Neutral Citation Number: [2022] EWHC 3688 (Fam)

Case No: FD22P00530

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/10/2022

Before :

Mr P HOPKINS KC
SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

G.T.J.

Applicant

- and -
L.S.

Respondent

MR A POWELL (Mr M Basi appeared for judgment) (instructed by **Ellis Jones Solicitors**) for the **Applicant**
L.S. Respondent appeared in person

Hearing dates: 20 & 21 October 2022

- -

Approved Judgment

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MR P HOPKINS KC DHCJ

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

MR P HOPKINS KC DHCJ:

INTRODUCTION

1. This is an application in relation to one child, O. S. M-J. It is an application pursuant to the 1980 Hague Convention and the Civil Aspects of International Child Abduction in relation to O. The Convention is, of course, embodied now within the Child Abduction and Custody Act 1985. O was born in 2018. I shall refer to O as "the child" in the course of this judgment. It follows therefore that the child is now aged four years and nearly five months in age.

2. The applicant is the child's father. He is Mr G. T. J. and I shall refer to him as "the father" in the course of this judgment. He currently resides in E [city] in the Republic of South Africa ("South Africa") and has been represented by Mr Powell, of counsel, in this hearing.

3. The respondent is the child's mother, Ms L.S, who is known colloquially as "L". I hope she will forgive me for referring to her with that degree of informality. I shall refer to her as "the mother" in the course of this judgment. She is currently living with the child in a property, the party's home, in S [city in the United Kingdom ("UK")]. She has previously instructed solicitors, but they have very recently come off the court record. The mother has represented herself in this hearing.

4. There is another relevant, but non-subject, child of the parties' marriage. This is C. L. M-J. He is more informally known as "K". He was born in 2012 and therefore he is aged 10 years old. He lives with the father in South Africa. I shall refer to him as his informal name, K, in the course of this judgment.

5. The father's application is dated 5 August 2022. The application was issued on 8 August 2022. That application seeks the summary return of the child to South Africa. The mother defends the application raising the following exceptions / defences: (1) Article 3 (habitual residence); (2) Article 13(a) (consent or acquiescence) and (3) Article 13(b) (grave risk of harm / intolerability).

PARTIES' POSITIONS

6. The father at the conclusion of the hearing continues to seek an order for the summary return of the child. The mother continues to resist the return of the child, albeit there has been a degree of revision in terms of the basis on which she opposes the application. The nature of the revision will become clear in the course of this judgment.

NATIONALITIES

7. The father has dual nationality. He is a UK and Liberian citizen. The mother also enjoys dual nationality. She is a UK and South Africa citizen. The child also enjoys dual nationality. She too is a citizen of the UK and South Africa.

HISTORY OF THE LITIGATION IN THIS JURISDICTION

8. The father made his application to the relevant Central Authority in South Africa on 6 July 2022. The father's solicitors were instructed by ICACU on 19 July 2022. As I have mentioned, the application is dated 5 August 2022, but was issued on 8 August 2022. The application was served on the mother on 10 August 2022.

9. The application was listed for the first inter-partes hearing before Newton J on 16 August 2022. In addition to court alert and various court orders, the court made a number of directions to ensure the case was prepared for a final hearing [Core Bundle: E-53].

10. In accordance with the directions that were given on 16 August 2022, the mother filed her response and evidence in response on 30 August 2022. There have been two further statements evidence filed on behalf of the father in response.

11. There was a Pre-Trial Review listed for hearing on 6 August 2022. However, that hearing was vacated by agreement by the parties' solicitors. I digress to comment that the mother still had solicitors at that time. An agreed administrative order was made by Francis J in place of the inter-partes hearing on 6 October 2022 [Core Bundle: E-55].

SUMMARY OF THE EVIDENCE

12. There are a number of sources of evidence before the court. Firstly, there is the core bundle (as I have described it). That contains the documents that have been filed directly in relation to this litigation. Secondly, there is a supplementary bundle. That bundle contains documentation from the litigation involving the parties in the High Court in South Africa, together with other miscellaneous documents that have come into existence in that jurisdiction.

13. In addition to these two bundles, the mother filed a second statement earlier this week. She gave evidence yesterday and, in the course of giving evidence, signed her statement and added a declaration of truth. However, in addition to that further typed statement, for reasons that will be covered in the course of this judgment, I also gave her permission to draft in handwritten form, file and serve a further third statement which happened yesterday. There was then extremely limited focused evidence by each parent. That evidence was confined to the issue of consent and/or acquiescence.

THE LAW

Habitual Residence

14. The issue of habitual residence has been before the Supreme Court on five occasions, namely A v A (Children: Habitual Residence) [2013] UKSC 60; Re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening) [2013] UKSC 75, sub nom Re KL (A Child) (Abduction: Habitual Residence: Inherent Jurisdiction) [2014] 1 FLR 772; Re LC (Children) (Reunite International Child Abduction Centre intervening) [2014] UKSC 1, sub nom Re LC (Children) (Abduction: Habitual Residence: State of Mind of Child) [2014] AC 1038; Re R (Children) (Reunite International Child Abduction Centre and others

intervening) [2015] UKSC 35, sub nom Re AR v RN (Habitual Residence) [2015] 2 FLR 503 and Re B (A Child) (Habitual Residence: Inherent Jurisdiction) [2016] UKSC 4.

15. In Re B (A Child)(Custody Rights: Habitual Residence) [2016] EWHC 2174 (Fam), [2016] 4 W.L.R. 15 Hayden J at paragraph 17 very helpfully summarises the outline of the principles from the leading authorities on habitual residence as follows:

> "i) The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (A v A adopting the European test).
>
> ii) The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual enquiry must be centred throughout on the circumstances of the child's life that is most likely is most likely to illuminate his habitual residence A v A).
>
> iii) In common with the other rules of jurisdiction in Council Regulation (EC) No 2201/2003 ("Brussels IIa") its meaning is 'shaped in the light of the best interests of the child, in particular on the criterion of proximity'. Proximity in this context means 'the practical connection between the child and the country concerned': A v A, para 80(ii); In re B, para 42, applying Mercredi v Chaffe (Case C-497/10PPU) EU:C:2010:829; [2012] Fam 22, para 46 .
>
> iv) It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (Re R).
>
> v) A child will usually but not necessarily have the same habitual residence as the parent who care for him or her (Re C). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration.
>
> vi) Parental intention is relevant to the assessment, but not determinative (Re L, Re R and Re B).
>
> vii) It will be highly unusual for a child to have no habitual residence. Usually a child loses a pre-existing habitual residence at the same time as gaining a new one ((Re B).
>
> viii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resides before the move (Re B, see in particular the guidance at para 46).
>
> ix) It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there though (Re R and earlier in Re L and Mercredi).

x) The relevant question is whether a child has achieved some degree of integration in social and family environment; it is not necessary for a child to be fully integrated before becoming habitually resident (In re R) (emphasis added).

xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (article 9 of Brussels IIA envisages within three months). It is possible to acquire a new habitual residence in a single day (A v A ; Re B). In the latter case Lord Wilson JSC referred (para 45) to those "first roots " which represent the requisite degree of integration and which a child will " probably " put down " quite quickly " following a move.

xii) Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (Re R).

xiii) The structure of Brussels IIa, and particularly Recital 12 to the Regulation, demonstrates that it is in a child's best interests to have an habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence; As such, "if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former. (Re B supra)".

16. In Re M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention) 2020 EWCA Civ 1105 Moylan LJ endorsed the summary that I have just set out, but suggested that the point of (vii) should be omitted as it might distract the court from the essential task of analysing the situation of the child.

17. In the case of Re C and Another (Children) (International Centre for Family Law, Policy and Practice Intervening) [2018] UKSC 8; [2018] 1 FLR 861 Lord Hughes said the following:

"[11] In the simple paradigm case of wrongful removal, one parent will have taken the child from the State where s/he is habitually resident to a destination State. Similarly, in the simple paradigm case of wrongful retention, one parent will have travelled with the child from the State of habitual residence to the destination State, for example for an agreed fortnight's holiday (and thus without the removal being wrongful), but will then wrongfully have refused to return. In each of those paradigm cases, the child will have remained habitually resident in the home State. An application under the Abduction Convention will be made in the destination (or 'requested') State for the return of the child to the State of habitual residence. The return will be a summary one, without investigation of the merits of any dispute between the parents as to custody, access or any other issue relating to the upbringing of the child (Art 16). Such merits decisions are for the courts of the State of the child's habitual residence.

> [12] In some cases, however, it is possible that by the time of the act relied upon as a wrongful removal or retention, the child may have acquired habitual residence in the destination State. It is perhaps improbable in the case of removal, but it is not in the case of retention. It may particularly happen if the stay in the destination State is more than just a holiday and lasts long enough for the child to become integrated into the destination State. It is the more likely to happen if the travelling parent determines, however improperly, to stay, and takes steps to integrate the child in the destination State. Even in the case of wrongful removal, it may be possible to imagine such a situation if, for example, there had been successive periods of residence in the destination State, followed by a removal from the State of origin which infringed the rights of custody of the left-behind parent".

Consent/Acquiescence

18. The leading case in relation to consent is Re P-J (Children) [2009] EWCA Civ 588. The court bears in mind, in particular, the contents of paragraph 48 in the judgment of the Court of Appeal:

> "48. In my judgment the following principles should be deduced from these authorities.
>
> (1) Consent to the removal of the child must be clear and unequivocal.
>
> (2) Consent can be given to the removal at some future but unspecified time or upon the happening of some future event.
>
> (3) Such advance consent must, however, still be operative and in force at the time of the actual removal.
>
> (4) The happening of the future event must be reasonably capable of ascertainment. The condition must not have been expressed in terms which are too vague or uncertain for both parties to know whether the condition will be fulfilled. Fulfilment of the condition must not depend on the subjective determination of one party, for example, "Whatever you may think, I have concluded that the marriage has broken down and so I am free to leave with the child." The event must be objectively verifiable.
>
> (5) Consent, or the lack of it, must be viewed in the context of the realities of family life, or more precisely, in the context of the realities of the disintegration of family life. It is not to be viewed in the context of nor governed by the law of contract.
>
> (6) Consequently consent can be withdrawn at any time before actual removal. If it is, the proper course is for any dispute about removal to be resolved by the courts of the country of habitual residence before the child is removed.
>
> (7) The burden of proving the consent rests on him or her who asserts it.
>
> (8) The enquiry is inevitably fact specific and the facts and circumstances will vary infinitely from case to case.

(9) The ultimate question is a simple one even if a multitude of facts bear upon the answer. It is simply this: had the other parent clearly and unequivocally consented to the removal?"

19. The leading case on the meaning of consent or acquiescence remains with the House of Lords authority of Re H (Abduction: Acquiescence) [1998] AC 72, [1997] 1 FLR 872. The following principles can be extracted:

(1) The burden of proof whether the wronged parent had consented lies on the abducting parent.

(2) The court is looking to the subjective state of mind of the wronged parent to ask whether he has in fact consented to the continued present of the child in the jurisdiction to which the child had been abducted. Acquiescence is a question of the actual subjective intention of the wronged parent, not the outside world's perception of those intentions. The question whether the wronged parent has acquiesced in the removal or retention of the child depends upon his actual state of mind.

(3) In the ordinary case, the court has to determine whether, in all the circumstances of the case, the wronged parent has in fact gone along with the wrongful abduction.

(4) The only exception to "the ordinary case" is "where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires the wronged parent to be held to have acquiesced.

20. In the Court of Appeal case of Re L and S [2017] EWCA Civ 2177, McFarlane LJ (as he then was) said this:

"40. In relation to acquiescence, both parties, in common with the judge, acknowledge that the leading authority remains that of Re H and, in particular, the leading judgment of Lord Browne-Wilkinson who (at page 88d) described the position that applies in all cases, save for the one "exception" that he went on to identify, on the following basis: "In my judgment, therefore, in the ordinary case the court has to determine whether in all the circumstances of the case the wronged parent has, in fact, gone along with the wrongful abduction. Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions."

41. Lord Browne-Wilkinson then went on to describe "the exception" (at page 89):

"It is a feature of all developed systems of law that there are circumstances in which one party, A, has so conducted himself as to mislead the other party, B, as to the true state of the facts. In such a case A is not allowed subsequently to assert the true facts as against B. In English law, this is typically represented by the law of estoppel but I am not suggesting that the rules of English law as to estoppel

should be imported into the Convention. What is important is the general principle to be found in all developed systems of law.

It follows that there may be cases in which the wronged parent has so conducted himself as to lead the abducting parent to believe that the wronged parent is not going to insist on the summary return of the child. Thus the wronged parent may sign a formal agreement that the child is to remain in the country to which he has been abducted. Again, he may take an active part in proceedings in the country to which the child has been abducted to determine the long-term future of the child. No developed system of justice would permit the wronged parent in such circumstances to go back on the stance which he has, to the knowledge of the other parent, unequivocally adopted: to do so would be unjust.

Therefore in my judgment there are cases (of which in Re A.Z (a Minor) (Abduction: Acquiescence) [1993] 1 FLR 682 is one) in which the wronged parent, knowing of his rights, has so conducted himself vis-à-vis the other parent and the children that he cannot be heard to go back on what he has done and seek to persuade the judge that, all along, he has secretly intended to claim the summary return of the children. However, in my judgment these will be strictly exceptional cases. In the ordinary case behaviour of that kind will be likely to lead the judge to a finding that the actual intention of the wronged parent was indeed to acquiesce in the wrongful removal. It is only in cases where the judge is satisfied that the wronged parent did not, in fact, acquiesce but his outward behaviour demonstrated the contrary that this exceptional case arises.

My Lords, in my judgment these exceptional circumstances can only arise where the words or actions of the wronged party show clearly and unequivocally that the wronged parent is not insisting on the summary return of the child: they must be wholly inconsistent with a request for the summary return of the child. Such clear and unequivocal conduct is not normally to be found in passing remarks or letters written by a parent who has recently suffered the trauma of the removal of his children. Still less is it to be found in a request for access showing the wronged parent's desire to preserve contact with the child, in negotiations for the voluntary return of the child, or in the parent pursuing the dictates of his religious beliefs."

Later, when setting out his conclusions in summary form, Lord Browne-Wilkinson said:

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

21. In the Court of Appeal case of P v P (Abduction: Acquiescence) [1998] 2 FLR 835, Ward LJ said:

"I deal with two live issues. First consent. The parties agree that the onus is on the mother to establish this, that it should be shown in a manner similar to that which is required now for acquiescence in light of the House of Lords decision in Re H (Abduction: Acquiescence) [1998] AC 72…… The task of the court is to find as a

fact whether the father subjectively intended to and did give unconditional consent to the removal of the child."

22. I refer next to Pauffley J's judgment in Re D (A Child) (FD) [2016] 937 who summarised the law of consent in the following passage:

> "55. When I consider the issue of "consent" I remind myself of the key passages from Re P-J (Children) (Abduction: Consent) [2009] EWCA Civ 588, sub nom Re P-J (Abduction: Habitual Residence: Consent) [2009] 2 FLR 1051. As relevant here, they might be summarized as follows. Consent to the removal of the child must be clear and unequivocal. The burden of proving the consent rests on him or her who asserts it. The inquiry is inevitably fact-specific and the facts and circumstances will vary infinitely from case to case. The ultimate question is a simple one even if a multitude of facts bear upon the answer. It is simply this – had the other parents clearly and unequivocally consented to the removal?"

Article 13(b)

23. The leading authorities on this exception are the two Supreme Court decisions in Re E (Children: Custody Appeal) [2011] UKSC 27 and Re S (A Child) (Abduction: Rights of Custody) [2012] UKSC 10.

24. In Re S, the Supreme Court repeated and stressed the approach taken in Re E. The terms of Article 13(b) are plain, require neither elaboration nor gloss and by themselves demonstrate the restricted availability of the defence and where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk the child would be exposed to physical or psychological harm or otherwise placed in an intolerable position. If so, the court must then ask how the child can be protected from that risk. If the evaluation of the protective measures fails to meet the identified grave risk, the court may have to do the best it can to resolve the disputed issues of fact.

25. The relevant test has been summarised by McDonald J in MB v TB (Art 13 Alleged Risk of Oppressive Litigation) [2019] EWHC 1019 (Fam) as follows:

> "31. The law in respect of the defence of harm or intolerability under Art 13(b) was examined and clarified by the Supreme Court in Re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 AC 144. The applicable principles may be summarised as follows:
>
> 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) Where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation would become intolerable the court will look very critically at such an assertion and will, among other things, ask if it can be dispelled. However, in principle, such anxieties can found the defence under Art 13(b).

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.

33. As I have noted above, the burden of proof rests upon the mother to make out her case and establish the particulars of that part of the Art 13 exception she relies upon."

26. Moylan LJ subsequently stated in A (Children) (Abduction: Article 13(b)) [2021] EWCA Civ 939 as follows:

"94. In the Guide to Good Practice, at paragraph 40, it is suggested that the court should first "consider whether the assertions are of such a nature and of sufficient detail and substance, that they could constitute a grave risk" before then determining, if they could, whether the grave risk exception is established by reference to all circumstances of the case. In analysing whether the allegations are of sufficient detail and substance, the judge will have to consider whether, to

> adopt what Black LJ said in In re K, "the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an article 13(b) risk". In making this determination, and to explain what I meant in In re C, I would endorse what MacDonald J said in Uhd v McKay [2019] EWHC 1239 (Fam); [2019] 2 FLR 1159, para 7, namely that "the assumptions made by the court with respect to the maximum level of risk must be reasoned and reasonable assumptions" (my emphasis). If they are not "reasoned and reasonable", I would suggest that the court can confidently discount the possibility that they give rise to an article 13(b) risk".

27. The court also bears in mind the HHCH guide to Article 13(b) which provides the following:

> "Specific protective measures should only be put in place where necessary strictly and directly to address the grave risk. They are not to be imposed as a matter of course and should be of a time limited nature that ends when the state of habitual residence of the child is able to determine what, if any, protective measures are appropriate for the child." [Paragraph 44]
>
> "The court is not to embark on a comparison between the living conditions that each parent or each State may offer. This may be relevant in a subsequent custody case but has no relevance to an Article 13(1)(b) analysis. More modest living conditions and/or more limited developmental support in the State of habitual residence are therefore not sufficient to establish the grave risk exception. If the taking parent claims to be unable to return with the child to the State of habitual residence because of their difficult or untenable economic situation, eg because his or her living standards would be lower, he/she is unable to find employment in that State or is otherwise in dire circumstances, this will usually not be sufficient to issue a non-return order."

Discretion

28. In the event that a party establishes a defence pursuant to Article 13(b) then the Court's discretion arises in relation to whether nonetheless to order the Child's return. I bear in mind the House of Lords decision in Re M and Another (Children) (Abduction: Rights of Custody) [2007] UKHL 55, [2008] AC 1288, is the authoritative statement of the case relating to exercise of discretion in Convention cases when exceptions under Article 12 or 13 have been established. The leading opinion of Baroness Hale held that earlier decisions which sought to import an additional gloss into the Convention by requiring a test of exceptionality to be met in addition to finding that one of the Article 12 or 13 exceptions applies were wrong. In Hague Convention cases, general policy considerations may be weighed against interests of children.

Witness assessment

29. I have referred to the parties having given evidence and, ordinarily, I would at this stage in the summary of the law set out the relevant authorities that direct the court on its approach to assessing the reliability of parents giving evidence. In fact, for reasons that will become clear, that analysis is not necessary as part of this judgment.

BACKGROUND

30. The parties married in 2009 in the UK, having met in 2004. K was born to the parents whilst they were living in the UK. The parents then relocated to South Africa in 2016, but thereafter travelled back and forth between the two countries as they had done previously. When they relocated to South Africa in 2016, at that point K was four years old. He was enrolled in a school in South Africa on their arrival.

31. Whilst the parents relocated in 2016, it is clear on any view of the evidence, that they retained significant links to the UK. They retained a property in S [City in the UK] where, as I have just indicated, the mother is currently residing. After they relocated, they regarded this as an investment property in that it was rented out. They also have a company registered in this country, namely "F. H. Ltd", which is, as I understand it, based in E [area in the UK] in H [county in the UK].

32. The parties had a family home in E [city in South Africa] and the parties have a company there as well. On my understanding this is "F.K", which is a business that provides [x] services.

33. The parents have travelled internationally between this country and South Africa, and in fact, S was born in S [city in the UK] in 2018.

34. The mother has very significant links to South Africa. As indicated earlier, she has citizenship of that country. She has members of her family residing there, including her mother, who at times was living near to the mother.

35. There are significant issues between the parties. It seems on any view there were problems in the relationship in the first half of 2021. The evidence indicates that the mother wished to relocate to the UK at that time, in part for professional reasons. I digress to note that the mother is, by profession, a qualified social worker. The father was resistant to relocation. It would appear from the evidence that has been filed that this was the catalyst for the development of a degree of disharmony between them.

36. The precise date of the end of the parties' relationship or marriage is unclear. It seems likely that the marriage had effectively and irreconcilably broken down by the spring of 2021. By September of 2021 the mother issued an application in the High Court in South Africa in relation to the children, effectively seeking permission to relocate with them to the UK (or more precisely the jurisdiction of England and Wales).

37. Again whilst there are issues relating to the end of the relationship between the parties, it is apparent from the evidence that the mother removed the children from the family home in E [city in South Africa] in November 2021 and moved with them to her mother's home in a different part of the city. Initially there was no contact between the children and the father. That said, K returned to the father within days of this move in November 2021.

38. Then in December 2021, the mother came to the UK alone, leaving the child with the maternal grandmother. At that point, K was with the father in his home. Mother went to the parties' property in S [city in the UK]. Then in March 2022 the mother returned to South Africa. She attended at K's school on 7 March 2022. I will deal with this event in a little more detail in a moment.

39. Mother moved the child from South Africa on 13 or 14 March 2022. The precise date for removal in the papers is very unclear. The father case refers to a timeframe between 13 and 24 March 2022. However, in the course of oral evidence the court was told that the date the child was brought to this jurisdiction was either the 13 or the 14 March 2022. Therefore, on the father's case, it is on one of those two dates that the wrongful removal of the child took place.

40. When the mother arrived back in this jurisdiction, she travelled with the child to the property in S [city in the UK] where she was also joined by her elder daughter by an earlier relationship. There was a period when there was unfortunately no contact between the child and father, and for that matter between K and the mother. However, more positively, since the hearing before Newton J indirect contact by video platform has been taking place between the child and father and also between K and the mother.

HISTORY OF RELEVANT EVENTS IN SOUTH AFRICA

41. As anticipated a moment ago, I am now going to set out in greater detail the events relating to the litigation in South Africa and relevant associated events.

42. The mother, as I have indicated already, commenced proceedings in the High Court in South Africa in September 2021. In those proceedings mother sought, on this court's understanding, permission to remove both children permanently from South Africa to this jurisdiction on an urgent basis. Father resisted that application. The court has, in the supplementary bundle, evidence that was filed both in support of that application by the mother [Supplementary Bundle: A-1 to 3] and the evidence in response by the father [Supplementary Bundle: A-34 to 94].

43. The High Court in South Africa directed a number of enquiries in relation to the issues raised in that litigation which involved a family advocate and a family counsellor. These two child professionals completed their enquiries. Each of them filed a report. Both reports are dated 28 October 2021 [Supplementary Bundle: A-14 to 33].

44. The recommendations of those child professionals reporting to the High Court in South Africa related to whether that the children should remain in that country. I digress at this point to note that the mother's "urgent" application was ultimately unsuccessful. However, it would appear that the order [Supplementary Bundle: A-95] dismissing the mother's application was not made until 18 May 2022.

45. Returning to the chronology, following the commencement of the proceedings by the mother in 2021, there were a number of other significant events 'on the ground'. As I have mentioned already, the mother removed the children from the family home in November 2021, relocating them to the maternal grandmother's home in a different part of the city. This seems to have taken place on 19 November 2021.

46. There was a significant incident between the parents on 25 November 2021 at the family home. The context appears to have been the mother wishing to remove further items from the family home. The father alleges that he was assaulted by the mother. The mother makes cross-allegations. The police were involved in relation to that

incident and an investigation was undertaken. Ultimately, no charges were brought in relation to either parent.

47. As I have indicated, K returned home to father shortly after the earlier arrangements for him to live with mother at her mother's home. On the court's understanding, he had returned home by 25 November 2021.

48. There was then another alleged incident at the family home on 14 December 2021 and again the court has details of the evidence on both sides in relation to that allegation.

49. The mother applied for a protection order, which is an order in the nature of a restraining order, in South Africa. It is clear that this court does not have all of the documentation in relation to that application in the supplementary bundle. However, in the course of submissions to the court, it was agreed that there was an interim protection order made in favour of the mother in December of 2021. That order continued until 19 January 2022. However, the order was set aside on that date. By then, the mother was in this jurisdiction, having left South Africa in the latter part of December 2021.

50. There is also in the supplementary bundle an indication that the father also had a protection order granted in his favour, but there is no copy of that order (if there was one) before this court.

51. Following the incidents in November and December of 2021, there appears to have been a degree of movement 'on the ground' between the parties. The court has seen correspondence that was exchanged between the parties' solicitors at that time. K was still with the father. He was seeking the return of the child to his care as well. No agreement was forthcoming.

52. By the end of 2021, as I have indicated, there was a significant change. The father had earlier in the autumn of 2021 opposed the mother's application for permission to relocate the children to this country. However, by the end of 2021 the father indicated his willingness to "compromise" and to relocate with the children to the UK after all. In the core bundle there are records of contemporaneous communication which indicate that by the end of 2021 or early 2022, that was the position. I have in mind the following sources of contemporaneous communication:

    i) An email dated 24 December 2021 [Core Bundle: C-256];

    ii) An email from the father to the school with a notice of termination of K's placement at his school on 17 January 2022 [Core Bundle: C-263];

    iii) An email by the father to a person called D.P. in January 2022 [Core Bundle: C-259]; and

    iv) An email from the father to his solicitors on 17 January 2022 indicating he intended to leave on 18 February 2022 [Core Bundle: C-264].

53. There was also an exchange of correspondence between attorneys acting for the parents as to "arrangements as to how the children would be relocated to the United Kingdom" but there was in the correspondence that I have seen ultimately no agreement between the parents.

54. The father then issued an application himself in the High Court in South Africa on 11 February 2022 in relation to the children. The terms of the order that he sought are set out in the affidavit that he submitted in support of that application [Supplementary Bundle: B-45]. At that point, he was seeking the return of the child to him, orders in relation to travel documents for the children and permission to him to relocate with the children to this jurisdiction.

55. In essence, his case in relation to this change of stance on this part, which is reflected within the contemporaneous documentation, is that he felt that he effectively had been forced to compromise with the mother to relocate the children to this jurisdiction but he was seeking to do so effectively on his terms, namely that the children would be allowed to relocate with him and the mother but with them living apart and with the children to live with him.

56. That is why on his case, which in my judgment is borne out by the totality of the evidence relating to this point, that he sought permission from the High Court in South Africa for leave for him, not mother, to relocate with the children to the UK (or again more precisely to the jurisdiction of England and Wales).

57. What happened following the issue of the application was that an order, which is described in the local documentation as a "rule nisi", was made on 24 February 2022. The order was made in the terms sought by the father that I have already summarised [Supplementary Bundle: B-95]. The High Court in South Africa ordered, amongst other points, for the child to be returned to the father's care and for permission to be granted to him to relocate with the children to this jurisdiction. As I have said, that was described as a rule nisi, which had a return date, on this court's understanding, of 15 March 2022.

58. That leads me to the events that occurred after the making of that rule nisi. According to the contemporaneous documentation in the supplementary bundle, the father's attorneys had asserted that they had difficulty properly serving the mother with that order. However, what is clear on any view is that the mother, as I have mentioned already, returned to South Africa in the early part of March and it may well have been on 7 March 2022. On that day, as indicated, she attended at K's school at about 8.30am [Supplementary Bundle: B-155; Core Bundle: C-124].

59. The course of emails from the school indicates that the mother reportedly attended at the school in order to remove K for him to see an education psychologist; certainly that was the information from the school. There may well be issues in relation to this particular visit, but it appears to be agreed by the mother that she did attend at the school that day and that the school was disinclined to allow her to remove K. There are also in the documentation issues as to whether the school was informed whether there was an order in place in relation to K. However, as I say, there is no issue about the fact the mother attended at the school. She says so in terms in her statement in these proceedings [Core Bundle: C-142].

60. The next, and in my judgment, significant development was that the mother issued what is described as *'an urgent application'* within the proceedings that had been commenced by the father in the High Court in South Africa in February 2022. If they were not issued as part of those proceedings, they were certainly consolidated with the ongoing proceedings. The precise procedural '*niceties*' are not entirely clear.

61. It is clear that an application was made by the mother and the terms of her application are set out within an affidavit that she deposed to and filed in the High Court in South Africa [Supplementary Bundle: B-98]. Mother instructed attorneys at that time. Indeed, there is confirmation of attorneys coming onto the court record on 7 March 2022 [Supplementary Bundle: B-125].

62. In the mother's affidavit, she referred to what she described as "the parties' common intention" for the children to relocate to this jurisdiction. The purpose, then, of her urgent application is set out at paragraph 8 of her affidavit [Supplementary Bundle: B-1]. She was effectively seeking to return with the children to this jurisdiction as a matter of urgency and was inviting the court to direct that the father to accompany her and the children. She was also seeking for the court to bring forward the return date of the rule nisi on 15 March to 9 March to allow her to return to this jurisdiction earlier.

63. This also seems to be what is set out in what must be a draft order [Supplementary Bundle: B-113 to 114] which I am satisfied must have been filed by the mother's attorneys, but it is not completed. I digress to note that the proposed date of return was meant to be 12 March 2022, but there is also reference to the mother potentially returning to the jurisdiction on 13 March 2022.

64. However, the position is, from the documentation that I have read, that the father was insistent that the child should be returned to him before he would leave to travel with them to this jurisdiction. There is an email from the father's attorney to the mother's attorney on 8 March 2022 which confirms the position that I have just set out [Supplementary Bundle: B-119].

65. The father also confirmed via communication from his attorney in an email on 8 March 2022 that he was not prepared to relocate at short notice in the terms sought by the mother. There is reference to him suggesting that they could relocate on a later date, namely 30 April 2022 [Supplementary Bundle: B-121]. The father was also continuing to seek the return of the children's travel documents to him.

66. That was the run-up to the father's more formal response to the mother's urgent application. The father did formally respond to the application by way of an affidavit [Supplementary Bundle: B-135]. In his affidavit in response, it is clear that the father was opposing the mother's urgent application and there are various reasons for that opposition.

67. No doubt on advice of his lawyers, he was within that affidavit asserting procedural irregularities on the part of the mother's attorneys concerning the application. The affidavit also referred to concerns the father had about the mother's attendance at K's school on 7 March 2022. He also took factual issue in relation to a number of points set out in the mother's affidavit in support of the urgent application.

68. At paragraph 25 in his affidavit in response [Supplementary Bundle: B-145] the father says this:

> "It need be noted that I am not willing to appease L's [i.e. mother] unreasonable demands to vacate South Africa almost immediately due to her unreasonable and illogical conduct which would be to the detriment of our minor children's interests."

69. He later indicated at paragraph 30 of that same affidavit that, whilst he remained in principle willing to relocate to compromise with mother, he was effectively unhappy that she was looking to expedite the process in circumstances in which he felt were not in the children's interests [Supplementary Bundle: B-147].

70. Therefore, I am satisfied from what I have read from the relevant court documentation, and from contemporaneous messages around that period, that the father was plainly opposing the mother's urgent application to allow the children to relocate to this jurisdiction. I am also satisfied that the mother clearly knew that the father was opposing her application because this was stance in the father's affidavit in response to her application, she had attorneys on record representing her in terms of her urgent application and, lest there be any doubt about this, she confirmed the same in her own statement filed in these proceedings in paragraph 56 [Core Bundle: C-152] wherein she indicates that she knew the father was opposing her application.

71. I am satisfied, for the reasons I have just set out, that the order that was made on 9 March 2022 [Supplementary Bundle: B-166], the mother knew that her urgent application was dismissed with costs on 9 March 2022 and, as I say, I am entirely satisfied she was aware that her application had been unsuccessful. I have every reason to suppose that she became aware of that outcome on that day, namely 9 March 2022.

72. We therefore move to events that occurred following the dismissal of the mother's urgent application on 9 March 2022. The father makes allegations that he was a victim of a number of threats from the mother and her friends. He has provided evidence of a bullet that was delivered to him. The mother takes issue with those allegations. She has made no admissions and I am not going to make any findings in relation to this aspect.

73. The mother in her typed statement that was filed earlier this week referred to some telephonic communication with the father and in the course of submissions yesterday there was an assertion that the father, notwithstanding the events in court on 9 March 2022, had in fact consented to the children relocating to this jurisdiction.

74. The mother was also keen to refer to the email communication that I have summarised indicating the father's stance about compromising and agreeing to the children coming to this jurisdiction. However, it became clear that the mother was asserting that there was further purported consent by the father after 9 March 2022. I therefore gave the mother permission to file a further statement. This is the third statement that I mentioned earlier, which was drafted in her own hand and filed. In that further statement, the mother said that she had spoken to the father's brother, Mr F.J, on 9 March 2022 and, as part of that conversation, she says that her brother-in-law confirmed that the father would be making arrangements for the children to leave South Africa.

75. I digress to note that, in her earlier statement the mother does deal in part with reference to a 'Spider-Man' party, which is also a reference point in this further third statement. However, in the first statement filed in these proceedings there is no reference to a conversation with her brother-in-law.

76. Then in the further third statement by the mother, she asserts that on either 10 or 11 March 2022, one or two days after the order dismissing her urgent application on 9 March 2022, she spoke to her brother-in-law again. She refers in the statement to a discussion about setting up a meeting for the father to say goodbye to the child.

77. Later, according to the statement, the mother says that the father would not attend a meeting, that he reported again through her brother-in-law a fear that a meeting was a trap. However, according to her, the father said through his brother to her that she could leave with the child, do effectively as she saw fit and that he, the father, did not care.

78. That account then led to the court acceding to a direction that required the parties to give limited oral evidence in relation to the events of 9, 10 and 11 March 2022. Let me therefore summarise briefly the evidence.

79. Whilst father accepted that his brother Mr F.J. had acted at times as a form of mediator, he denied telling his brother that he could tell the mother that she could leave with the child.

80. The mother gave evidence. She confirmed her account, as per her third statement, was accurate.

81. At this point I digress to comment that counsel for the father properly, in my judgment, ultimately did not invite the court to make findings in relation to the factual issues that arise. He makes the pertinent point that the court does not have all of the evidence in relation to this set of issues, that the brother has not provided a statement and therefore has not given any evidence.

82. As I have indicated already, the mother then left South Africa with the child on 13 or 14 March 2022. The father's evidence is that he was not aware immediately that this had occurred. The father's evidence indicates that he was speaking to a person described as "a church leader" on 21 March 2022 and, in the course of that conversation, he then became aware that the mother had left South Africa with the child. It is his case that, after becoming aware of what had happened, he made enquiries of friends living in S [city in the UK] and discovered that the mother had relocated to the family home there. He also shortly thereafter reported the child's removal to a number of agencies in South Africa.

83. Let me then just deal, by way of completeness, with other events that followed in South Africa from this point onwards. The mother's application, as I have mentioned, which was commenced in the Autumn of 2021, reached a final determination on 8 May 2022. Her application was dismissed.

84. The proceedings commenced by the father in February 2022 continued and an order was made on that application on 3 June 2022 [Supplementary Bundle: B-167]. Amongst other provision, the order provides for the residence of the children with the father. The court in South Africa directed the mother to return the child to his care. Provision was also made relating to travel documentation concerning the children in favour of father. Alternative ancillary provision was also provided that, if such documents were not provided, the forms were to be signed on behalf of the mother.

Leave was given to the father to remove the children from South Africa to this jurisdiction. Costs were payable by the mother.

85. The father's case in relation to the provision for him to have leave to relocate with the children from 3 June 2022 is essentially that this was on a provisional basis so that he has that permission in place should he decide that he wishes to relocate in the future. However, I again emphasise that that is an order which is in his favour rather than the mother's favour.

86. The mother says that she has sought to appeal that order of 3 June 2022 and that her lawyers are waiting for a hearing in relation to an appeal. The father in his evidence asserts that his attorneys in South Africa are not aware of any appeal. Again I do not make any finding in relation to that aspect and, in my judgment, I do not need to do so.

SUMMARY OF FATHER'S CASE

87. By way of general background, as I have indicated already, the father makes a number of allegations against the mother in the nature of abusive behaviour and alleged violence by her and those connected with her. There has been no forensic examination of those allegations and there are no findings in relation to them in this judgment.

88. Turning to the father's application in relation to the summary of return of the child, it is firstly accepted that he is seeking an order in relation to a child who is aged less than 16 years. It is the father's case that he had rights of custody with respect to the child and was exercising those rights at the time of her removal in March 2022. He also refers through counsel to seeking to exercise those rights in the order that was made by the High Court in South Africa on 24 February 2022.

89. There has been no argument advanced by the mother in relation to the father having such rights of custody.

90. It is father's case, as set out in the evidence filed, that the child was habitually resident in South Africa immediately before her removal to this jurisdiction. In support of that submission he relies upon, through argument by counsel, that both parties engaged in litigation in the High Court in South Africa in relation to the two children, thereby arguably indicating that both parents accepted that the court there had jurisdiction founded on habitual residence to make orders in relation to the children.

91. In addition, the father through counsel, and in his own evidence, makes reference to a number of other points in support of the child being connected with South Africa.

92. The mother, in the course of earlier submissions to the court, did seek to associate herself with an argument that, due to the child's age, as her mother and primary carer from birth, the child had the same habitual residence as herself at the time she was removed to this country. However, by the end of the submissions, it was certainly my understanding the mother accepted the force of the argument that had been presented on behalf of the father in relation to habitual residence.

93. Lest there be any doubt in relation to this aspect, I will deal briefly in relation to habitual residence at this point in the judgment. I am satisfied that the child was

habitually resident in South Africa immediately before her removal to this jurisdiction. I endorse the submission that the fact the parties engaged in litigation in the High Court in Africa is, in and of itself, significant evidence that both parties accepted at that point that the child was habitually resident there.

94. In my judgment, there are compelling additional aspects of the child's circumstances and life history to date to persuade this court that she was habitually resident in South Africa. I deal with them in fairly short order:

i) The child has spent the majority of her life there;

ii) The child's father and her brother were at the time of removal resident there;

iii) The child is a citizen of South Africa;

iv) The child has extensive maternal family members living in South Africa;

v) It does not seem to be in dispute that the child had been placed in a nursery school in South Africa. The point is also made by the father, which in my judgment is likely to be correct, that she had a cohort of friends both in and outside of her nursery school in South Africa;

vi) The child is registered with a doctor in South Africa.

95. I am satisfied that these features of the child's life taken together amount to compelling confirmation that she was habitually resident in South Africa at the time she was brought to this jurisdiction.

96. Turning, then, to the remainder of the father's case:

i) There was a wrongful removal by the mother of the child to this jurisdiction on 13 or 14 March 2022 for the purposes of Article 3 of the Convention;

ii) He disputes that he gave his consent for the mother to remove the child from South Africa to this jurisdiction at the time that the removal took place and that he has not acquiesced in relation to that removal thereafter;

iii) He does not accept the allegations the mother makes of domestic abuse in relation to him and does not accept the concerns that the mother expresses that he will face deportation from South Africa in the immediate future and therefore disputes the mother's claim in relation to Article 13(b);

iv) In the alternative, in the event that the court finds that a defence in accordance with Article 13(b) is made out, then the father through counsel invites the court to exercise its discretion to nevertheless return the child to South Africa.

SUMMARY OF MOTHER'S CASE

97. By way of general outline, the mother has made a number of allegations against the father but, as I have indicated already, there has been no forensic evaluation of those allegations. There will be no findings. I will deal at the appropriate juncture with the

court's approach to those allegations when I deal in more detail with the Article 13(b) defence.

98. There is no suggestion, nor could there be, that the mother was seriously advancing any argument about the father's rights of custody.

99. I have already dealt with the position in relation to habitual residence when setting out the summary of the father's case.

100. Turning to the substantive case advanced by the mother, she asserts that this was not a wrongful removal in accordance with Article 3. It is her case that the High Court in South Africa had specifically permitted the removal of the family, including the child, who was removed in March 2022.

101. In the alternative, but also linked in many ways with her case on Article 3, she asserts that the father did consent to the removal of the child in that the father had himself sought permission for the child to be relocated to this jurisdiction.

102. The mother appeared to accept that the father had not, though, thereafter acquiesced and I will deal shortly with acquiescence in due course.

103. Further, or in the alternative, the mother seeks to rely upon Article 13(b) grave harm and that it would be intolerable for the child to return to South Africa. There are two limbs to that aspect of her defence:

    i) She asserts that the father is essentially present illegally in South Africa as he is there pursuant to a spousal visa and that it is likely he is going to be deported. She continues that it would be wrong and potentially intolerable for the child to be returned to a country where the father would face a risk of deportation;

    ii) She asserts that she has been the victim of domestic abuse and domestic violence, that she is not able to return for fear that such a course of conduct would happen to her in the future and that the protective measures that are proposed are insufficient. Indeed, her position at the moment is that if the court orders the child's return to South Africa, she will not go with her.

104. By way of amplification to this aspect of the case, the mother referred in her evidence and her submissions to this court about the impact on her capacity to parent the child, the impact arising out of her exposure to a dysfunctional relationship and thereby the impact on the child through the impairment of her parenting capacity in the event that she were made to return to South Africa and choose to go.

105. In relation to that point, it is right that I note, for completeness, that in the documentation filed in these court proceedings there is a suggestion that there was to be a Part 25 application on behalf of the mother by her then-solicitors for a psychologist to explore this limb of the mother's case. This is reflected in the order made in September 2022. However, there has been no such application. It follows there is no such expert evidence before the court.

106. Let me then deal with each of the mother's specific purported exceptions.

REMOVAL NOT IN BREACH OF ARTICLE 3: COURT PERMISSION

Mother's case

107. It is the mother's case that the High Court in South Africa had permitted the removal of the child. The mother refers to the order of the High Court there on 24 February 2022 in support of her position. In her argument, she also seeks to set that order against the wider context of the father, over a period of time, confirming his willingness for the child to be relocated to the UK from South Africa. She refers in support to contemporaneous messages that I have summarised already earlier in this judgment and in terms of his application to the court which led to the order made by the Court on 24 February 2022.

108. In short, her understanding is that permission has been given by the court for the child to be removed. She also refers to the order that was made on 3 June 2022, which of course post-dates the child's removal, which has the clause within it relating to permission for the father to remove the children to England and Wales at that time. She seeks to bring this to the court's attention by way of further confirmation that the father has not opposed the removal of this child to this jurisdiction.

Father's case in response

109. Father's case on this point is as follows: He submits that the order of the High Court in South Africa on 24 February 2022 does not assist the mother in the way that she contends. He submits that the only conceivable construction of that order is that it allowed father, not mother, permission to remove the children from South Africa to this jurisdiction.

110. The father, also by way of responding to this aspect of the mother's case, reminds the court through counsel of the specific extract of the chronology that I have summarised in some detail which led up to the dismissal of the mother's urgent application on 9 March 2022. This had the effect, on the father's case, of there being no permission for mother to remove the child from South Africa to this jurisdiction.

Determination

111. In my judgment, there is very considerable force in the father's submissions. I do remind myself of the extract of the chronology of the parties' litigation in the High Court in South Africa. The mother's application was dismissed by the court on 9 March 2022. The order that was made on 24 February 2022 was clearly, on its face, an order that ordered relief for the father and not the mother.

112. I am satisfied that there is no merit in the mother's defence that this was not an unlawful removal within the meaning of Article 3 of the Convention.

ARTICLE 13(a): CONSENT/ACQUIESCENCE

Mother's Case

113. The mother's case on consent is linked in part to her case on Article 3. She effectively again refers, in the context of this defence, to the history of father's willingness to compromise and for the children to be relocated to the UK, both in

terms of various contemporaneous messages and the application by the father seeking permission to remove the children that led to the order on 24 February 2022.

114. As I have referred to already when dealing with the background, there was a refinement to the mother's case in the course of submissions in that she was contending to the court that after 9 March 2022, on any view a significant date, she was asserting that she believed that the father had consented to the child's removal to the UK notwithstanding the dismissal of her application at court.

115. The mother refers again in the context of this point to the order made on 3 June 2022, which has the clause relating to permission for the father to relocate at that time by way of general reference to being potentially supportive of her position in terms of consent.

116. A specific point has been raised by the father in relation to the fact that a travel form that is required by the 'Border Force' in South Africa was not completed in relation to the removal of the child from the jurisdiction in March 2022. There is a blank version of that form [Core Bundle: C-182] and it is part of father's case, which I will come to in a moment, that that this form was not completed by the mother because she knew that she was not in a position to complete it.

117. In relation to that form, the mother's case is that she did not, on her understanding, have to complete that form because the child was "coming home" to her in the UK.

Father's case in response

118. The overarching introductory submission advanced on behalf of father through counsel is to remind the court that a parent can change his or her mind in relation to consent at any point up to the time of the removal of the child and that this submission is made because of course of the history that I have, hopefully, accurately described earlier on in this judgment from the end of 2021 up until the child was removed from the jurisdiction.

119. The point is well-made that consent can be removed at any point. That is a significant part of the father's case. Although there had also been reference by him in various messages to different people, including the mother, that he would compromise, in fact, he changed his mind and instructed his lawyers to oppose the mother's urgent application. His opposition was successful because her application was dismissed on 9 March 2022. His case is that he therefore clearly indicated to the mother that he was not consenting for the child to be removed from the jurisdiction at that time.

120. It is also part of his case that he did not tell his brother to tell the mother at any point that she could, effectively, do as she saw fit in relation to the child and to remove her.

121. However, in relation to that aspect of the case, I have indicated already the father through counsel does not ask the court to make findings in relation to the evidence. In particular, the father does not invite the court to find that the mother has manufactured an account in relation to this course of discussions with her brother-in-law.

122. I have already referred to the rationale underlying father's position. The court does not have all of the best evidence in relation to that particular issue in that the brother

has not given evidence, there being on the face of it, until yesterday, no reason for the father on the evidence that had been filed to approach his brother to secure a statement from him.

123. In relation to the order dated 3 June 2022 the father submits again that the order is essentially for his benefit, not the mother, on a provisional basis that it would be available to him should he choose to relocate the two children to this jurisdiction.

124. Also, as part of the father's case in response, it is submitted quite properly and correctly on his behalf that the burden is on the mother to show that he had consented to the removal. I have indicated in the review of the case law that the burden is to show that there was clear and unequivocal consent on his part that continued up to the point of removal. The father's case is that he did not consent or, in the alternative, the mother has failed discharge the burden on her to show that he had at the time consented.

125. As I have indicated, the father also refers to the blank form [Core Bundle: C-102] and asserts through counsel that it is not completed because the mother was not in a position to do so.

Determination

126. Once again, in my judgment, there is considerable force in the submissions advanced on behalf of the father. The burden is on the mother to show that there was clear and unequivocal consent on the part of the father operating at the time of the child's removal.

127. I am satisfied that the immediate context to the court order in the High Court of South Africa on 9 March 2022 is highly significant. From my summary, it is clear that the father was not consenting to the mother's application. As I have said already, I am satisfied the mother would have been aware the father was not consenting to her application. I am satisfied the mother was aware that the court refused her application on 9 March 2022.

128. I am also satisfied that counsel is right in submitting to me that, ultimately, it is not necessary to make findings in relation to the evidence that I have summarised from the mother and the father about conversations involving her and her brother-in-law. Counsel, in my judgment, makes the sound submission that, set against the context that I have just summarised, and the order that had been made on 24 February 2022, that it is incumbent upon the mother, on her case, not merely to accept what was indicated by a third party on behalf of the father, but to have clear and unequivocal confirmation that the parent, rather than the third party, was consenting.

129. I am satisfied that whatever took place in terms of the conversations between the mother and her brother-in-law, the father had not instructed his brother to consent in relation to the child being removed and I am, in the light of the evidence on this issue, satisfied that the mother has failed to discharge the burden that there was unequivocal consent from the father at the time she removed the child to this jurisdiction.

130. I have referred already to acquiescence as a further limb to this aspect of the mother's defence. As I have indicated, she did not pursue that in the course of her argument to

the court. She was candid enough to confirm that there had been no communication of any kind between the father and her after she returned to the jurisdiction with the child and no suggestion at all that, following the child's removal, the father indicated that he was willing to concede and accept the child's removal.

131. It is part of the father's case that his litigation conduct in South Africa following the child's removal is also, lest there be any doubt, confirmation that following removal he did not acquiesce.

132. On reflection, I do pause though to consider the relevant paragraph of the order of the High Court on 3 June 2022 which gives the father permission to relocate the children. However, I pause only momentarily in confirming that I am not in any way satisfied that this begins to suggest that this was an indication of acquiescence on his part in relation to the child's removal in March 2022. I am satisfied that, once again, as in relation to the order made on 24 February 2022, that was provision in his favour in relation to the removal of the children rather than any form of provision for the mother. I see no reason to reject the explanation that this was effectively provisional authorisation for him to move the children in the future if he so decides he wants to remove them.

ARTICLE 13(B): GRAVE HARM / INTOLERABILITY: IMMIGRATION STATUS

Mother's case

133. It is part of mother's case that the father is effectively now living in South Africa illegally, that he is there by virtue of a spousal visa and that she, as the spouse referenced in that spousal visa, is no longer living in South Africa.

134. The visa is copied within the bundle [Core Bundle: C-175] and, although it is not a good quality photocopy, what appears on the face of the document is an obligation on the father to reside with a South African citizen and not to work. As mother says there are sustainable concerns about the father's immigration status, it would be intolerable to place the child in jeopardy of being returned to father who then may be deported in the near future.

Father's case in response

135. By way of overarching submission, father through counsel makes the point that the burden in terms of advancing the defence is, once again, on the mother. He essentially submits that the concerns about this aspect on mother's case merely amount to contentions that she advances with implications in terms of his status and that he has placed evidence before the court of his immigration status.

136. I digress to remind myself that the court at the hearing in September 2022 directed him to place evidence before the court as to his status and the implications of mother no longer living in South Africa. He has done so within a statement and also by reference to the source email communication from his immigration lawyer about his status.

137. In summary, the father refers to the evidence that has been filed to suggest that there is no immediate consequence for him resulting from the mother no longer living in

South Africa, that his visa is valid until 23 August unless it is cancelled before that date, with cancellation said to be rare according to that lawyer.

138. As I indicated earlier, the visa itself requires the father to reside with a South African citizen. I have already referred to the dual nationality of both the children. It did cross the court's mind whether the father living with either or both of the children would in fact satisfy that requirement, but there is no evidence about that and so I do not proceed on that basis. What is in the bundle, which I note, is the reference in the advice from the immigration lawyer that the father can apply to change his status from that of a spousal relative to that of a parental relative [Core Bundle: C-190].

Determination

139. I am again satisfied that the mother has failed to discharge the burden on her in relation to advancing this part of her defence. She makes a number of assertions within her evidence. There is no independent evidence to substantiate the concerns. The court directed the father to provide evidence of his immigration status. He has done so. That evidence suggests that there is no immediate cause for concern and it would appear that there are options available to father to explore in terms of regularising his visa status following the mother's relocation to this country.

140. Furthermore and in any event, there may well be ongoing proceedings in the High Court in South Africa in relation to these children. On my understanding, it would be open to the mother to advance the case, if I return the child, for her to seek permission to relocate herself with the two children to this jurisdiction. Matters are not, in my judgment, finally settled in South Africa. I am satisfied that the principle that there is no such thing as a 'final' order in relation to any child applies in South Africa.

141. Insofar as there may be difficulties in relation to the father's immigration status, I am satisfied that these may arise in the future and should not cause this court a concern when considering making a summary return order.

ARTICLE 13(B): GRAVE HARM / INTOLERABILITY: DOMESTIC ABUSE

Mother's case

142. As I have indicated more than once, the mother has made a number of serious allegations of domestic abuse in terms of a course of conduct towards her as well as alleged domestic violence. She has told the court that she has also referred to these allegations in proceedings in South Africa.

143. Digressing for a moment, the father makes the point that none of the allegations that are set out in the mother's statement appear to have been asserted by her in support of her application in the autumn of 2021 for permission to remove the children and that the allegations were not, seemingly, reported to the child professionals or reported to the court in the context of that application. The comment arising is that the allegations lack veracity on the basis that they have not previously been rehearsed in the documentation from South Africa.

144. I have considered that submission with some caution. I understand why it is made. The reality is that I am satisfied I do not have all of the documentation in relation to

all aspects of all the litigation in South Africa. I have referred to the interim protection order that was made in December 2021. I do not have the evidence in support of that application. So whilst I note why that submission is made on behalf of the father, I do not come to the conclusion that the mother's allegations are inherently unreliable.

145. However, to be fair to counsel for the father, and if I may say so, counsel has conducted this case in accordance with the highest standards of the Bar in terms of fairness to a litigant in person, he made the point that the court should proceed in relation to the allegations the mother has made by taking them at their highest. That is what I propose to do.

146. The mother asserts as part of this aspect of the case that there has been significant impact upon her in terms of her mental health: she has lost weight, she has lost some hair, she has deficiency with her teeth as a consequence of stress and that she is in receipt of a prescription for mirtazapine for anxiety. She asserts that this is all referable to her experience at the hands of the father.

147. In the light of the case law summarised earlier, it is not simply the case that just because allegations are made the court immediately then goes on to consider protective arrangements. The court has to be satisfied that it is appropriate to take that next step regarding the allegations at their highest. In my judgment, that connection is made out by the mother in this case. It is appropriate, in the light of the nature of the allegations, to consider whether the proposed protective arrangements are appropriate.

148. I therefore go on to consider the mother's position in relation to the proposed protective arrangements for her. The father has provided a third statement in which he sets out the undertakings that he would offer to give the mother "a soft landing." The mother does not accept that the proposed undertakings offered by him would be sufficient. She says that she has concerns that he would not obey undertakings or an order of the court (in place of undertakings) and that the system to protect partners from abusive relationships in South Africa is ineffective.

149. I invited the mother in the course of taking submissions from her to consider the various undertakings and to see whether or not any refinements to them would address her concerns such as the extent of an exclusion zone. However, she firmly indicated that no extent of refinement would, on her case, amount to sufficient protective arrangements.

Father's case in response

150. It is right that I should record again that the father denies the allegations the mother makes and that he has made counter-allegations. I am not making any findings. I am proceeding on the basis that I should take mother's allegations at their highest. He does deny that the mother has mental health problems and it is right certainly that she has not placed before the court any evidence of that in the form of medical records, a letter from her general practitioner, a copy of the prescription or anything of the kind.

151. On the premise that the court accepts the gateway, if I can use that expression, to protective provisions is opened, the father has set out in a third statement a number of undertakings that are proposed. The proposed undertakings are without prejudice,

which is the usual arrangement. The proposed undertakings are to last until further order of the High Court of South Africa unless otherwise specified. The following is a summary:

i) Not to molest, pester or harass or interfere with or use or threaten violence against the mother or to encourage anyone else to do so;

ii) Not to support, whether by himself or through lawyers, agents or any other person, any criminal or civil proceedings for the punishment of the mother arising out of the child's unlawful removal to England;

iii) To facilitate and encourage indirect and direct contact between the children and the mother in accordance with an order of the High Court of South Africa or as agreed between the parents in writing;

iv) To file a statement in the South African proceedings confirming that he accepts the children are habitually resident in South Africa and that it is in the children's best interests to remain there;

v) To book and pay for in advance the reasonable costs of the child's flight to South Africa, that he will agree the date and the time of the same with the mother and to provide her with documentary evidence that the flight has been booked; and

vi) Not to go within 200 metres of wherever the mother is living except where agreed between them in writing and for the purpose of facilitating contact between the children and the mother.

152. There are also mirror undertakings sought about not removing the children from South Africa without the other parent's written consent or the order of the court of South Africa. The father seeks undertakings from the mother. That request at the moment appears to be somewhat academic. As I have mentioned, the mother has indicated that she would not accompany her daughter back to South Africa.

153. At this stage I digress to deal with some very recent information shared with the court. Before starting to give this judgment, I was informed by counsel for the father that, in the light of the mother's indication yesterday that she would not return to South Africa, enquiries were made of the immigration lawyer to establish whether or not the father could come to this country for the purpose of collecting the child to return to South Africa without any adverse implications in terms for him of re-entry to South Africa in view of his immigration status. In short, the position, as summarised by counsel, is that there are no such concerns. The mother, though, in response wished to share with the court concerns that there may still be potential adverse implications on father on his return to South Africa with the child.

Determination

154. Having taken mother's allegations at their highest, and being satisfied that the gateway opens up to consider protective arrangements, I am satisfied that the proposed protective arrangements in this case do address the circumstances appropriately and do amount to an appropriate "*soft landing*" for the mother in the

event that I order immediate return. Therefore, in my judgment the mother's case in relation to this limb of her defence or exception also thereby fails.

DISCRETION

155. It will be apparent from the judgment so far that I have considered separately each exception or defence advanced by the mother and that I have rejected each of them. Nevertheless, I am invited to indicate in this judgment what the court would have done in terms of exercising its discretion, or otherwise, in the event that the relevant defence had been made out. Father's counsel invites me to indicate the court's approach now.

156. Had it been relevant, counsel for father would have invited the court to exercise its discretion in favour of returning the child to South Africa in any event for three reasons:

    i) Policy reasons in view of the clear orders that have been made in the High Court in South Africa;

    ii) The extent of the connection between the child and South Africa;

    iii) The implications in terms of the child's sibling and her relationship with him and vice versa.

157. Mother in relation to this aspect effectively invited me, should the circumstances arise, not to exercise my discretion to order an immediate return.

158. In my judgment, the individual and collective implications of the points that would have been advanced on behalf of the father in relation to the discretionary exercise are well made out and, taking them together, it would have persuaded this court to exercise its discretion in favour of a return even in the event that an exception or defence had been made out.

159. Accordingly, in all of the circumstances set out in this judgment, the court grants the father's application and orders the summary return of the child to South Africa.