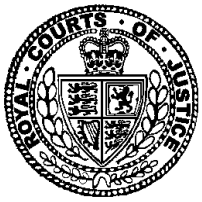

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly 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.

Neutral Citation Number: [2023] EWHC 1673 (Fam)

Case No: FD22P00545

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 July 2023

Before :

MR JUSTICE PEEL

- -

Between :

Z

Applicant

- and -

Z

Respondent

- -
- -

Katy Chokowry (instructed by Thomas Dunton Solicitors) for the **Applicant**
Jacqueline Renton and Mani Singh Basi (instructed by Dawson Cornwell) for the **Respondent**

Hearing dates: 22-23 June 2023

- -

Approved Judgment

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MR JUSTICE PEEL

Mr Justice Peel :

Introduction

1. The Father ("F") applied on 20 July 2022 under the 1980 Hague Convention for return of the three children of the family, aged 9, 7 and 5, from this jurisdiction to British Columbia, Canada. Their mother ("M") opposes the application. At play are issues of wrongful retention, habitual residence, acquiescence, grave risk of harm under Article 13(b) and objections of the children. Some of the defences relied upon overlap with each other.

2. I have had before me a 531 page bundle, and over 50 pages of skeleton arguments, including a summary of the law. I heard oral evidence from three witnesses. As is so often the way in Hague Convention cases, these proceedings have been far from summary in nature. Further, the parties have inevitably ventilated matters which are sensitive, disputatious, and divisive. Again, as so often in these case, the very fact of litigious Hague Convention proceedings has been inimical to the children's interests and enormously stressful for the parties. It has effectively suspended proper cooperation between the parties and a focus on the children's welfare interests until determination of the Hague application which is essentially jurisdictional in that it concerns where future litigation should take place. Unless and until a way is found to confine the proliferation of evidence (both written and oral), and to ensure that these cases take place promptly (the 6 week requirement for final determination is rarely achievable), I fear that Hague Convention proceedings run the risk of adding to the delay, acrimony and attendant harmful consequences for children. In this case, it seemed clear to me that at its heart is a concerned father who has not seen his children since February and is anxious that his relationship with them is suffering. Their mother told me she is supportive of the children spending time with him in Canada and England, yet the Hague Convention proceedings have stymied any meaningful focus on the issues which matter most to the children.

3. That said, I am very grateful to counsel for their focused and clear presentation.

4. I note that (i) for various reasons (partly due to M's medical condition, but also a successful application by F to adjourn so as to await the outcome of a referral to the Local Authority) it has taken nearly a year to reach this final hearing and (ii) the children have now been living in this country, in the care of their mother, for 1 ½ years. I repeat my sense of frustration, without apportioning blame, that so much time and energy has been devoted to the jurisdictional issue, and so little to the children's welfare.

The evidence

5. In considering the evidence I have had in mind the famous words of Dame Elizabeth Butler-Sloss P (which, albeit in the context of a public law fact-finding exercise, resonate here) in **Re T [2004] EWCA Civ 558, [2004] 2 FLR 838** at 33:

> "Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof."

6. Both parents gave evidence. They seemed to me be thoroughly likeable people. This has been a deeply difficult time for both of them. M has had to endure the shock and trauma of a Stage 3 cancer diagnosis and treatment which has proceeded far from smoothly. F, I am satisfied, tried his very best to support M. In the end, the relationship broke down while the treatment was ongoing and the family has never quite recovered.

7. Both did their best to tell me the truth. They have different perceptions, and different recollections, but I did not think either was trying to deceive me. F was a little hazy and hesitant at times, whereas M seemed to me to be clearer and more accurate in her narrative. On balance, where they differed, I generally accept what M told me, which is buttressed by the written material to a greater degree than H's presentation.

The background

8. F is a Canadian citizen; M is a British citizen. They are both 44 years old. They married in England in 2013 and moved to British Columbia. All three children were born in Canada and are dual Canadian/British citizens. During the marriage F was the breadwinner and M the homemaker, although my impression is that F was a hands on father. I am quite sure that both parents are devoted to their children and want the best for them. Sadly, their relationship has broken down, as have relations between F and M's family who he believes to be domineering and controlling.

9. In November 2021, M was diagnosed with Stage 3C colorectal cancer. 3C lies just below stage 4 which is the most serious of the categories. The parties explored treatment options in Canada, but because of likely delays there, they agreed (albeit with a degree of reluctance on F's part) that M would travel to England on 6 December 2021 for private medical care funded by her father, and that the children would accompany her, to be followed shortly thereafter by F. The medical advice in Canada had been that M would require chemotherapy followed by surgery. There seems to have been some doubt about whether radiotherapy would be available in Canada. Before leaving for England, M spoke to clinicians in England who informed her that she would likely need a number of chemotherapy cycles, radiotherapy, and surgery, and that the treatment could start straight away. That said, the clinical path was unpredictable with a number of variables. The medical professionals indicated it was impossible to say how long the treatment and the recovery process, would take, but it was likely to be at least a year. I am satisfied that F participated in at least some of the discussions and had a general overview of the picture. M says that she and F both understood the probable timeframe for treatment of one year. That is disputed by F but I consider it likely that, given the serious nature of the cancer, and the likely treatment, both parties appreciated that the length of treatment would be of significant duration, certainly much longer than a few months.

10. Upon arrival in England, M and the children lived with her father and brother at the wider family home in Buckinghamshire. She underwent four 3 week cycles of adjuvant chemotherapy which ended in February 2022. That was less than expected because she found herself unable to tolerate the treatment. The chemotherapy was not as successful as hoped, reducing the tumour size by only 20%. Accordingly, after a break she followed up with radiotherapy between March and May 2022. In April 2022 she transferred to the NHS from her private medical provision, but continued on the same treatment path. Between 17 and 24 August 2022 she had major surgery to remove the tumour. Since then, she has had numerous complications which led to four hospital

appointments between September and November 2022. She continues to take medication, and remains under medical care. She has a stoma-bag as a result of an anastomotic leak, which it is hoped may be reversed by an operation but a full decision on that possibility has not yet been taken by her and her medical team. Clearly, in my view, treatment for her cancer has been ongoing since she arrived in this country, and continues to this day. There is little doubt that the physical and emotional impact on M has been immensely draining.

11. It is accepted that M and the children came to this country with F's consent. It is clear that F was hesitant about the treatment taking place in England, but equally clear that ultimately it took place, at least initially, with his blessing. At issue is whether, (i) as F says, the intention and agreement was that M would come to England on a temporary basis for the preliminary chemotherapy treatment which would likely be completed by March 2022, whereupon she would return to Canada to complete her treatment or whether, (ii) as M says, the intention and agreement was that she would remain in England until conclusion of her cancer treatment, of uncertain duration but likely to be at least a year.

Factual findings

12. As to this critical evidential issue between the parties, and having read the papers and heard some limited oral evidence, I prefer M's case and make the following findings:

    i) F agreed to M and the children coming to England on 6 December 2021 on the basis that they would remain here for the duration of M's cancer treatment, and not simply to the end of the first chemotherapy treatment. It may be that both parties (and particularly F) hoped that the chemotherapy treatment would be completely successful such that further treatment would be dispensed with and they could return to Canada, but there was no agreement or intention that M and the children would return prior to conclusion of all the treatment. In the event, the chemotherapy treatment was followed by radiotherapy and surgery, and she now faces a reverse stoma bag operation, followed by a further recovery period.

    ii) F started to change his mind as the treatment progressed, and the timeline appeared to lengthen. He did not make any meaningful objection to the children being in this country during chemotherapy (up to March 2022) and radiotherapy (up to May 2022). He returned to Canada on 17 May 2022, by when the marriage was in some difficulty. On 23 June 2022 (before surgery which took place from August onwards) he definitively communicated to M by text for the first time that he expected the children to be returned to Canada.

    iii) F told me that during May 2022 he was told by M's sister in law, and also heard her father in conversation on the telephone to an unknown person, to the effect that M intended to live permanently in England. Whatever he may have heard, I am confident that M had formed no such intention, nor did she communicate any such intention to F. She does not say it anywhere in the written material before me, including in a text message to F of 20 May 2022 replying to F who had mentioned what he overheard; the clear impression of her reply is that it was nonsensical.

    iv) In support of these core findings, I refer to the following:

a) As indicated above, I preferred M's oral evidence on this, to the effect that it was always intended she would complete treatment in the UK which was likely to last significantly longer than a few months, and that F was broadly aware of this.

b) There is no evidence before me, in the voluminous written material, showing F stating either before or after March 2022 that the children were expected to be returned by then, upon conclusion of chemotherapy.

c) M told her employer in November 2021 that she was leaving, saying *"I have been diagnosed with colorectal cancer.* ***I will be doing all my treatments etc. in London.*** *I won't be back in Canada in Jan. I don't know when I will be back*" [emphasis added].

d) I accept the oral evidence of a friend of M that, before departure from Canada, F told her he did not know how long they would be in England for, and M told her that that she would be in England for the duration of the clinical path, including chemotherapy, radiotherapy, and surgery. I reject the suggestion that she was a witness biased in favour of M; she was credible and balanced in her testimony.

e) Shortly before M and the children travelled to England, there was a goodbye party in the family home in Canada which suggests to me an expectation of a potentially long absence.

f) In his oral evidence, F told me he assumed that if the chemotherapy did not work, the treatment would continue in England, but if it did work (which he said meant any improvement, no matter how slight) it would take place in Canada and M would return. As it happens, the chemotherapy did not work in that it only reduced the size of the tumour by 20%, and M required a course of radiotherapy to further reduce it before surgery. I felt that F with hindsight alighted upon the end of chemotherapy as the key date, reconstructing what he had hoped might happen. At the time, as he told me, nobody knew how the treatment would progress and how long it would take. At one point in his evidence, he said "*I didn't know for sure when they would come back, you can't put a date on cancer"* which tended to support M's presentation.

g) I do not consider it likely that they would have agreed, or F would have insisted, that M would have to return to Canada potentially in the middle of her critical treatment plan. Given the uncertainties inherent in her condition and treatment, the advanced stage of cancer, and the obvious benefits of continuity of care, it is far more likely that the parties intended that M should remain in England, with family support, until the treatment was concluded. In oral evidence, F suggested that M would have the chemotherapy in England, return to Canada for further treatment and then fly back to England for follow-ups, all of which seemed unlikely to me.

h) The flights of M and the children were one way, not return.

i) The children seem to have thought the treatment would take some time. The oldest child said to the Cafcass Officer that "*At first I thought that when my Mum's treatment was finishing and her cancer was out, we were going to go back to Canada. Then my Dad became impatient…*".

j) On 8 December 2021, after M had arrived in England, she sent F a text in which she said *"…all my treatments are getting done at Harley Street Clinic at the LOC (leading oncology centre")…and st marks is where I will have my surgery"*. The reference to surgery at St Mark's in Middlesex is of significance. F could have replied immediately to say that the agreement was for chemotherapy only in England, and not surgery, but he did not. It was clearly understood that each stage of treatment would take place here, including, I am satisfied, stoma bag reversal which was referred to in the same exchange of texts that day.

k) F relies upon an email to his gym on 9 December 2021 in which he told them that M needed medical treatment abroad and "*will hopefully be back in a few months"*. In my view, that can be read as exactly what it says, namely a <u>hope</u> on F's part about how long the treatment would take.

l) The children were withdrawn from their Canadian school/nursery on 3 December 2021, with no suggestion of any immediate date for return. F says that he was not copied in by M, but there is nothing before me to suggest he opposed this course of action. The withdrawal email from M is final in its terms, expressing gratitude to the school and teachers, and saying "*Perhaps one day our [paths will cross…I wish you all the best for the future*". There is no ring about this communication suggesting that the children would return in the near future. There was no communication with the Canadian schools about a return date, nor was there any suggestion of online teaching at Canadian schools between January and March, effectively one term. In my judgment, this clearly points to an expectation that the children would be in England for longer. Instead, in January 2022 the children were registered in educational establishments in England. It may be that F did not expressly agree to the children being placed in schools here, but the exchanges which I have seen show that he was aware of it, and did not express any opposition. Thus, for example, on 2 February 2022 M texted F to say "*I'm putting the kids in school and sports. They need it*" to which F replied "*It's ok*". Once they were in school, he regularly took them there himself.

m) On 4 May 2022, F told the school in Canada that he was not sure when the children would return, mentioning September as a possibility: *"…is temporarily going to school here [in England]…its only temporary here in the UK while her mother gets treatment. Perhaps see the students in September as it might be little bit of a journey for her mother*". The date of this email, and the content, conflicts with F's stated case about a return in March 2022. The word "Perhaps" is telling.

n) On the eve of 17 May 2022, when F was about to return to Canada, he told M (on his case) that the children should be returned "*so they can re-*

*attend school back in Canada for Septembe*r". Again, the reference to schooling in Canada in September 2022 is indicative of a longer time scale than December 2021-March 2022.

o) By April/May 2022, relations between the parties were deteriorating, which must have been largely because of the strain on both parties of the ongoing health concerns and the way in which their lives had been turned upside down.

p) F spent a considerable amount of time in England between 24 December 2021 and May 2022; as I understand it, he was here for all of that period other than 24 March to 11 April 2022. F's initial ticket provided for him to return to Canada on 8 March 2022, but he in fact stayed longer in England (until 24 March) and then subsequently came back to England on 12 April 2022. F took extended leave off work, with no specific return date, and put his gym membership on hold. During that period, they lived together and led a normal family life together in England. It seems to me that F's eventual return to Canada on 17 May 2022 was in large measure because of the breakdown in their personal relations.

13. I am accordingly satisfied that the parties thought it would take an indeterminate time for the treatment to finish, and anticipated that M and the children would remain in England until then, but F, upon his return to Canada in May 2022, became impatient and demanded their return sooner.

Wrongful Retention and repudiatory breach: principal conclusion

14. Article 3 of the Convention provides:

"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 ….."

15. Mostyn J in **JM v RM [2021] EWHC 315 (Fam)** referred to the need for "an agreed due date for return". I do not read him as stating that there must in every case be fixed calendar dates. Each case must be judged on its specific facts. Thus, for example, rather than a specified calendar date, the agreed or anticipated date for return may be referable to an agreed crystallising or triggering event, the precise date of which is unknown to the parties at the time of departure. In this case the due date for return was at the conclusion of the treatment, the precise timing of which was unknown when they flew to England and, in the event, has not yet come to pass. But it seems to me that there must be some ingredient to indicate that the departure from one country to another is intended to be temporary rather than permanent or potentially permanent, even if the precise date of return is not fixed. Thus, it is hard to conceive of a wrongful retention where the departure from the outward country is agreed to be open ended with no determining or triggering event; I endorse the observations of Mostyn J at para 32. In

each case, the court will have to do the best it can on the available information to determine the relevant date.

16. Based on my findings above, the agreement was for M and the children to remain in this country until conclusion of the treatment. That event has not yet come to pass. There has accordingly been no wrongful retention.

17. Given my findings on this, F's case on repudiatory breach is somewhat academic because:

    i) It depends on a finding by me that the agreed date for return was in or about March when the chemotherapy cycle was due to conclude. I have determined this against him, and found in favour of M that the agreement was for M and the children to remain in the UK for the duration of the treatment.

    ii) Even if I had accepted the finding sought by F, the alleged date of the repudiatory breach (28 February 2022) is so close to the date for F's case on agreed return (March 2022) as to be largely irrelevant.

18. However, for completeness, I take the view that at its highest, on F's case, M said to him on 28 February 2022 that she wanted to remain in England for the duration of her treatment. That was his oral evidence. Given that the agreement was, as I find it, in those terms, she was simply restating what was understood between them, and which had formed the basis of leaving Canada. F did not tell me that on 28 February 2022 M said she would remain in England permanently, event after conclusion of the treatment, which might well have constituted repudiatory breach. There is no evidence of a conversation along those lines, nor any documentary evidence such as texts or emails to that effect. I accept what M told me, that she did not form such an intention at least until she was served with the Hague Convention application, and she said nothing to that effect to F; her focus was entirely on getting better. In the circumstances, there was no clear and objectively verifiable repudiatory breach of the sort characterised in **Re C, and another (Children)(International Centre for Family Law, Policy and Practice Intervening [2019] AC 1.**

Habitual residence

19. I adopt the helpful summary given by Hayden J at para 17 of **Re B (A Child)(Custody Rights: Habitual Residence) [2016] EWHC 2174 (Fam), [2016] 4 W.L.R. 156**, save for sub para (viii) which Moylan LJ suggested in **Re M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention) 2020 EWCA Civ 1105** should be omitted. Moylan LJ went on to say:

> "61. In conclusion on this issue, while Lord Wilson's see-saw analogy can assist the court when deciding the question of habitual residence, it does not replace the core guidance given in *A v A* and other cases to the approach which should be taken to the determination of the habitual residence. This requires an analysis of the child's situation in and connections with the state or states in which he or she is said to be habitually resident for the purpose of determining in which state he or she has the requisite degree of integration to mean that their residence there is habitual."

20. How quickly and easily habitual residence may be lost and/or gained will be a question of fact and degree. Per Baroness Hale in **Re LC (Children International Abduction: Child's Objections to return) [2014] UKSC 1** at para 63:

> "63. The quality of a child's stay in a new environment, in which he has only recently arrived, cannot be assessed without reference to the past. Some habitual residences may be harder to lose than others and others may be harder to gain. If a person leaves his home country with the intention of emigrating and having made all the necessary plans to do so, he may lose one habitual residence immediately and acquire a new one very quickly. If a person leaves his home country for a temporary purpose or in ambiguous circumstances, he may not lose his habitual residence there for some time, if at all, and correspondingly he will not acquire a new habitual residence until then or even later. Of course there are many permutations in between, where a person may lose one habitual residence without gaining another."

21. I also bear in mind the recent dicta of Moylan LJ In **Re A [2023] EWCA Civ 639** at paras 41 to 48, and in particular paras 47 and 48:

> "47. In *Re G-E*, I also quoted the "expectations" set out by Lord Wilson in *Re B 2016*, at [46], which bear repeating, namely:
>
> > "(a) the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state;
> > (b) the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and
> > (c) were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it."
>
> 48. I have already dealt with the legal approach to habitual residence at some length in this judgment but, finally, I would refer to *In re B (A Child) (International Centre for Family Law, Policy and Practice intervening)* [2020] 4 WLR 149 when, at [83]-[89], in addition to *Re B 2016*, I referred to the CJEU's decision of *Proceedings brought by HR (with the participation of KO) (Case C-512/17)* [2018] Fam 385 and to Black LJ's (as she then was) judgment in *In re J (A Child) (Finland) (Habitual Residence)* [2017] 2 FCR 542 ("*Re J*"). Black LJ, at [57], referred to "the relevance of the circumstances of a child's life in the country he has left as well as the circumstances of his life in his new country" and, at [62], she said:
>
> > "What is important is that the judge demonstrates sufficiently that he or she has had in mind the factors in the old and new lives of the child, and the family, which might have a bearing on this particular child's habitual residence."

22. I acknowledge the strength of the children's links with Canada. They were born there, lived there, went to school there, have friends there and F's family are nearby. The family unit was settled in Canada. They were plainly fully integrated there up until the time of their departure to England in December 2021. Had I found (per F's case) that on departure from Canada, it was intended that they would return permanently in about March 2022, I doubt very much that I would have concluded habitual residence had transferred to England by that date. The temporary nature of such a trip (no more than about 3 months), for a specific purpose (chemotherapy treatment for M), in the context

of deep roots in Canada would have pointed against them losing the Canadian habitual residence.

23. But that is not my finding. In fact, the departure from Canada was on the expectation of living here for a lengthy period, perhaps a year or more. In my judgment, the children acquired habitual residence in this country during that time. The evidence clearly establishes "some degree of integration" in this jurisdiction in a social and environmental context. They had left Canada on one way tickets. They were withdrawn from school in Canada and enrolled at English schools where they have settled well. The focus of the family shifted to England. They joined local clubs. Significantly, in my view, F travelled to, and lived in England with M and the children from December 2021 to May 2022. The children have been registered with GPs here for many years. Before coming here in December 2021, they had regularly travelled here and were familiar with England; the evidence suggests fifteen times for up to a month on each occasion, and I am inclined to the view that they considered England to be their second home. They are dual nationals. M's extensive family, who the children knew well before December 2021, live here. Their primary carer, M, was living here, a factor which, although not determinative, points to the children's degree of integration. Despite the deep roots in Canada, there were also not insubstantial roots in England and in my judgment habitual residence here was swiftly established. As to the date on which it transferred to England, I take the view that it was probably at about the beginning of April 2022. By then it was clear the chemotherapy had not been as successful as hoped. Any lingering hope of a miracle cure, with no need for further treatment, and the possibility of a swift return to Canada, dissipated. M and the children were faced with a much longer stay in England, and in my judgment the children acquired habitual residence in England at about that time, and therefore before the operative date of retention which is the end of cancer treatment.

Acquiescence

24. In the light of my findings, acquiescence does not arise. Wrongful retention did not, in my judgment, take place in March 2022, and accordingly the question of whether F subsequently acquiesced in that wrongful retention is counter factual and redundant.

Child's objections

25. The law is conveniently summarised by Macdonald J in **B v P [2017] EWHC 3577**, at paragraphs 60 -61:

"60. The law on the 'child's objection' defence under Art 13 of the Convention is comprehensively set out in the judgment of Black LJ in *Re M (Republic of Ireland)(Child's Objections)(Joinder of Children as Parties to Appeal)* [2015] 2 FLR 1074 (and endorsed by the Court of Appeal in ***Re F (Child's Objections)*** **[2015] EWCA Civ 1022**) and I have regard to the clear guidance given in that case. In summary, the position is as follows:

> i) The gateway stage should be confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.
>
> ii) Whether a child objects is a question of fact. The child's views have to amount to

> an objection before Art 13 will be satisfied. An objection in this context is to be contrasted with a preference or wish.
>
> iii) The objections of the child are not determinative of the outcome but rather give rise to a discretion. Once that discretion arises, the discretion is at large. The child's views are one factor to take into account at the discretion stage.
>
> iv) There is a relatively low threshold requirement in relation to the objections defence, the obligation on the court is to 'take account' of the child's views, nothing more.
>
> v) At the discretion stage there is no exhaustive list of factors to be considered. The court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available. The court must give weight to Convention considerations and at all times bear in mind that the Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly".

26. The Cafcass Officer reports that the children have a level of understanding and maturity commensurate with their ages. Depressingly, it is apparent that M has been talking to the children about the proceedings and influencing them against F, perhaps out of a sense of intense frustration. That must stop. They have been drawn into a conflict between the parents, although the Cafcass Officer observes that they are resilient children, who know they are loved by both parents. The older children say they would like to remain in England and do not want to be separated from M. The children are happy in England. They have some understanding of M's health issues. The Cafcass Officer has identified no safeguarding concerns in the care of either M or F. There is no evidence that they do not want to spend time with F, save for a little reticence expressed by the middle child which I suspect would be readily overcome.

27. I am not satisfied that any of the children objects (within the Convention meaning) to a return to Canada. In reality, they all express a preference to stay in England, which is hardly surprising as they are dependent upon their primary carer. The oldest child does not paint a negative view of Canada; he refers to positive aspects including friends and F's family, and says he misses Canada a bit. All the children say they would be sad if they were to return, although some of the reasons given by the younger two children seemed to be a little trivial, for example lack of water parks in Canada compared to England. At its heart, their concern about a return to Canada is the fear of being separated from M; the oldest child when asked what his view would be if M were to return with them to Canada said "*that's different"*. The Cafcass Officer observed that they would be "distraught" if separated from their mother. Their relationship with their father, is good; their concerns are not rooted in hostility to the notion of being with him. They want to see him and spend time with him; what they don't want is conflict. On balance, in my judgment these are children whose expressed wishes are shaped primarily by their close bond with M, to whom they feel protective, rather than an objection to Canada or a return per se. This defence is not made out.

Article 13(b)

28. I adopt the formulation of the legal test set out by the Court of Appeal in **Re IG [2021] EWCA Civ 1123**:

> "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 Judgment Approved by the court for handing down. Double-click to enter the short title 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."

29. Should the Article 13(b) exception be established, that is not the end of the matter. The court is required to go on to consider whether, notwithstanding the availability of the defence, the child should nevertheless be returned. This is an exercise of discretion, albeit it is well established (see **Re M (Abduction: Zimbabwe [2007] UKHL 55)** that in the usual course of events it is unlikely that the court will order a return if to do so

would place the returning child in the way of the very harm which has been found to constitute the Article 13(b) defence.

30. A particular ingredient in this case is that M says she will not return to Canada if the court orders that the children be returned there. I fully accept that an alleged abducting parent cannot be allowed by the court to approach the litigation in a forensically manipulative way, forcing the hand of the judge. To do so would permit such a litigant to drive a coach and horses through the purpose of the Convention. F suggests that M would in fact return with the children, but I take the view that is not the case; her determination first and foremost is to maximise her prospects of recovery for the sake of her children. She is adamant that she must remain in England for the rest of her treatment to do so, and, in my judgment, has come to the difficult, but genuinely held, decision not to accompany the children to Canada if that is what I order. I am quite sure that this is not tactical manoeuvring on her part.

31. M is still undergoing complex cancer treatment. She has faith in her medical team in this country. It is reasonable for her to take the view that her priority must be to give herself the best possible prospects of recovery and remission. That is not just in her interests, but overwhelmingly in the interests of the children as well. For her, I am satisfied, to give up the continuity of medical care and treatment she receives here and travel to Canada would be an enormous and intolerable ordeal. Even if it is logistically doable, it would be emotionally and psychologically damaging for her. To move from her settled treatment plan and clinical team to a new medical environment on Canada would be highly destabilising. It would also remove her from the bedrock of support which is given to her by her family, in circumstances where her relationship with F has broken down. I consider that it is reasonable for her to decide that her best chance of resuming a healthy life with her children is to complete her treatment here.

32. In my view, to force upon the children a return to Canada, separating them from their mother, would expose them to a grave risk of harm and an intolerable situation. They would be "distraught" as the Cafcass Officer says. They would be thousands of miles away from their primary carer. They would be required to leave this country, where they have been living for about 18 months and where they have family, friends, schools and settled surroundings. All this would take place in the context of knowledge that their mother is not well, and against the backdrop of a disintegrating marriage. I strongly suspect that as time goes by, and they appreciate the gravity of M's health, their sense of loss, and perhaps guilt, would become more acute. This is not to say that F cannot provide them with an acceptable level of care, but the unique circumstances of this family are such there is a grave risk of, in particular, emotional harm to these children in the event that I make a return order. I am not persuaded that an adequate protective measure for M is the possibility of seeking expedited custody proceedings in Canada. It seems to me that to be required, in her current state, to embark upon such litigation now, in Canada, whilst continuing her cancer treatment here, is unsustainable.

33. I conclude that the Article 13(b) defence is made out. Following established authority, I am satisfied that it would not be appropriate to exercise my discretion and order a return.

Conclusion

34. For the reasons stated herein, I refuse the application for a return order on three grounds:

i) Wrongful retention is not established.

ii) Habitual residence at all relevant times lay, and continues to lie, in England.

iii) Article 13(b).

35. The children love both parents. The effect of my decision is that decisions as to their future welfare will be made in this country rather than in Canada; that could, at least in theory, include an application by F for the children to relocate and live with him in Canada, although such an application would face obvious hurdles as things currently stand. The parents are in the fortunate position that they appear to have the financial means to ensure that the children can maintain a strong relationship with them both. M has made clear that she thinks the children should spend half of all holidays and half terms with F. I hope and expect that she genuinely means that and will do all she can to promote contact. I encourage them both to work together for the benefit of these much loved children. F's concern, expressed in his counsel's position statement, is the potential damage caused to his relationship with the children. I consider, as I have already remarked, that the children's bond with him is strong and I see no reason why they should not spend ample time with him. But I make clear that in my view the children need to have a strong, ongoing relationship with both parents for the sake of their happiness, security, and sense of identity.

Child arrangements

36. I invited the parties to send in to me by email their proposals as to contact going forward, indicating that I was minded to make a child arrangements order, albeit perhaps of an interim nature, given that there is broad agreement that the children should spend time with F in holidays and at half terms, in England and/or Canada.

37. Happily, a large measure of agreement was reached, including for F to see the children for up to 3 weeks in England in August and for part of the Christmas holidays in Canada. I commend the parties for this sensible and constructive approach, and I will make a separate Children Act order in these terms.