



Neutral Citation Number: [2022] EWHC 1343 (Fam)

Case No: FD22P00140

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 June 2022

Before :

Geoffrey Kingscote QC sitting as a Deputy High Court Judge

TB

Applicant

- and -

ISG

Respondent

Edward Bennett (instructed by **Dawson Cornwell** for the **Applicant** (father))

Paul Hepher (instructed by **Russell Cooke** for the **Respondent** (mother))

Hearing date: 27 May 2022

Approved Judgment (Anonymised)

.....

MR GEOFFREY KINGSCOTE QC SITTING
AS A DEPUTY JUDGE OF THE HIGH COURT

This judgment was handed down in private on 8 June 2022. The judge gives leave for it to be reported in this anonymised form as TB v ISG. Pseudonyms have been used for all of the relevant names of people, places and companies.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by his or her true name or actual location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

A Introduction

1. This is an application by the father, dated 25 February 2022 for the summary return of three children, A, now 3 years old, T, now 2 and B, now 1, pursuant to the Child Abduction and Custody Act 1985 (incorporating the 1980 Hague Convention on the Civil Aspects of International Child Abduction (“Hague Convention 1980”).
2. The application is opposed by the respondent mother.
3. The children have a half-brother, R, the child of an earlier relationship of the mother.
4. The mother’s defences to the application are the following:
 - i) Under Art 13a that the father had consented to the removal of the children
 - ii) Under Art 13b that there is a grave risk that the return of the children would expose them to physical or psychological harm or otherwise place them in an intolerable situation.

B The hearing and preliminary applications

5. The case was listed before me for 1 day. I have read a bundle of 278 pages and received oral and written submissions from the parties’ counsel.
6. The parties were ably represented by Mr Bennett for the father and Mr Hepher for the mother and I extend my thanks to both. The father had the benefit of a Moroccan Arabic interpreter, Ms Amraoui to whom I also extend my thanks.
7. The hearing was conducted on a hybrid basis. The father and interpreter attended by CVP. The mother and legal advisers all attended in person.
8. There were two preliminary applications:
 - i) The mother’s application for oral evidence in relation to the issue of consent;
 - ii) The mother’s application for an adjournment for further evidence to be produced on:
 - a) Her immigration status and that of the children;
 - b) Her entitlement to benefits and financial support in Spain.
9. Both were opposed by the applicant. I refused both applications and gave a brief ex tempore judgment. I will not repeat the judgment here but set out the key points.
10. As to the first application, I remind myself that these are summary proceedings. As Mostyn J makes clear in the authority of *ES v LS* [2021] EWHC 2758 that the relief under the Hague Convention 1980 is of an interim, procedural nature. The proceedings are summary and oral evidence is very much the exception, rather than the rule. He observed that there was no obvious reason why Art 13 (b) defences should not include oral evidence but defences of consent and acquiescence under Art 13 (a) should be heard with oral evidence. Peel J agreed with the views of Mostyn J in *Re IK* [2022] EWHC 396. After the hearing counsel brought my attention to the

decision of MacDonald J in *E v D* [2022] EWHC 1216, which I have read, in which he also recently refused an application to hear oral evidence in relation to consent.

11. Both parties set out their cases in full in their statements.
12. The Practice Guidance on "Case Management and Mediation of International Child Abduction Proceedings" provides that the court will rarely make a direction for oral evidence to be given. Any party seeking a direction will have to demonstrate to the satisfaction of the court that it necessary to assist the court to resolve the proceedings justly.
13. I did not consider that I needed oral evidence to determine the issue of consent justly.
14. In relation to the adjournment it was impressed upon me that I would need further information to undertake a full investigation in concrete terms of the situation that the children would face on their return.
15. The mother's case as to financial support had been set out in her statement and responded to by the father. At the first listed final hearing on 9 May 2022 I had adjourned the final hearing to allow Spanish social services to answer questions as to social services support and financial relief to which an answer had been supplied.
16. The mother's case as to immigration status was not raised until the position statement of Mr Hepher, received at 9.30pm on 26 May 2022. I should point out that instructed counsel contracted Covid requiring Mr Hepher to step into the breach at the last minute and I do not criticise him, at all, for the lateness of the document. But it is fair to say that the matter was not raised in the mother's statement and could only be addressed in submissions.
17. I did not consider that a further delay was required. As stated, Hague Convention Proceedings are summary in nature and are intended to be completed within a six week time frame. This matter had already been before the Court on five occasions. I considered that I was able to make a reasoned decision on the basis of the information before me.

C Background

18. The case concerns a return to Spain. The mother removed the three subject children from Spain to England on 23 August 2021.
19. The mother is British. She is 23 years old. She does not work. The mother lived in Spain from the age of 16 with her family.
20. The father is 36 and is Moroccan. He has lived in Spain for 20 years and has not visited Morocco since 2009.
21. The subject children are A, aged 3, T, aged 2 and B, aged 1. They were all born in Spain.
22. The mother has a child, R, aged 6, from an earlier relationship, who was also born in Spain. R's biological father has no role in R's life.

23. None of the children are Spanish nationals. They all have British passports.
24. Neither of the parents is a Spanish national. The mother expressed concern about her immigration status in Spain and, in his note, Mr Hephher suggested that, post Brexit, the mother and children could only remain in Spain for 90 days out of 180.
25. The mother and children had remained in Spain from Brexit until she removed with no difficulties in relation to residency until she left with the children in August 2021.
26. The parties met in either 2016 (according to the mother) or 2014, according to the father. The parties lived together until the mother removed the children in August 2021.
27. The three older children, R, A and T were all in the care of Spanish social services from September 2020 to April 2021 notwithstanding their non residence status.
28. The parties and the children lived with the mother's parents in a number of different locations in Spain until 2019 when the mother's parents moved to England.
29. The family life for the parents and the children was difficult. The parties do not agree on the chronology.
30. The father says that the mother's parents were engaged in criminal activity, an allegation the mother denies.
31. The mother's position is that the relationship was positive initially, but the father became controlling. She says that after the children were taken into care the father's behaviour escalated to violence but that she was too scared to report his violence to any authorities. He was controlling about money and would lock her in the house. That abusive behaviour continued when the children were returned to her. He has been abusive on social media and threatened to kill her and take the children if he lost the court case.
32. The father denies any abusive behaviour.
33. The parents were first involved with social services in Spain in 2018 whilst the mother was pregnant with A when she tested positive for cocaine. The mother says that the source of the cocaine was a dental spray and no further action was taken by Spanish social services.
34. The position of the family deteriorated. Social services in Alicante produced a report dated 1 September 2020 which listed the involvement of the family with social services and their concerns.
35. That report set out that the following
 - i) An assessment report in Murcia dated March 2020 identified concerns as consumption of toxic substances by the parents, conflictive relationship and lack of collaboration (with social services).
 - ii) A complaint was filed with social services in Alicante in August 2020 which stated that the children were usually alone, unattended, dirty and hungry.

- iii) The concerns as at the date of report in September 2020 were unhealthy conditions, lack of basic foods for the children and the adults; failure to register either A or T with medical services; frequent moves of the family.
36. The children were taken into foster care in September 2020.
37. The parents worked successfully and extensively with social services in Alicante. The files produced by social services list the interventions which I return to in my analysis. Both parents were described as being actively involved with social services and had shown an interest in improving as parents. They both produced negative drug tests in December 2020 and April 2021.
38. Following the successful assessment the children were returned to the parents at the end of April 2021.
39. Social services files record that it was recommended that there should be monitoring and support by the Family Intervention Team.
40. Social services in Spain continued to provide support between 24 April 2021 and 23 August 2021 with an allocated social worker and visits to the family once or twice each week.
41. It is common ground that the parties discussed and considered a permanent relocation to England. They both wanted to move to England. As part of those discussions the father accepts that he applied for a UK visa in May/June 2021. British passports were also obtained for the children.
42. The father's application was unsuccessful and his visa application rejected. The father says that the parties therefore resolved to stay in Spain albeit he knew that the mother wished to move to England.
43. On 23 August 2021 the mother removed the children to England.
44. The father's case is that they left without his knowledge or consent. He says that the mother arranged for him to have a job that day at a construction site and left for England without his consent and without telling him she was going.
45. The mother says that the father agreed that they could go. She says that she had told him that she would be travelling to England that day and that he saw the packed bags. The mother says that the father was controlling and would lock her in the house but that he unlocked the property and let her out that day. She says that the father had also suggested that B be born in England.
46. The mother called him on 23 August 2021 from England.
47. The father reported the children as missing to the police, the Guardia Civil, on the same day, 23 August 2021. They contacted the English police and an address in Cornwall was produced.
48. Spanish social services spoke to the mother by Whatsapp on 24 September 2021. The father spoke to social services that day and, according to the social services report, he said that the children had gone without his knowledge and consent.

49. Social services received a referral from a specialist social work advisor on 17 September 2021.
50. An assessment by Cornwall Council was commenced on 21 September 2021 which was completed on 22 November 2021.
51. The decision was taken to step down the involvement of Cornwall Council from a Child in Need plan to a child support plan in February 2022.
52. A letter dated 5 May 2022 from Cornwall Council, referred to in Mr Hephher's note, (but not in the bundle, I believe) states that the mother was fully engaged with social services and there were no concerns as to her parenting capacity.
53. An email from Cornwall Council dated 25 May 2022 states that the "LA is concerned that (the mother) has been a victim of domestic abuse and the children witnessed this, the children remain out of education and concerns have been identified in relation to home conditions on occasions as well as the children presenting as unkempt". The reference to abuse is not the father.
54. The mother has a 3 bedroom property and is in receipt of benefits. She feels far more supported than in Spain. One of her concerns is that she will return to an unstable environment and the children may again be taken into care.

D These proceedings

55. The father submitted his application to the Spanish Central Authority in October 2021 and the application for a summary return of the children was issued on 25 February 2022.
56. There have been five hearings in the case.
57. The application was heard without notice to the mother by Francis J, who made a location order and directions for the mother to file an answer and statement. The mother was served and attended the hearing before Moor J on 18 March 2022 at which Moor J gave further directions including for the mother to file an answer and statement. At the PTR before Arbuthnot J on 29 April 2022 the mother had not provided an answer or statement but said that she could comply with the direction by 2 May 2022. On 3 May 2022 the mother produced a 21 line email that failed to set out her case.
58. Legal aid was not formally granted until 5 May 2022.
59. At the final hearing listed on 9 May 2022 I acceded to the request for an adjournment to allow the mother to file a statement setting out her case. I also made respectful requests to Spanish social services to provide further information and relisted the case for final hearing on 27 May 2022.
60. The father set out protective measures in his first statement and these have been augmented in the second statement and modified in oral submissions. The current offered protective measures are

- i) Not to support any criminal or civil proceedings, relating to the children's wrongful removal.
- ii) To pay the cost of the children's return flights to Spain including luggage costs, COVID test (if required).
- iii) Not to separate the separate the children from the mother save for periods of agreed contacts.
- iv) Not to attend at the airport on the day that the children arrive back to Spain.
- v) Not to attend at the mother's place of residence without her prior knowledge save to collect the children for agreed period of contact.
- vi) Not to threaten, intimidate or subject the mother to any violence, nor instruct any person to do so.
- vii) To pay the mother €800 in advance of return to allow the mother to put towards a rental deposit.
- viii) To pay the mother child maintenance in the amount 400 Euro a month for 3 months.
- ix) To pay for the rent of the property in which the mother and the children reside up to 200 Euro a month.
- x) To ensure that the children receive any appropriate medical care, as recommended by professionals.
- xi) To ensure that the children see any professionals (as required by them).
- xii) Not to remove the children from Spain without the mother's consent and not to take the children to Morocco.

61. The father agreed that the following could be conditions of return

- i) Providing evidence that he had asked for the proceedings in Spain to be discontinued. In addition, he accepted that it would take a little time to obtain that evidence because the relevant Spanish official was away and sought that the return by ordered for 4 weeks away.
- ii) The €800 to be paid in advance of return.

E The law: essential principles

62. The application is to be determined by reference to the provisions of the Hague Convention (1980)

Article 1 of the Convention has, as one of its objects

"to secure the prompt return of children wrongfully removed to or retained in any Contracting State."

63. The wrongfulness of a removal or retention is governed by Article 3, which provides that:

"The removal or the retention of a child is to be considered wrongful where –

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

64. In this case it is not disputed that both parents have rights of custody in relation to A, T and B.

65. The substantive obligation to return is provided for by Article 12 of the Convention. This 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."

66. If I get to that stage I have to consider the defence that the mother raises in relation to the obligation to return namely under Art 13 which provides

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

(a) the person, institution or other body having care of the person of the child was not actually exercising the custody rights at the time of the wrongful removal or retention, or had consent to or subsequently acquiesced in that removal or retention

(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

67. If I find the terms of Article 13(a) or 13 (b) are satisfied, this does not automatically lead to an order for non-return. The factual findings open the door to the exercise of discretion. That discretion has to be exercised having regard to the underlying policy of the Convention as well as all the other circumstances of the case.

F The law: Art 13 (a)

68. The parties agree the law in relation to Art 13 (a). The crucial point is that I must find, on the balance of probabilities, that the father gave clear and unequivocal consent to the removal of the children.

69. In Re G (Abduction: Consent/Discretion) [2021] EWCA Civ 139, Peter Jackson LJ summarised the essence of the law at §25, as follows:

“(1) The removing parent must prove consent to the civil standard. The inquiry is fact-specific and the ultimate question is: had the remaining parent clearly and unequivocally consented to the removal?”

(2) The presence or absence of consent must be viewed in the context of the common sense realities of family life and family breakdown, and not in the context of the law of contract. The court will focus on the reality of the family's situation and consider all the circumstances in making its assessment. A primary focus is likely to be on the words and actions of the remaining parent. The words and actions of the removing parent may also be a significant indicator of whether that parent genuinely believed that consent had been given, and consequently an indicator of whether consent had in fact been given.

(3) Consent must be clear and unequivocal but it does not have to be given in writing or in any particular terms. It may be manifested by words and/or inferred from conduct.

(4) A person may consent with the gravest reservations, but that does not render the consent invalid if the evidence is otherwise sufficient to establish it.

(5) Consent must be real in the sense that it relates to a removal in circumstances that are broadly within the contemplation of both parties.

(6) Consent that would not have been given but for some material deception or misrepresentation on the part of the removing parent will not be valid.

(7) Consent must be given before removal. Advance consent may be given to removal at some future but unspecified time or upon the happening of an event that can be objectively verified by both parties. To be valid, such consent must still be operative at the time of the removal.

(8) Consent can be withdrawn at any time before the actual removal. The question will be whether, in the light of the words and/or conduct of the remaining parent, the previous consent remained operative or not.

(9) The giving or withdrawing of consent by a remaining parent must have been made known by words and/or conduct to the removing parent. A consent or withdrawal of consent of which a removing parent is unaware cannot be effective.”

G Art 13 (b)

70. The Supreme Court examined the law in respect of the defence of harm or intolerability in a number of recent authorities including in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27
71. A very helpful summary of the law is set out in re IG (Child Abduction: Habitual Residence: Article 13b) [\[2021\] EWCA Civ 1123](#) where Baker LJ stated at paragraphs 46 to 48;

'46. The leading authorities remain the decisions of the Supreme Court in *Re E (Children) (Abduction: Custody Appeal)* [\[2011\] UKSC 27](#), [\[2012\] 1 AC 144](#) and *Re S (A Child) (Abduction: Rights of Custody)* [\[2012\] UKSC 10](#), [\[2012\] 2 AC 257](#). The principles set out in those decisions have been considered by this Court in a number of authorities, notably *Re P (A Child) (Abduction: Consideration of Evidence)* [2017] EWCA 1677, [\[2018\] 4 WLR 16](#) and *Re C (Children) (Abduction: Article 13(b))* [\[2018\] EWCA Civ 2834](#), [\[2019\] 1 FLR 1045](#). Since the hearing of the present appeal, this Court has handed down judgments in another appeal involving Article 13(b), *Re A (A Child) Article 13(b)* [\[2021\] EWCA Civ 939](#) in which Moylan LJ carried out a further analysis of the case law. I do not intend to add to the extensive jurisprudence on this topic in this judgment, but merely seek to identify the principles derived from the case law which are relevant to the present appeal.

"47. The relevant principles are, in summary, as follows.

- (1) The terms of Article 13(b) are by their very nature restricted in their scope. The defence has a high threshold, demonstrated by the use of the words "grave" and "intolerable".
- (2) The focus is on the child. The issue is the risk to the child in the event of his or her return.
- (3) The separation of the child from the abducting parent can establish the required grave risk.
- (4) When the allegations on which the abducting parent relies to establish grave risk are disputed, the court should first establish whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then establish how the child can be protected from the risk.
- (5) In assessing these matters, the court must be mindful of the limitations involved in the summary nature of the Hague process. It will rarely be appropriate to hear oral evidence of the allegations made under Article 13(b) and so neither the allegations nor their rebuttal are usually tested in cross-examination.

(6) That does not mean, however, that no evaluative assessment of the allegations should be undertaken by the court. The court must examine in concrete terms the situation in which the child would be on return. In analysing whether the allegations are of sufficient detail and substance to give rise to the grave risk, the judge will have to consider whether the evidence enables him or her confidently to discount the possibility that they do

(7) If the judge concludes that the allegations would potentially establish the existence of an Article 13(b) risk, he or she must then carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to the risk.

(8) In many cases, sufficient protection will be afforded 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.

(9) In deciding what weight can be placed on undertakings, the court has to take into account the extent to which they are likely to be effective, both in terms of compliance and in terms of the consequences, including remedies for enforcement in the requesting State, in the absence of compliance.

(10) As has been made clear by the Practice Guidance on "Case Management and Mediation of International Child Abduction Proceedings" issued by the President of the Family Division on 13 March 2018, the question of specific protective measures must be addressed at the earliest opportunity, including by obtaining information as to the protective measures that are available, or could be put in place, to meet the alleged identified risks.

"48 In his judgment in the recent case of Re A, Moylan LJ (at paragraph 97) gave this warning about the failure to follow the approach set out above in paragraph (4):

"if the court does not follow the approach referred to above, it would create the inevitable prospect of the court's evaluation falling between two stools. The court's "process of reasoning", to adopt the expression used by Lord Wilson in Re S, at [22], would not include either (a) considering the risks to the child or children if the allegations were true; nor (b) confidently discounting the possibility that the allegations gave rise to an Article 13(b) risk. The court would, rather, by adopting something of a middle course, be likely to be distracted from considering the second element of the Re E approach, namely "how the child can be protected against the risk" which the allegations, if true, would potentially establish."

72. As part of my analysis, I have to scrutinise carefully the protective measures that are proposed by the father. I also have to consider whether further protective measures need to be imposed and whether the mother will have access to justice in Spain should she or the children be subject to abusive behaviour.

73. Guidance has been provided by Moylan LJ in *S (A Child)(Hague Convention 1980: Return to Third State)* [2019] EWCA Civ 352 as to how protective measures should be considered

“54 Thirdly, I also repeat what I said in *Re C*, at [43], about the "need for caution when relying on undertakings". In *In re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144, Lady Hale JSC (as she then was) drew attention to this issue, at [7], when she referred to concerns having been expressed about the "too ready" acceptance by the courts of common law countries of undertakings which are not enforceable in the courts of the requesting state. She also drew attention to the importance of the "efficacy of protective measures" adding, at [36], that "the appropriate protective measures and their efficacy will obviously vary from case to case and from country to country".

55. The Hague Conference on Private International Law is expected soon to be publishing a Guide to Good Practice on Article 13(b) of the 1980 Convention. This is likely to refer to the need to consider whether, when undertakings are being relied upon, they can be made enforceable in the requesting state and, if not, that they should be used with caution when being relied on as measures to protect against an Article 13(b) risk. It will also draw attention to the difference between protective measures and practical arrangements. The latter are put in place to ensure an orderly return so are directed towards facilitating and implementing the child's return by, for example, providing who will pay for flights. They might be described as arrangements which are more light touch.

56. Clearly, protective measures designed or relied on to protect a child from an Article 13(b) risk are in a different category. If the court is considering such measures in the context of determining whether the risk has been established or whether, as in the present case, such measures will sufficiently ameliorate an identified grave risk, the efficacy of the measures will need to be addressed with care. Clearly, the more weight placed by the court on the protective nature of the measures when determining the application, the greater the scrutiny required in respect of their efficacy.”

74. In re GP (A Child) (Abduction): Consideration of Evidence [2017] EWCA Civ 1677 put the test in very clear terms... “it was ... necessary...for the judge to examine in concrete terms the situation that would actually face GP on her return to Italy. What would happen when she and her mother stepped off the plane? Would her mother be arrested? Where would they go, and what would they live on?”. In that case Henderson LJ noted that the judge, if he considered the information was insufficient, should have adjourned the hearing for further information.
75. The burden of proof is on the mother. The standard of proof is the ordinary balance of probabilities
76. I also remind myself that Art 13 (b) is referring to the harm likely to be caused to the child, not the adults. It is, however, clear from *S (A Child) (Abduction: Rights of*

Custody) [2012] 2 FLR 442 that the subjective anxieties of a respondent can found an Article 13(b) defence.

F The issues

77. I therefore have to consider the following questions:
- i) Did the father consent to the removal of the children to England and, if so, should I exercise my discretion not to return
 - ii) Is there a grave risk that, if the children were to return to Spain, it would expose them to physical or psychological harm of place them in an intolerable situation. If so should I refuse to make an order for return
 - iii) In considering the second point I have to consider the protective measures that have been proposed by the father, any further measures that may be necessary and access to justice that may be available to the mother

G My analysis

78. The parties' cases on consent.
79. The mother's case is that the father had agreed to her going to England.
80. She says that when the children were returned to the parties' care by Spanish Social services the parties discussed the move to England. Whilst R, A and T were in care the father had said to the mother that he wanted to give birth to B in England and leave him there whilst she returned to Spain to work on getting the other children back to their care. That did not happen: B was born in Spain.
81. The parties wanted to move to England with the children and, to that end, the father had applied for a visa, and they had obtained passports for the children. The father signed for the passports after his visa had been refused.
82. The mother says that she and the father spoke about moving to England after his visa was refused and he said she could still go. He told her to take the children to England as the children would otherwise go into care. She said that he told her this on multiple occasions but the mother did not have evidence of this as she changed her phone because of the abuse.
83. The mother left on 23 August 2021. She says the reason they left then was because they had the children's passports. Whilst the father had agreed to them returning the mother was afraid of him and did not want him to go with her and the children. The father was aware that the mother intended to go even after his visa was refused. She told the father that day, the 23 August 2021 that they were going. She says he saw that the bags were packed. She says he chose to go to work rather than take the children to the airport. She says that the parents were worried the children might be taken back into care.
84. The mother exhibits no documents, emails, Whatsapp or text messages to her statement.

85. The father accepts that he had wanted to go as a family to England. He accepts that he applied for a visa and signed the children's passports. He denies asking the mother to give birth to B in England. But, he says, when his visa application was refused the parties agreed that the children would stay in Spain.
86. The father says that the mother had specifically arranged for the father to work that day. She had got the children up and dressed very early but he was not suspicious.
87. The father reported the children's removal to the Guardia Civil on 23 August 2021.
88. Social services spoke to the mother on 24 August 2021. The record of the conversation, as set out in the Child Protection Files is as follows. I bear in mind Mr Hephher's argument that this is hearsay evidence.
- i) On 24 August 2021, after contacting (the social worker) via whatsapp, she says that she has gone to England with the children; she says that F tried to beat her and she decided to go to England. She claims to be at his parents' house, giving the following address (...). According to him (sic), he wants to arrange F's papers so that he can go too. It is said that the relationship in Spain with her parents did not benefit them and much less the children, to which M says they now have a better life. She is stressed of the importance of the children's wellbeing and that she should go to her Social Services Team for help.
 - ii) On the same day, 24 August, F reports that M had gone to England with her 4 children without his knowledge and consent. He says that he went yesterday, 23 August, to the Guardia Civil in the nearby town of Almoradí to report these events; he says that the Guardia Civil has contacted the English police, who provided them with the family address in England, and that the court would be informed.
 - iii) F expresses concern about the situation of his children, as he says that his in-laws are drug users, and he doubts that his children will be cared for there. According to him, M's parents pressured M to go with them in order to obtain child benefits in England.
 - iv) In Algorfa Social Services we were aware that the couple were planning, when the necessary conditions were met, to move to England, but we were surprised that she finally left alone with the children and, apparently, without the consent and agreement of the children's father.
89. The report on the initial assessment undertaken by Cornwall County Council dated 22 November 2021 records a referral from VR, a specialist social work adviser at the British embassy in Madrid, who informed the Council on 17 September 2021 that the mother "has suddenly withdrawn from supervision and support from Spanish Local authorities. The children were born in Spain and have been taken to the UK without preparation or family arrangement. The children are not seeing their father."
90. Cornwall County Council spoke to the mother on 27 September 2021. Although she complained that she had been in an abusive relationship with the father she does not mention that he had agreed for her to bring the children to England.

91. Cornwall County Council also spoke to the mother's parents on 27 September 2021 and the report indicates that the parents "informed that once their grandchildren were removed from care they flew to Spain to take them and their daughter home".
92. I consider the evidence.
93. The mother's case is supported by no supporting evidence. She gives no explicit description of the conversation in which the father gave his clear and unequivocal consent to let the children go to England after his visa had been refused. She says that the father had told her to go on numerous occasions but has no evidence for that as she changed her phone because of his abusive messages.
94. Her case is that "F had agreed to me going and was aware that I intended to go, even after his visa was refused. I told F that day before he left for work that I would be travelling to England with the children. He could see the bags had been packed for us to leave".
95. The mother makes no reference to any discussions about the practical arrangements for the children in England. The parents would have discussed where the children would live, how their lives would be financed, where they would go to school and how and when the father would see them. There is no reference to any such conversation about practical arrangements.
96. The mother provides no supporting documentary evidence at all in support of her case. There are no messages or texts. There is no message to say "I will ring you when I get there" or any suggestion as to how contact would work or even where the children would be staying.
97. The mother did not tell the father in advance that she was leaving. She did not tell him that she was buying air tickets. At its highest she told him that morning. She did not encourage the children to say goodbye to their father.
98. There is no supporting evidence from family members that the father had consented to the removal even though, it appears, she went to stay with her parents on the day of the removal.
99. The father said that, had he known the children were going, he would "at least have gone to the airport and not gone to work." I accept that assertion.
100. The mother rang the father on the afternoon of 23 August 2021 from England. The father then went that day to the Guardia Civil who contacted the police in England and obtained an address for the mother. The mother's case is that the father's actions are explained by the fact that he had simply changed his mind, that day, and had then decided to go to report the matter to the police. Her case must be that he lied to the police and pointlessly, asked the police in Spain to contact the police in England to obtain an address for the children
101. Social services in Spain then spoke to both parents. When the mother spoke to social services she raised concerns about domestic violence from the father but she said nothing about any agreement from him that she could take the children to England.

102. By contrast when the father spoke to Spanish social services on 24 August 2021 he told them from the outset that the mother had gone to England without his knowledge or consent.
103. The mother did not inform Spanish social services that she was leaving. I note that Spanish social services were visiting the family twice a week and the family appear to have been working with them.
104. Neither the mother nor her parents appear to have told Cornwall County Council that the father had agreed that she could leave Spain.
105. Under the checklist in re G the Court of Appeal noted that “a primary focus was likely to be on the words and actions of the remaining parent. The words and actions of the removing parent may also be a significant indicator of whether that parent genuinely believed that consent had been given, and consequently an indicator of whether consent had in fact been given”.
106. Adopting that methodology, it is clear that the words and actions of the father are consistent with him not having given his consent to a removal once his application had been refused. It does not make sense that the father would go to work rather than say goodbye to the children who he would not see for an unknown period of time. It is also implausible that the father would report the removal to the police that day if he had agreed to the children leaving.
107. The father accepts that he had signed for passports and had wanted the children to go to England but that, once his visa was refused, he did not agree to them going. That makes sense and his behaviour is consistent with that case.
108. By contrast, many of the words and actions of the mother relating to removal are indicative of a clandestine removal
 - i) The mother left whilst the father was at work and he did not say goodbye to his children either at home, or at the airport, notwithstanding that he was unable to travel to England to see them because of visa issues.
 - ii) On her case she did not tell the father she was leaving until the morning of her departure. But her case is that this was an agreed removal to which the father had consented.
 - iii) The mother herself says that she did not want F to go with her. But, of course, he could not go at all, because he did not have a visa.
 - iv) The parties appear to have had no discussions at all about practical arrangements for the children and no discussions about schooling, finance, housing or contact.
 - v) The mother did not tell social services in either Spain or England that the father had consented to the removal.
109. The evidence points very strongly in favour of this being a clandestine removal.

110. In considering the evidence I find that the mother has not proved, on the balance of probabilities, that the father gave his clear and unequivocal consent to the removal of the children to England.
111. The mother has failed to provide her Art 13 (a) defence.

Art 13 (b)

The parties' cases on Art 13 (b)

112. The father asserts that there is no grave risk of the children being exposed to physical or emotional harm or otherwise place them in an intolerable situation. In any event, he has offered a number of undertakings which would ameliorate any such risk.
113. The mother's case is that there is a grave risk of the children being exposed to physical or emotional harm on their return for the following reasons
- i) She has suffered domestic abuse and coercive control from the father including a threat to kill her made on 11 May 2022 and the children would be exposed to that abuse.
 - ii) She and the children have uncertain immigration status and can only remain in Spain for 90 days out of 180.
 - iii) She and the children would lack basic necessities and would have insufficient financial support. She says that was one of the reasons why the children were taken into care in August 2020. The children faced going back into care.
 - iv) The children would face the prospect of being separated from their mother if she were arrested.
 - v) The children might be abducted to Morocco.
114. I consider all five reasons below. In doing so I bear firmly in mind that under the checklist in *Re IG* at para 47 (4) where the allegations are disputed, I should first establish whether, if true, there would be a grave risk that the children would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then establish how the child can be protected from the risk. In essence, I have to take these allegations at their highest on the evidence before me.
115. But I also remind myself that I am to carry out an evaluative exercise of the allegations as well.

Physical and emotional abuse

116. The mother's case is that:
- i) The father was controlling throughout the relationship.
 - ii) He was verbally abusive and would threaten her and try to hit her.

- iii) He would lock her in the house.
 - iv) He was controlling with the children too and would lock them in.
 - v) He became physically abusive when the children were taken into care and would “hit her” and “chuck” her around when she was pregnant with B after he had been drinking .
 - vi) When the children were returned to them by social services, the father would be controlling and abusive and continued to hit her. He would lock the mother and the children in the house.
 - vii) He has continued to send abusive messages, but she does not have any record of these because she got a new phone as he was so abusive.
 - viii) The father threatened to kill the mother on 11 May 2022 during a video call, if he lost the case.
117. The mother says that she was too scared to tell social services or the police in Spain as she was trying to get the children returned from care. She says that she finds it difficult to think about this time, she has been blocking it out of her mind and she did not have a clear recollection of how frequently he would do this.
118. The father denies the allegations completely. He also says that, in a conversation on 19 May 2022 the mother invited him to come to England and live near her. She said the children could have regular contact with him and after some time they could try to rebuild the relationship. The father has exhibited a screenshot of communications between the parents on that day which demonstrate that there were frequent calls between them. The mother did not deny that conversation in submissions. I bear in mind that these communications took place, on the mother’s case, 8 days after he made a threat to kill her. |
119. The Spanish social services report state that the parties were identified as having a “conflictive” relationship in the Murcia report of March 2020. There is no reference to a controlling relationship or to the father being violent. There is a reference to the father being a protective factor.
120. The mother and her parents did, though, report to social services in Cornwall that she had been in a violent and controlling relationship in Spain.
121. In evaluating the evidence I note the lack of detail about any of the allegations, none of which are dated other than the recent threat to kill or reported to any third party other than social services in Cornwall.
122. I have to consider in concrete terms the situation that would face the children on return. In taking the allegations at their highest I do not consider that they reach the high test of grave risk that is required for Art 13 (b). In reaching that conclusion I bear in mind the following
- i) After return the parties would be living in separate accommodation and contact would only take place on an agreed basis

- ii) The mother has not made allegations that the father has been physically violent or abusive to the children
 - iii) The mother says that the children were exposed to coercive behaviour because the father would lock them in the property with her. But the children and the mother will be living in separate accommodation so this type of coercive behaviour cannot recur.
 - iv) The father has given undertakings not to
 - a) threaten, intimidate or subject the mother to any violence, nor instruct any person to do so.
 - b) attend at the mother's place of residence without her prior knowledge save to collect the children for agreed periods of contact
 - v) The mother invited the father to move close to her in England and have regular contact with the children.
 - vi) The father was identified as the protective factor in the family and concerns were not expressed about domestic violence by Spain in the lengthy period of time that they worked with the family.
 - vii) Social services will continue to work with the family on return to Spain
123. Spain is a signatory of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Child (1996 Hague Convention). As is made clear by *Re Y (A Child)* [2013] EWCA Civ 129 and *Re J (A Child)* [2015] UKSC 70 these undertakings are measures that are recognised and enforceable pursuant to Arts 11 and 23 of the 1996 Hague Convention in Spain.
124. I have seen no evidence that the mother would be unable to access justice in Spain should she face abusive or violent behaviour from the father. There is a bespoke Domestic Violence Court in Spain.
125. I therefore do not find that the allegations of domestic violence reach the threshold required for Art 13 (b)

Immigration status

126. The mother asserted, through Mr Hopher, that her residence position was uncertain. She says that she can only stay for 90 days out of 180 days. The children's residency status is also unclear.
127. The mother lived in Spain from the age of 16 in 2014. She did not choose to regularise her residency status whilst living in the country. She has not obtained her residence permit nor even the NIE document that leads to a residence permit.
128. The mother also says that the father has not renewed his residency status which has expired. The father says that it has not.

129. These points were raised on the eve of the final hearing. I did not consent to an adjournment for further information.
130. The mother can point to no difficulties that she had in living in Spain with the children after Brexit. All three children were born in Spain, the youngest in January 2021.
131. The children were in care from September 2020 to April 2021. There is no explicit reference to difficulties in relation to residency in the detailed reports from Spanish social services.
132. The work carried out by Spanish social services was extensive and thorough and it is clear they assisted the family on residence permits specifically. The report produced for the court from Spanish social services dated 5 May 2022 lists the following help that has been provided to the family and the organisations that they have worked with.

1. Processing of basic documentation

With the support and accompaniment of the educator and the social worker of the family team, as well as the foreigners' service (PANGEA) and the legal advice service of the *Mancomunidad*,

they were able to process the following documentation:

- Passport renewal Isabella and Tarik.
- Processing of Isabella, Tarik and Blaze health cards.
- Management of the change of midwife following her transfer to another municipality.
- Civil registry formalities in Alicante, Algorfa and San Javier for pending registration of children.
- Blaze's English passport.
- Residence permits.

In addition, during the intervention, coordination was carried out with different external agents in order to work towards supporting the achievement of the objectives set. Some of the co-ordinations carried out were with:

- Babelia Association: Procedures and formalities at the British Consulate.
- Pangea MLV: Consultation of doubts and procedures for foreigners.
- Legal advice MLV
- Midwife Isabella. Contraception and gynaecological monitoring.
- Algorfa Council: Food support.
- Social worker Algorfa. Application for financial aid.
- Ministry Platform "POSITIVE PARENTALITY PROGRAMME FROM BIRTH TO THREE YEARS OF AGE", started in February and supervised by the social educator of the case.
- Social worker at the Almoradi Health Centre. Management of health cards, referrals to specialists.

- General practitioners. Toxic analysis possible referral to USMI.
- British Clinic Alicante
- Social worker Hospital.
- Collaborating midwife Columbares
- Technical team Provincial Home
- Technical team, Child Protection Section, Territorial Directorate.
- Social Services El Pilar de la Horadada.

133. It can be seen that Spanish social services assisted the parties with residence permits. “Babelia Association” specifically provides support for residency to UK citizens living in the provinces of Alicante, Valencia and Castellon.
134. The list also demonstrates just how much work was carried out by social services in Spain.
135. Neither of the parties referred to this work in their statements but it appears that social services have worked with the family in relation to residence permits.
136. In considering what will happen to the children on return to Spain I note that the family will continue to have an allocated social worker and Social services will continue to work with them.
137. The mother and the children are in the same position in relation to immigration.
138. In *KJC v GRC* [2019] EWHC 3170 Robert Peel QC as he then was noted that at para 48

In general, immigration difficulties, which are relatively common in these cases, do not by themselves establish the Article 13(b) defence. It is a question of assessment of risk as part of the overall Hague Convention evaluation. In **Re R [2005] 1 FLR 33**, for example, the mother's ability to re-enter Germany for only a short period of time did not prevent a return order. A similar outcome can be found in **Re K [1995] 2 FLR 550**. I note also **Re GP [2017] EWCA 1677** which mandates the court to "examine in concrete terms" the position to be faced by a parent upon return; if the judge has insufficient information, consideration should be given to an adjournment to obtain appropriate evidence.

139. I evaluate the evidence.
140. The mother lived without difficulty, post Brexit, in Spain, until the removal of the children in August 2021. Social services worked specifically with the family on the issue of residence permits and liaised with third party organisations dedicated to residency issues for British residents in Alicante. Social services will continue to work with the family and continue to support the family if there are difficulties regarding residence.

141. I have to assume that the Spanish judicial system is also capable of dealing with immigration issues, as is the court in England and Wales.
142. In the circumstances I can evaluate the risk without further evidence. I do not consider that the children will be exposed to a grave risk under Art 13 (b) of being placed in an intolerable situation on return as a result of their immigration status. I consider that the judicial system will be in a position to deal with that issue in any proceedings. I further consider that Spanish social services have, and will continue, to assist the parents on this issue.

Basic necessities and financial provision

143. The mother's position is that the family will not have sufficient to meet their basic needs. They will move to an unstable environment that may result in them going back into care.
144. Mr Hephher impresses on me that these are not just practical considerations. The mother's financial instability unless ameliorated could amount, he says, to an Art 13 (b) risk.
145. The parties clearly had a modest rather unstable life in Spain and moved frequently. The report in Spain refers to constant moves in eight municipalities. The mother has moved frequently in England too and appears to have had five addresses. The current accommodation, a 3 bedroom home, is the most stable.
146. Looking to the future, the father says that the mother can rely on state benefits, assistance from the local authority and support from his earnings. The mother does not accept that she is entitled to benefits. She says that when they were living in Spain she received no financial support from the father as he was not working. The family's sole income, on her case, appears to have been assistance from her parents and from a family friend.
147. The role of a family friend is confirmed in the Child Protection file document produced for the court on 5 May 2022. The mother had told social services that an English relative was giving her €800 a month. Social services spoke to the relative who confirmed that she was very fond of the mother, was helping her out whenever the mother needed it and planned to continue doing so.
148. Social services record that Municipal Social Services granted them social emergency financial aid to help them pay their rent. The report also recorded that the parents had managed to pay for a private vehicle to finance visits to the children which had never been a problem. The mother was able to finance transport home for herself and four children in August 2021.
149. The father says that he is working earning €1,500 to €2,000 a month at a casino and does additional work as a painter and decorator earning a total of €800 a month. He is renting a studio flat for €300 a month. He has provided no documentary evidence.
150. Modest 2 bedroom flats appear to cost about €350 to €450 a month.
151. The father's financial proposals are

- i) That he pay €800 upfront to the mother as a condition of the summary return
 - ii) €200 a month towards rent
 - iii) €400 a month towards child maintenance
152. The father says that the mother should receive €350 benefits and 2 food vouchers a week of €150 in value.
153. As part of the practical measures for return I consider that the father should pay a total of €350 towards rent so that a modest property can be rented regardless of benefits. That figure of €350 is the amount of rent that the mother stated that they had occupied before the family left Spain.
154. Social services were asked to set out to what financial assistance the mother is entitled. The letter dated 4 May 2022 is not entirely clear but it states that
- i) The family will be assigned the same social worker
 - ii) The family will be assigned the same team of professionals
 - iii) The family could go to the municipal social services where they must register which is fundamental for access to any type of assistance, social services, benefit, education, health resources.
 - iv) If the family does not have accommodation with the basic conditions of habitability and equipment, social service could respond for the children/minors, if it is considered that they are in a situation of possible vulnerability, having to adopt child protection measures foster care in juvenile centres.
155. Social services identified in the Child Protection report that they had worked with Algorfa council to obtain food aid. The list of organisations that social services worked with included
- *Algorfa Council: Food support.*
 - *Social worker Algorfa. Application for financial aid*
156. Comity requires the signatory states to the 1980 Hague Convention to assume that other signatory states are equally competent to deal with child protection. I have seen no evidence the contrary in relation to Spain.
157. This is not an affluent family and they lived a modest life in advance of the removal. This is not a case where the mother will be returning to destitution.
- i) She will have sufficient for 2 months accommodation up front.
 - ii) She will be in receipt of some support from the father. In total, she will have €750 a month from the father. Her case is, whilst they were together, she received nothing from him at all so that represents a considerable improvement.

- iii) Given her comments to Spanish social services it may be that she will continue to have support from family members.
 - iv) She will have the same social services team as before the removal of the children and they have demonstrated that they have worked with the family to offer and obtain financial support in the past.
158. Financial issues between the parties will ultimately be determined by the Spanish authorities.
159. Mr Hephher drew my attention back to the case of Re GP in relation to the need to consider the financial position of the children, post return, but I note in that case that the mother was facing a situation of homelessness.
160. I do not consider that the mother's concerns about lacking financial necessities reach the threshold required by Art 13 (b) that the children would be placed in an intolerable situation.
161. The mother expressed concern that the children would likely be placed back in care. The children would not be returned to foster care. They would be returned with their mother.
162. Spanish social services worked collaboratively with the family to return the children and I can assume that they will continue to work with them to keep the children with their mother. The work carried out by social services with the family whilst the children were in care was extremely extensive.

Separation

163. The mother has agreed that she and R will accompany the children should they return to Spain.
164. The mother has expressed concern about a "denuncia" the father's complaint in Spain.
165. The father offered an undertaking not to support any criminal or civil proceedings relating to the children's wrongful removal in his first statement and repeated that offer in his second statement. He has agreed to withdraw the complaint and has already spoken to an individual, I believe at the police, to effect this.
166. These are very young children aged 3, 2 and 1 who have been living with their mother in England since August 2021 and have only seen their father on video calls.
167. From the children's perspective a removal from the mother would, potentially, put them in a very difficult situation. But I have to balance in my considerations the fact that
- i) two of the three subject children were in foster care for more than seven months from September 2020 to April 2021 before being returned to their parents;

- ii) the specialist social worker relayed that Spanish social services considered the father to be the protective factor in the family. I note here that the request for more explanation of this finding was not complied with by social services. The mother denies that the father was the protective factor in the family and does not understand the reference.
168. The father has already indicated that he will obtain evidence that he has sought to withdraw his complaint and that this can be a condition of return. Mr Bennett rather questioned whether or not it was possible to obtain anything formal from the Spanish police or prosecution authorities to say that the complaint was not going to be progressed.
169. At this point I remind myself, as MacDonald J observed in *H v K and B and M* [2017] EWHC 1141 at paragraph 44.
44. Generally, the risk of the abducting parent being arrested and prosecuted for child abduction is not sufficient by itself to satisfy Art 13(b). In *Re L (Abduction: Pending Criminal Proceedings)* [1999] 1 FLR 433 it was held that neither the possibility of criminal proceedings being brought nor even the possibility of the mother being arrested at the airport on her return was enough to establish a grave risk of harm to the children. In *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145 it was held that the possibility that the father would change his mind and bring criminal proceedings against the mother if she returned to the United States was not sufficient to establish the exception under Art 13(b).
170. Taking all these points into consideration, I am not satisfied that a removal from their mother would potentially expose the children to a grave risk under Art 13 (b). But in any event I consider that the risk can be sufficiently ameliorated by the father's proposal that it be a condition of the summary order to return that he provide evidence that he has withdrawn his consent to a prosecution of the mother.

Abduction to Morocco

171. The mother has expressed concern that the father may abduct the children to Morocco. In her statement the mother states that the father said that he would take the children to Morocco on a video call in April 2022. There are no other references to any threat to remove the children.
172. The father says that he has no intention of taking the children to Morocco. He has lived in Spain since 1992. He is Moroccan but has not visited the country since 2009. He has lived in Spain since 1999/2. He has limited links to Morocco. The Child Protection Files from Spain noted that the father "had only the memory of a sister's care for his nephews and nieces when he lived in Morocco" and did not have positive caregivers as a child.
173. The father has offered to give an undertaking not to remove the children from Spain.
174. Morocco is a signatory to and has ratified the 1980 Hague Convention and the 1996 Hague Convention.

175. I am not persuaded that there is any grave risk of the children being abducted by the father to Morocco. I am satisfied that any risk, whatever, it might be, is met by the father's undertaking, and the fact that Morocco and Spain have signed and ratified the 1980 Hague Convention and the 1996 Hague Convention. His undertakings are enforceable in both jurisdictions.

Conclusion

176. I have determined that the mother has failed to prove her case that the father consented to the removal of the children to England. Her Art 13 (a) defence is not satisfied.
177. I have further determined that the mother's Art 13 (b) defence is not satisfied.
178. I am therefore required under the terms of the Convention to order a summary return of the children to Spain. Given the likely delay in obtaining confirmation that the father has withdrawn the prosecution the return should be by no later than 27 June 2022.
179. I set out below the conditions and undertakings that are required.

Condition of return

- i) The father to provide evidence that he has withdrawn his complaint in relation to abduction
- ii) The father to deposit the sum of €800 in advance of the return

Undertakings

- iii) Not to support any criminal or civil proceedings, relating to the children's wrongful removal.
- iv) To pay the cost of the children's return flights to Spain including luggage costs, COVID test (if required).
- v) Not to separate the children from the mother save for periods of agreed contacts.
- vi) Not to attend at the airport on the day that the children arrive back to Spain
- vii) Not to attend at the mother's place of residence without her prior knowledge save to collect the children for agreed period of contact.
- viii) Not to threaten, intimidate or subject the mother to any violence, nor instruct any person to do so.
- ix) To pay the mother child maintenance in the amount 400 Euro a month for 3 months.
- x) To pay for the rent of the property in which the mother and the children reside up to €350 Euro a month.

- xi) To ensure that the children receive any appropriate medical care, as recommended by professionals.
- xii) To ensure that the children see any professionals (as required by them).
- xiii) Not to remove the children from Spain without the mother's consent and not to take the children to Morocco.

180. That is my judgment.