issue of habitual residence is the same as adopted by the Court of Justice of the European Union. In *A v A* at [48] Lady Hale quoted from the operative part of the CJEU's judgment in *Proceedings brought by A* [2010] Fam 42 at page 69, para. 2:

> "The concept of habitual residence …. must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration."

c. Integration does not have to be full; it may occur quickly – per Lord Wilson in *In re B (A Child) (Reunite International Child Abduction centre and others intervening)* [2016] Ac 606.

d. Lord Justice Moylan noted at [49] to [53] that another relevant factor when analysing the nature and quality of the residence is its "stability" as can be seen from *In re R (Children) (Reunite International intervening*) [2016] AC 76 where at [16] Lord Reed held that it was,

> "the stability of the residence that is important, not whether it is of a permanent character … there was no requirement that the child should have been resident in the country for a particular period of time" nor was there any requirement "that there should be an intention on the part of one or both parents to reside there permanently or indefinitely.".

Indeed, Lord Reed held at [23] that following the children's move with their mother, in that case to Scotland,

> "that was where they lived albeit for what was intended to be a period of 12 months. Their life there had the necessary quality of stability. For the time being their home was in Scotland. Their social life was there. Their family life was predominantly there. The longer time went on the more deeply integrated they had become into their environment in Scotland…"

e. Lord Justice Moylan referred to Lord Wilson's see-saw analogy from para. [45] of *In re B*, where he said:

> "The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new state, up will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it.".

Moylan LJ warned at [61] and [62]:

> "While Lord Wilson's see-saw analogy can assist the court when deciding the question of habitual residence, it does not replace the core guidance given in A v A and other cases to the approach which should be taken to the determination of the habitual residence.
>
> "Further, the analogy needs to be used with caution because … it can … result in the court's focus being disproportionately on the extent of a child's continuing roots or connections with and/or on an historical analysis of their previous roots or connections rather than focusing, as is required, on the child's current situation (at the relevant date). This is not to say continuing or historical connections are not relevant but they are part of, not the primary focus of, the court's analysis when deciding the critical question which is where is the child habitually resident and not, simply, when was a previous habitual residence lost."

Consent and Acquiescence

37. These are mutually exclusive concepts, the difference between them having been described as "one of timing", *Re A (Minors) (Abduction: Custody Rights)* [1992] Fam 106 at 123. The main principles concerning the defence of consent are set out at para. [48] of the judgment of Ward LJ in *Re P-J (Children) (Abduction: Consent)* [2009] EWCA Civ 588. One of those principles is that consent, or the lack of it, must be viewed in the context of the realities of family life, it is not governed by the law of contract. In *Re H (Abduction: Acquiescence)* [1998] AC 72, [1997] 1FLR 872 the House of Lords laid out principles applying to the issue of whether the left behind parent had subsequently acquiesced in the removal or retention of the child.

38. It might be contended that if the left behind parent consented to the removal of the children from the jurisdiction of their habitual residence, then the children were not wrongfully removed, and so the Convention does not "bite". However, it is established that consent falls to be considered under Art 13a not under Art 3, *P (A Child)* [2004] EWCA Civ 971; under the name *Re P (Abduction Consent)* [2004] 2 FLR 1057, in which Ward LJ said at [33].

> If the giving of consent prior to the removal had the effect that the removal could never be classified as wrongful or in breach of the right of custody, then there would be no need for Article 13 at all. Whereas acquiescence is expressly recognised to be acquiescence subsequent to the removal, consent is not so limited in Article 13 and must, therefore, include permission which is given before the removal. If clear unequivocal and informed consent is given to the removal of a child, then it is difficult to see why the court should not exercise the discretion conferred by Article 13 to permit the child to remain in the country to which it was agreed he or she should go. The policy of the Convention is to protect children internationally from the harmful effects of their wrongful removal or retention. If a child

> is removed in prima facie breach of a right of custody, then it makes better sense to require the removing parent to justify the removal and establish that the removal was with consent rather than require the claimant, asserting the wrongfulness of the removal, to prove that he or she did not consent. Article 3 should govern the whole Convention and Article 13 should take its place as the exception to the general duty to secure the return of the child which is, after all, the basic principle of the Convention.

39. As Ward LJ noted, for consent to be valid it must be unequivocal and informed, and it must have been given prior to the removal. Consent obtained by fraud will not be considered valid, *Re B (A Minor) (Abduction)* [1994] 2 FLR 249.

Grave Risk of Harm

40. The mother raises the defence under Art 13(b). The principles to be applied in relation to grave risk are well established and were set out in In *re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, in particular at [31] to [36]. MacDonald J helpfully summarised the applicable principles in *MB v TB* [2019] EWHC 1019 (Fam) at [31] and [32]. So far as relevant they are:

> "i. There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.
>
> ii. The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.
>
> iii. The risk to the child must be 'grave'. It is not enough for the risk to be 'real'. It must have reached such a level of seriousness that it can be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two.
>
> iv. The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'. 'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'.
>
> v. Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that

> the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child's immediate future because the need for protection may persist.
>
> vi.…
>
> [32] The Supreme Court made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as ground the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest on the evidence available to the court and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm are identified. It follows that if, having considered the risk of harm at its highest on the available evidence, the court considers that it does not meet the imperatives of Art 13(b), the court is not obliged to go on to consider the question of protective measures."

41. *In Re D (Abduction: Rights of Custody)* [2006] UKHL 51, Baroness Hale held as follows at [52]:

> "'Intolerable" is a strong word, but when applied to a child must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate". It is, as article 13(b) makes clear, the return to the requesting state, rather than the enforced removal from the requested state, which must have this effect. Thus, the English courts have sought to avoid placing the child in an intolerable situation by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting State to protect him once he is there. In many cases this will be sufficient. But once again, the fact that this will usually be sufficient to avoid the risk does not mean that it will invariably be so."

Child's Objections

42. In relation to children's objections, I follow the guidance of Black LJ in re *M (Republic of Ireland) (Child's Objections) (Joinder of Children as parties to appeal)* [2015] EWCA Civ 26 at [69] to [71]:

> "69. … the position should now be, in my view, that the gateway stage is confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned and has

> attained an age and degree of maturity at which it is appropriate to take account of his or her views. Sub-tests and technicality of all sorts should be avoided. In particular, the *Re T* approach to the gateway stage should be abandoned.
>
> 70. I see this as being in line with what Baroness Hale said in Re M[1]at §46. She treated as relevant the sort of factors that featured in Re T but, as she described the process, they came into the equation at the discretion stage. It also fits in with Wilson LJ's view in Re W that the gateway stage represents a fairly low threshold.
>
> In relation to the discretion stage Black LJ said this:
>
> 71. …. The court has to have regard to other welfare considerations, in so far as it is possible to take a view about them on the limited evidence that will be available as part of the summary proceedings. And importantly, it must give weight to the Hague Convention considerations. It must at all times be borne in mind that the Hague Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned and returned promptly. To reiterate what Baroness Hale said at §42 of Re M, "[t]he message must go out to potential abductors that there are no safe havens among contracting states".

43. In *Re F (Child's Objections)* [2015] EWCA Civ 1022, the Court of Appeal confirmed that no gloss should be applied to the word 'objects' in the Convention:

> "35. In her definition of an objection, (counsel) had, in my view, introduced an unwarranted gloss on the simple words of Article 13. It is not necessary to establish that the child has "a wholesale objection" to returning to the country of habitual residence and "cannot think of anything positive to say about that other country". The exception is established if the judge concludes, simply, that the child objects to returning to the country of habitual residence…. Whether a child objects is a question of fact, and the word "objects" is sufficient on its own to convey to a judge hearing a Hague Convention case what has to be established; further definition may be more likely to mislead or to generate debate than to assist."

Discretion

44. *Re M* (above), Baroness Hale gave guidance on the exercise of the discretion which applies however the discretion arises under the Convention at [43]:

[1] In re M and another (Children) (Abduction: Rights of Custody) [2007] UKHL 55

> "… in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare."

Inherent Jurisdiction

45. In Re NY (A Child) [2019] UKSC 49 Lord Wilson considered eight questions the court should consider on an application to exercise the inherent jurisdiction in relation to a child who cannot be returned under Article 3 of the 1980 Convention – see paragraphs [55] to [64]. In short, is the evidence sufficient to make a summary order; are the findings sufficient to justify a summary order; should an enquiry be made in order sufficiently to identify what the children's welfare requires for the purposes of a summary order; should an inquiry be made into any allegations of domestic abuse; if there is no identification of arrangements for the children on return would it be appropriate to conclude that their welfare required them to return there; is any oral evidence required; should Cafcass be required to provide a report; and does the court need to consider the comparative abilities of the courts in the relevant jurisdictions to resolve issues between the parents.

Ms Huntington

46. Ms Huntington of Cafcass saw the children in person on 11 June 2021. She spoke very briefly to the mother on the same date. She has not spoken to the father. The two girls are clearly mature, intelligent, articulate, and considerate. They are a credit to both their parents. The conflict that has arisen between the parents since the marriage breakdown, and particularly in relation to the events giving rise to the applications now before the court, have not gone unnoticed by the children. P had understood from her father and conversations she had overheard that the father believes he was tricked by the mother's lies into agreeing to her brining the children to England. Both children sought to be diplomatic, so as not to offend their father, when speaking to Ms Huntington. Unfortunately, after Ms Huntington's report was disclosed to the parties the father chose to message his daughters to tell them he felt disrespected and hurt by what they had said and written. He denied that this was a reference to what the report, but in any event his messaging only goes to show that his daughters had some insight into their father's conduct towards them.

47. The children had participated in plans to move to England, being actively involved in decisions about schools, housing and so forth. They were happy to come to England, although they enjoyed life in the USA. They both want to stay until the end of the mother's stationing here in 2023. They do not want to return to the USA. They each

spoke of the possibility of staying with a female relative rather than the father if they were ordered to return. They enjoy life here, except for the food, but they also look forward to returning to the USA in due course. Ms Huntington stressed the importance to each of the girls of feeling that their voice has been heard. It would be upsetting to them to feel that they were being forced to leave England and return to the USA against their wishes.

48. Ms Huntington advised in her report, "I consider that the children's expressed wishes and feelings amount to an objection. Whilst it is clear that they feel positively about their home and lives in the USA and so is not an objection to the place itself, I consider that P and Q clearly object to the circumstances under which a return would take place and have been clear about the level of upset they would experience were this to be the decision of the court." They do not wish to be separated from their mother. They were both aware that their mother would not return to the USA with them. Ms Huntington agreed that both children were mature beyond their ages. P's school considered her to be "very mature" and Q's school reported her to be "fairly mature". She was more reserved in personality and a little less able to articulate the rationale for her objections. Nevertheless, Ms Huntington's evidence about the maturity of both children was quite clear.: "it is my view that P and Q have reached ages and levels of maturity where their views should be taken into account."

The Mother

49. The mother was a highly articulate and intelligent witness. She answered questions directly and fully. She was not at all evasive or argumentative. I found her to be a wholly impressive witness. She explained the bureaucratic process of obtaining "orders" with as much clarity as is possible in relation to a system that few people, including those who operate it, probably fully understand. As an employee of the US Government being stationed abroad, she is entitled to consideration for a package of benefits, including support for shipping, travel, her children's education, and, if appropriate, her spouse or partner as a dependant. She would have to provide information to her employer and it would determine what orders were appropriate. The substance of the orders is not in her gift. At the time that she applied for the posting to England she was living with the father and he and the children were noted to be dependants. Later, and before her departure, the parties separated and the mother informed her employer of her change of address and that she no longer lived with the father. She was advised that the father was not a dependant for the purposes of her orders. As is often the way with bureaucracies, the mother would sometimes receive different advice depending on to whom she spoke when making enquiries about her orders. On 7 July 2020 she was sent a copy of her orders on which the father did not appear as a dependant [C210]. On 28 July 2020 she made further enquiries and was told that the father was still noted to be a dependant. She showed the father a printed screenshot of that information. I do not have the screenshot but I have the email from the mother in which she refers to it [C40] and the father accepted that he was shown the printout of it and that it had his name on it.

50. Despite these inconsistencies in information provided to her, the mother says that she was always consistent with the father that she could not mislead her employer and

claim for benefits, through her orders, to which she was not entitled. Thus, she had always maintained that he would not be living with her and the children together on relocating to England. Further, the agreed position was that if the children did leave for England with the children, the father would not be travelling over to England with them at that time. The mother told the court that what she did promise the father was that she would use her best endeavours to help him obtain his own orders, and a passport (which she and the children had acquired, the father assisting with the applications on behalf of the children). She would be content to describe the father as a carer for her children in the hope that he could be included on her orders in that capacity, and in order to encourage his employer to grant him permission to work remotely from England. However, it was not in her gift to grant him that permission or to guarantee what would be included on her orders by her employer.

51. The mother accepted that in July 2020, when the father was refusing to consent to the children leaving the USA, she effectively called his bluff. Hence, her messages to him about making arrangements for the children to remain with him in the USA. She said that she knew in her heart that he would not prevent the children from leaving with her. She did not say this with malice, but rather that she trusted him to do what was right for the children, who had clearly expressed a wish to live for a period of time in England, and that she suspected that he did not really want to have to look after the children 100% of the time on his own in the USA.

52. The mother said that the father did relent and an agreement was reached in late July 2020 that the mother would leave for England with the children but if the children did not like England and wished to return, they would do so with the father. As for her orders, she maintained that she had told the father she could not say to her employer that he was to live with her and the children because that was not true. As such, as she advised the father, he could not be regarded as a dependant, albeit he had appeared on her draft orders as such. However, she would support him to find a way to be able to stay in England during her stationing here.

The Father

53. The father was an affable witness. He too struck me as an intelligent and thoughtful man, but there were aspects of his evidence that were difficult to reconcile with other evidence, and there were other key parts of his evidence that lacked clarity and consistency.

    a. He sent messages to the children shortly after he had received Ms Huntington's report which accuse them of crushing him and disrespecting him with everything they had said and written. He suggested to the Court that this was a reference to what they had said over the previous few months, and to letters written 18 months beforehand. That is difficult to believe. He said that he was referring to being crushed by the process (including this application) but that is not he wrote at the time when he told the children that what they had said and written were what had crushed him. His answers to questioning about that messaging were not credible.

b. In the information the father gave in his application to the Central Authority in the USA, the father wrote on 22 February 2021 [E12], "On July 16 2020 I agreed to sending the girls but under one condition, that I'd be allowed to be on [the mothers'] Orders as well." In his first statement dated 22 March 2021, only one month later, the father states at paragraphs 19 to 20 that there was a family meeting on 16 July 2020. "I told the Respondent from the outset that the children and I would only travel to England on the condition that if the girls did not like it in England or if I was not named as a dependent on the Order, the girls and I would return to the United States of America by January 2021 at the latest." [C5]. These are not consistent statements:

    i. The father introduces a new condition in his statement that was not mentioned in his application.
    ii. The stated condition about the mother's orders changes from a condition that had to be met for him the agree to *sending* the girls, to a condition that had to be met by January 2021 otherwise they should be returned. In oral evidence the father said that the latter was the true position.

    Further, the evidence clearly shows that no agreement was reached on 16 July 2020, or at least it was no longer an agreement by 17 July 2020. For some time after 16 July 2020 the father was refusing to agree to the children going to England. Hence his application and statement were misleading in that regard.

c. In his statement to the court dated 23 March 2021 the father said, "The Respondent confirmed that she would add me to her Order" as if this was in her gift. It was not a matter for her as he, also a government employee, surely knew. Moreover, as was very apparent when the mother gave her oral evidence, she is not someone who would lie to her employer. She is committed to her work and would not jeopardise her position in that way. Thus, I am satisfied, the father knew that mother could not simply "add" him to her orders, and his evidence that she agreed to do so is not credible.

d. The father told the court in his written and oral evidence that the mother's email of 7 October 2020 sent him "reeling". This was because the mother told him in that email that "I am not able to place you on my orders and as such you cannot leverage any benefits that would normally be afforded a spouse." His evidence that this shocking news was a devastating blow to him is not credible. Not only was that something she had said to him previously (indeed she begins that paragraph of her email "As previously discussed"), but the subsequent emails from the father show no signs whatsoever of his being shocked or of his reeling from this news. He went on to sell the house, travel to England on 19 November and stay from nearly two months, to seek work, and to make arrangements with the mother about seeing the children. At no point in the days or weeks after 7 October 2020 does he accuse the mother in writing of tricking him, falsehood, or duplicity. Yet the father's case is that the email of 7 October 2020 was crucially important because it revealed that the mother had tricked him, had been dishonest, and was duplicitous.

e. I am also troubled by the father's without notice application to this court for a Location Order in March 2021. Whatever findings I make in this case, it is quite clear that the mother had kept up communication with the father, she had not withheld contact with the children from the father, she had not hidden away. The father knew where the children's home was and if he was concerned that they might have moved without telling him where, he could have checked by visiting (he too lived in the town) or by a simple telephone call or email. The mother has confirmed, and I accept, that in fact she and the children were still living in the same house. Furthermore, the father knew that the mother was highly unlikely to abscond with the children on being given notice of his return order application. She was a US government employee stationed in England having made very open arrangements to do so, placing the children in school here. The father had been involved in all those arrangements. The mother was not in hiding, she was not on the run, and she was not avoiding communication with the father. Instead of giving the mother notice, the father sought and obtained, without notice, a Tipstaff Location Order from the court that resulted in the mother and children being visited by police officers to seize their passports. I am satisfied that the father was not wholly frank with the court when he sought and obtained a without notice Location Order.

54. When considering all the evidence in this case I remind myself that emails and written messaging have to be considered in the context of a marriage breakdown, heightened feelings, changing information, and many oral conversations that are not recorded. It would be wrong to approach the communications between the parties as if analysing the terms of a commercial contract. This is a family case. I have regard to the whole of the evidence and the circumstances of the time. Some statements are made in the heat of the moment, when in a rush or when tempers are raised, others are more considered. Not all emails or messages should be given equal weight. Nor should the court approach the statements and agreements as though this were a contract law case.

Submissions

55. I received helpful submissions from Ms Watts for the father and Ms Papazian for the mother. The mother does not contend that the written Travel Consent and Separation Agreement documents, signed before a Notary, represent the entire agreement between the parties. She accepts that it was also agreed that if the children wished to return to the USA after a trial period in England then they ought to return. For the sake of economy, not out of disrespect for the quality of the submissions, I shall not repeat them in my judgment. It is evidence from my discussion of the issues in the case, to which I now turn, what the parties' respective positions are.

Discussion and Conclusions

56. Having read the documentary evidence and heard the oral evidence in this case I reach the following conclusions on the issues for determination.

Consent

57. There is no dispute that when the children travelled from the USA to England with their mother on 16 August 2020 they were habitually resident in the USA. Accepting that the removal on that date was prima facie in breach of the father's custody rights, did he give his prior, unequivocal, and informed consent to the removal? The burden of so proving is on the mother.

58. The mother points to a formal "Travel Consent Form", signed by the parties before a Notary on 28 July 2020 [C196]. I set out the terms of the consent earlier in this judgment. The terms of the father's consent on the face of the document are unequivocal and unconditional.

59. The parties also entered into a Separation Agreement on 3 August 2020, again signed in the presence of a Notary [C108]. Amongst the terms of the agreement is the following at paragraph 4:

> "The Parties agree that the children will primarily reside with [the mother]. In the event that [the mother] resides outside of the continental United States for employment purposes, [the father] agrees to allow minor children [named] to accompany [the mother] and attend school where [the mother] is stationed on a full time basis."

Again, the agreement is not qualified. Read in conjunction with the travel consent agreement, it records the father's unequivocal agreement to the children going to live with the mother in England when she left for employment purposes later that month. He accepted to the court that he knew this would be for a period of three years from August 2020.

60. However, the father contends that the written documents do not record the full agreement reached between the parties. In her written skeleton argument on behalf of the father, Ms Watts says that "The father signed the travel consent form on 28 July 2020 in good faith based on the mother's confirmation that he was on her Order as a dependent and his understanding that they would all be moving to England." However, in oral evidence the father confirmed that this was not a condition of his agreeing to the children leaving for England. Rather, it was a condition that he be included as a dependant on the mother's orders by early January 2021. As such, I do not accept that the father was tricked into signing the unequivocal travel consent document or the separation agreement by the mother falsely representing that he was and would remain as a dependant on her orders.

61. By the time of the family meeting the mother had received a copy of her orders showing that the father was not a named dependant (7 July 2020 – C210]. The mother had made it clear in communications with the father that he could not be included as a dependant on her orders and that she could not ask for him to be included on her orders as someone with whom she and the children would be living. She would, on

the other hand, be happy to say that he was a carer for the children in the hope that that would support his own applications for a passport and his own orders.

62. The email on which the father relies in support of his case that the mother misrepresented to him that he was named as a dependant on her orders is dated 28 July 2020 [C40]. The mother wrote that she had received information that the father was named on her orders as a dependant and she sent the father a screen shot. The father does not deny that he saw that screenshot. The mother was merely passing on the information she had received that day. He confirms that he saw his name on it. Of course, it contradicted the previous copy of her orders that she had been sent three weeks earlier on 7 July 2020 in which he was not named. It contradicted several other emails from the mother to the father in which she made it clear that he could not be named as a dependant living with the family in England, because he would not be living with them. It would have been foolish for the father, who is clearly no fool, to rely on this single communication as proof that he was on the mother's orders. In any event he now makes clear that it was not a condition of his consent that he was on the orders, only that he would be by early January 2021.

63. The father does not assert that there was any agreement that he would live with the family, indeed he had signed a Separation Agreement that the children would live with their mother, including when she was stationed abroad. The mother also wrote in her email of 28 July 2020 that the father was not relocating at "this time", had up to a year to relocate, and that the recommendation was that the other should wait until she was at the station in England before having the paperwork updated. If everything was settled, then there would be nothing to update.

64. Considering the evidence as a whole it seems to me to be clear that,

    a. The father had been named as a dependant initially because when the mother had applied to be stationed in England the parties were still together.
    b. The mother informed the father repeatedly prior to him signing the Travel Consent and the Separation Agreement documents that she had informed her employer of the change in her status – they were now separated – and as such he could not be included as a dependant on her orders.
    c. The only exception was her email on 28 July 2020 when she referred to him already having been named as a dependant but in the same email she told him that there would be updating once she had arrived in England.
    d. The father knew that even if he was still named as a dependant due to bureaucratic delay, that would not continue: the orders either had been updated so that he was not named as a dependant (as appeared from the version of 7 July 2020) or would be updated once the mother was in England.
    e. It was not within the mother's gift to guarantee that the father would be, or would remain on, her orders as a dependant. That was a matter for her employer. The father knew this as a federal government employee himself.
    f. The father knew that the mother would tell the truth to her employer about the family arrangements. The truth was that the father was not a dependant on the mother and they would not be living together.
    g. The father signed the Travel Consent and Separation Agreement documents knowing that they were solemn agreements which he was willing to be bound

by. They clearly record his unconditional agreement to the children living with the mother when abroad, with agreed contact with him.

h. I accept the mother's evidence that there was no agreed pre-condition to the children travelling to England that the father was named as a dependant on the mother's Order. Indeed, the father conceded as much during his oral evidence.
i. I further accept the mother's evidence that it was not an agreed condition, nor did the father seek unilaterally to impose a condition of his consent to the children remaining in England, that his name should be entered as a dependant on the mother's orders either by 5 January 2021 or at all.
j. It was agreed between the parties that if the children wished to return to the USA, they should not then be retained in England but should return.
k. The mother did agree, I find, to use her best endeavours to help the father to be able to come to and work in England. The parties did speculate as to whether it would be possible for the father to be included on the mother's orders in some capacity, for example as a care-giver to the children so as to give him leverage with his own employer to optimise his own orders.

65. As it happens the mother did help the father secure a passport. She did write to his employer in honest but supportive terms in February 2021. The mother accommodated the father in a room attached to the family home on his first visit to England. She co-operated with arrangements for him to spend time with the children on subsequent, lengthy visits to England. I am satisfied that she did what she could to help the father to be able to come to and work in England. However, I also accept her evidence that it proved not to be possible to include the father on her orders in any capacity.

66. The children were content to remain in England. The father accepts that. Indeed, the evidence of Ms Huntington demonstrates that they *strongly* wish to remain here. However, the wishes of the children to stay in England were a condition for their *remaining* here – as a matter of logic they could not have been a pre-condition for their travelling here in August 2020.

67. In short, I am satisfied that the mother did not mislead the father. She was honest with him and her employer throughout. He was kept fully informed by her of what she knew prior to him signing the Travel Consent and Separation Agreement, but he knew that his long term position was uncertain. He signed those documents knowing that he could not guarantee being allowed to come to live and work in England in the same manner as the mother had such permission. He hoped that he might be included on the mother's orders in some capacity and that that might help him with his own orders, but he knew that was only a possibility. As he told me, he decided to trust in God. He did not impose any condition on the children leaving from England in August 2020. His agreement to the children leaving for England was not given due to misunderstanding, misrepresentation, fraud, or mistake. He unequivocally gave his informed consent to their leaving the USA on 16 August 2020 to live in England as set out in the formal written Travel Consent and Separation Agreement documents.

68. The children were habitually resident in the USA at the time of their removal to England on 16 August 2020. However, the defence of consent having been established the Court must exercise its judgement whether, nevertheless, to order

return. In doing so I take into account the objects of the Convention, the circumstances giving rise to the need to consider the exercise of judgement or discretion, as well as the welfare of the children. The objects of the Convention would not be supported by ordering return when there has been unequivocal consent by the father for the children to move to England. The children cannot, in any meaningful sense, be said to have been abducted. There is no "hot pursuit" urgently to return the children to the jurisdiction where their future should be determined. As regards the welfare of the children, I take into account all the evidence including the report of Ms Huntington. The children strongly wish to remain in England. Were their wishes overridden they would feel that their voices had not been listened to and that would undermine and distress them.

69. The mother's evidence was very clear – she would not return to the USA if the court ordered the children to return. She has made the children aware of that. I do not criticise her for doing so. It is her approach to parenting to be honest with her children when they ask questions of her. They have asked her about this issue, and she has responded honestly. The mother told the court that she regarded it as important for herself but also as a mother to these two obviously intelligent and caring daughters, to demonstrate the importance of keeping promises and commitments – here her commitment to her employer – and to stand firm when someone else – here the father – is trying to push her to do something that she believes is wrong both for her and for others she loves. I accept therefore that the children would be returning to the USA without their mother, and they know that. They even told Ms Huntington that they may prefer to live with someone other than their father upon return to the USA. No doubt that sentiment has been aroused by the children's sense that their father has continued to pursue this application knowing that it is against the wishes and feelings of his daughters. They will struggle to understand why he has done that, and they will struggle to cope with the court ordering their return against their wishes. They are mature children who are emotionally intelligent.

70. Weighing all the evidence I would unhesitatingly decline to exercise my judgement to order the return of the children upon the defence of consent being made out.

Wrongful Retention

71. Did the mother wrongfully retain the children in England on 7 October 2020 or on 5 January 2021? The burden of so proving is on the father. 7 October 2020 was the date of the mother's email to him when she said that he could not be included as a dependant on her orders. 5 January 2021was the date on which the father returned, without the children, to the USA, albeit that he flew back to England later the same month. The father's case, as already discussed, is that it was a condition of his agreement to the children remaining in England that he would be named as a dependant on the mother's orders by early January 2021. The email of 7 October, it is submitted, manifested an intention by the mother not to be bound by that agreement. It was a unilateral attempt to pre-empt the father's custody rights. Alternatively, the condition for return was met by 5 January 2021 but the children were not returned with the father to the USA.

72. The father's case in this regard is problematic. I have already found that the only condition on the children remaining in England was that they wished to remain, and that that condition was met. The father does not dispute that it was met. I have rejected his contention that it was agreed by the parties that if his name was not on the mother's orders as a dependant by early January the children were to return with him to the USA. No such condition was imposed by the father or agreed by the mother. I can find no contemporaneous evidence referring to early January as a key time, to the requirement that the father be named as a dependant on the mother's orders by then, nor of the father reacting to the date having passed as a key moment or stage. Rather, I find, the father gave his unconditional consent to the children travelling to England and, for so long as they wanted to remain in England, remaining here until the end of the mother's stationing here in 2023.

73. In any event, the father's conduct after the children came to England in August 2020 is wholly at odds with his case that the mother had agreed that they should return to the USA should his name not be on her orders as a dependant by early January 2021. Contrary to his evidence that he was sent reeling by the mother's email on 7 October 2020 in which she said that it was not possible to include him on her orders, all the contemporaneous evidence is that their relationship and plans continued as before. I can find no messages from the father condemning the mother for her trickery or dishonesty. There are no messages where he expresses shock at the news she had given him. I accept that the written communications do not constitute the whole of their interactions, but there is no hint of the father believing he had been hoodwinked by the mother. The father carried on as before. He continued to sell the family home in the USA, he continued to try to obtain clearance to live and work in England, he continued to agree arrangements to see the children when he visited in November 2020 through to early January 2021. He even wrote to the mother in late January 2021 [C86] saying that both parties now lived in the town, that schools were closed and may be for some time and urging the mother to work together with him to make arrangements in England, in the best interests of their children.

74. I have no doubt that the father began to regret having agreed to the children living with the mother in England during her stationing here until 2023. The father did write an irate email on 18 December 2020 as part of a tense exchange of emails about future arrangements. However, I can find no contemporaneous evidence that he regarded the mother as having manifested an intention to breach any agreement between them. I find no evidence that he accused the mother of foul play. I find no contemporaneous evidence that the father regarded 5 January 2021 as a key date or that it marked a breach of the parents' agreement that the children did not return to the USA on that date.

75. I am not persuaded that the mother pre-empted the father's custody rights or unilaterally decided that the children should remain in England beyond an agreed return date, by her email on 7 October 2020 or otherwise. I am quite satisfied that she remained willing and able to return the children to the USA if they wished to return. Her email of 7 October 2020 did not say anything new, it merely reiterated the position she had previously taken. At the time he received the email, the father did not treat it as a unilateral change in the agreement by the mother.

76. Messages exchanged after the father's return to England later in January 2021 show that he was still looking forward, even then, to being in England whilst his daughters remained living here. There is no contemporaneous evidence from the period before he made his application to the Central Authority in the USA that the father regarded 5 January 2021 as a date beyond which the children were being wrongly retained in England.

77. I find that the father did not impose, and the mother did not agree to a condition that the children should be returned to the USA by 5 January 2021 if the father was not named as a dependant on the mother's orders by that date. There was no expectation on the part of either parent that the children would return to the USA in January 2021. The father's later application for return was a sudden and very marked change in the understanding between the parties and the agreements they had reached.

78. Although acquiescence was not raised as a defence prior to the hearing, Ms Papazian touched on it in her closing submissions. Such was the father's conduct after 7 October 2021 and 5 January 2021 that, had it been relevant, I would have had to consider carefully whether he had acquiesced. Given that the issue was not raised in advance of the hearing, and evidence was not directed towards it, I shall not draw any conclusions about whether the father acquiesced in the retention of the children after the dates when he says they were wrongfully retained.

79. Accordingly, I find that there was no wrongful retention of the children in England on 7 October 2020, or on 5 January 2021 or thereafter.

Habitual Residence

80. The children were habitually resident in the USA when they travelled to England in August 2020. Were they still habitually resident in the USA on 7 October 2020 or in early January 2021? The children had been involved in the planning for the move to England, including the selection of schools. The planning had taken many months. It was a new stage in their lives that they had looked forward to and prepared for. By January 2021 they had had a term in school in England. They were living with their mother in England. I do not have very much information about their social lives. There is some evidence that they had begun to make friends. The impression I had from the mother's evidence was that they formed a tight-knit family. They are very close to their mother. They had decided that they wished to remain in England. Although they knew that they would return to the USA eventually, they fully expected to remain here until 2023. Their father was present here for about half of the time they had been here by early January 2021. They saw a lot of him. They did not want to return to the USA.

81. Such was the degree of preparedness of the children for the move to England in August 2020, including counselling sessions, discussions about schools and accommodation, a family meeting, letters written by the children to the father giving reasons why he should allow them to live in England, that from their perspective, they were liable to become habitually resident here soon after their arrival provided that they liked it here and wished to stay. From their perspective there were no conditions attached other than that if they did not like it, they could return. In fact, they did like it

(other than the food). They liked their schools, they like living in England with their mother, they enjoyed time with their father whilst here too.

82. I am satisfied that in the circumstances of this case, in particular given the children's level of involvement in the preparation for the move to England, they were habitually resident in England by the end of 2020 and therefore by 5 January 2021. They had been in England for four and a half months. They were settled into school and home life. They spoke the language because it was their own. They had a sufficient degree of integration in their family and social environment here and, importantly, a level of stability in their lives here to be regarded as habitually resident here by the material time.

83. I am less convinced that they were habitually resident in England as early as 7 October 2020. That would still have been, from their perspective, part of the trial period. They might change their minds about living in England. By the end of the year, it was clear that they were settled here. By 7 October 2020, only about seven weeks after their arrival, I do not believe that they had sufficient stability here, given the option of them saying they wanted to go back to the USA if they did not settle in England, to find that they were habitually resident in England.

84. Having found that the father consented to the children being removed from the USA in August 2020, and that the children were not wrongfully retained in England thereafter, the father's application under the Hague Convention 1980 fails. Accordingly, I shall deal only briefly with the other issues under the Convention which would fall to be considered if my findings thus far are in error.

Children's Objections

85. Having regard to the helpful evidence of Ms Huntington it is clear that the children do not wish to return to the USA, their feelings about that are strong, and they are at an age and degree of maturity that the court should take into account their views. I have considered whether their wishes and views amount, in respect of each child, to an objection, and if so whether it is an objection to return to the jurisdiction of the USA or objection to no longer living with their mother.

86. The evidence is that the children do not object to returning to the USA at the end of the mother's stationing in England in 2023. They have happy memories of living in the USA. They are going to visit the USA this summer for a number of weeks. Once the mother's work in England is over they would be content to return. If they returned now, however, they would return without their mother. It would not be for a holiday but would be a permanent return. I am quite satisfied that the children's views about returning now, or at any time prior to the end of the mother's stationing in England, amount to objections. They are not merely expressions of preferences. They wrote letters to their father during the planning for the stay in England in which they set out the reasons why they wished to live in England whilst their mother worked here. They were involved in the family meeting to discuss the arrangements. They helped identify and choose suitable schools. They consider that the move to England was a planned event, for a certain period. They have adjusted to life in England in the expectation that they would stay here until 2023. They object to that plan being disrupted, to their lives being de-stabilised, to their voices being ignored. Ms

Huntington's evidence persuades me that the objections expressed were authentic, consistent, reasoned and balanced.

87. Not all objections are relevant to the defence under Art 13 of the Convention. The objection must be to being returned to the country of the child's habitual residence (assuming that I am wrong and that the country of habitual residence is the USA) not to living with a particular parent. However, there may be cases where the two factors are so inevitably linked that they cannot be separated – Re R (Child Abduction: Acquiescence) [1995] 1 FLR 716 at 730, and Re M (Children) (Abduction: Child's Objection) [2015] EWCA Civ 26 at [42]. Here, the children have expressed a tentative preference to living with female relatives rather than the father should they be returned to the USA. However, I am satisfied that they object to return to the USA itself. The timing of the proposed return is highly relevant to their objections. It is a matter of principle that their considered, thoroughly discussed, decisions to move with their mother to England for the duration of her stationing here should be respected. This is true for both children. Ms Huntington recognised that the children objected to return to the USA and I agree.

88. Hence the so-called gateway stage of the children's objections is met. The discretion stage involves a balance of considerations of welfare and upholding the purposes of the Convention as discussed earlier in this judgment. The exercise of discretion would only arise if the children had been wrongfully removed without consent, or wrongfully retained, and the USA was their country of habitual residence at the material time. Nevertheless, even on those assumptions, this would not have been a case of a clandestine abduction, hiding the children away from the left behind parent. This would not be a so-called hot pursuit. To overrule the children's objections would, I am sure, undermine their confidence in their parents and in figures of authority. Their welfare will be best promoted by their remaining in England until their mother completes her work here. I would not exercise my judgment so as to order their return.

Grave Risk of Harm

89. Whilst I believe that the children's welfare is best served by their remaining in England, I do not accept that the evidence establishes that there would be a grave risk that return to the USA now would cause them physical or psychological harm, or otherwise place them in an intolerable situation. I accept that the evidence is that the mother would not return with them, and so I do not lightly dismiss the Art 13b defence of grave risk of harm or intolerability. Ms Papazian contends that the father's recent message to the children about them crushing and disrespecting him [F15] suggests that life with him in the USA would be intolerable. However, although his messaging is regrettable, and I hope that he will make amends for it with his children, it has to be put into perspective. The children would probably live with their father upon return. He is, I am satisfied, perfectly capable of looking after them. The mother trusts the father to look after the children properly. She knows that he loves the children. The children would be well cared for and well educated in the USA. The children's emotional wellbeing is better protected and promoted by remaining with their mother, but that is not to say that there would be a grave risk of psychological harm caused by return to the USA. The mother has no safeguarding concerns and the

fact is that however committed she is to her employment here in England, I am sure that she would give it up and return with her daughters to the USA if she thought there was a grave risk that they would suffer harm on be placed in an intolerable situation. She knows that there is no such risk and that is one of the reasons why she would choose to remain in England.

90. It is not sufficient for the mother to show that the children would be upset to be returned, nor even that their welfare would be best served or promoted by their remaining in England. The question is one of risk to the child in the event of their return. I do not accept that the mother has proved the degree of risk (in relation to the extent of chance or the severity of outcome) necessary to establish this defence. The children would still have plenty of contact with the mother. There would be no grave risk of harm or intolerability upon return. Had I considered that there was a possibility of this defence being established then consideration of protective measures would have been required to determine whether, nevertheless, the risk could be adequately mitigated. As it is I need not consider the question of protective measures because I do not believe that return to the father's care in the USA until 2023 would give rise to a risk of harm or intolerability to be mitigated.

Inherent Jurisdiction

91. If the 1980 Hague Convention does not apply because the children were habitually resident in England at the material time of an otherwise wrongful retention, the father maintains that the court should exercise its inherent jurisdiction to order return. I have considered the matters to which the court is enjoined to have regard – *Re NY* (above). On return the children would be likely to live with their father and to attend public schools. They have extended family in the USA with whom they would spend time. The mother would visit them in the USA and the father would, I am sure, bring them to England to see the mother. Such travel would be subject to any restrictions on travel due to the Covid-19 pandemic. Applications could be made in the USA for child arrangement orders (subject to the courts there accepting jurisdiction). However, the parents are capable of resolving issues about children arrangements between themselves. I do not regard it as necessary for the resolution of the application under the inherent jurisdiction to require further inquiry by Cafcass, or the parties, or to hear further oral evidence. There are no allegations of domestic abuse in this case.

92. I am wholly unpersuaded that the court should exercise its inherent jurisdiction to order the return of the children to the USA. I have considered the welfare checklist under s 1(3) of the Children Act 1989 as a useful guide to my consideration of this particular application. The wishes and feelings of the children are clear – they wish to remain in England and object to returning to the USA. The change would be destabilising to them and would cause them distress. I do not think that they would be at grave risk of harm, but I do not doubt that they would undergo a difficult period of re-adjustment. Their physical and educational needs would be met in the USA, but they are also well met in England. Indeed, the children believe that their educational needs are better met here at present. Their emotional needs would be less well met in the USA than were they to remain here with their mother. Their relationship with their mother is of particular importance to them. Given their ages and sex, it will be especially valuable to them to be close to their mother over the next two years or so as

they undergo physical and emotional changes. Their relationship with the father is more strained, no doubt exacerbated by his pursuit of this application. They find him over-bearing and have to be diplomatic when saying things about him. His messaging to them earlier this month demonstrates why they might find him over-bearing and why they have to be diplomatic. He is less able to meet their emotional needs than the mother.

93. The children will be distanced from one or other parent whether they remain in England or return to the USA but, looked at in the round, their needs will be better met if they remain here with their mother, who is better able than the father to meet their needs. They will be able to have contact with their father and their relationship with him is likely to improve once this application is concluded and they know where they will be living in the future. The children have not suffered harm to date and I do not believe that there is a grave risk of harm to them were they to be returned to the USA. Nevertheless, there is some risk of emotional harm to the children from return due to separation from their mother and the overriding of their strongly held wishes, whereas there would be no such risk were they to remain in England. The court has the power to impose conditions on the return of the children but no conditions would mitigate the adverse impact on the children's welfare of their schooling and home lives being disrupted by return, the separation from their mother, and the overriding of their wishes. It is quite plain on the evidence I have received, without the need for further inquiry, that it would be contrary to the best interests of both children for them now to be returned to the USA. That is very likely to remain the position until the end of the mother's stationing in England, but the court cannot foresee every circumstance that might affect these children.

94. Accordingly, for the reasons I have given, I dismiss the father's applications under the Hague Convention and the inherent jurisdiction.