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Case No: FD23P00282

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 July 2023

Before :

MRS JUSTICE THEIS DBE

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Between :

	D	**Applicant**
	- and -	
	E	**Respondent**

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- -

Mr Teertha Gupta KC and Ms Victoria Green (instructed by **Dawson Cornwell**) for the **Applicant**
Ms Anna McKenna KC and Ms Jennifer Perrins (instructed by **Stewarts**) for the **Respondent**

Hearing dates: 18th July 2023
Judgment: 26th July 2023

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Approved Judgment

This judgment was handed down remotely at 10.15am on 26th July 2023by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE THEIS DBE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. 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.

Mrs Justice Theis DBE :

Introduction

1. The court is concerned with the mother's application under the Hague Convention for X, aged 2 years 10 months, to be returned to Country B. That application is opposed by the father on the grounds that at the relevant time in April 2023 the child's habitual residence was here and, if he is wrong about that, the mother consented or acquiesced to X remaining here. Finally, the father submits, in the event the court gets to that stage, the court should exercise its discretion and refuse the order for the child to go to Country B.

2. X was born here, and went with her parents to Country B in December 2020, when only a few weeks old. X remained there until December 2022 when she returned back here with the mother. The father accepts that prior to December 2022 X's habitual residence was in Country B. It is accepted the relevant date for determining habitual residence is about 12 April 2023, when the father removed X's passport without the mother's knowledge. X and the mother remain living here, as does the father. The parents separated in April, X lives with the mother and the father has contact with X.

3. The court has had the benefit of detailed skeleton arguments filed by both parties, in addition to the chronology prepared on behalf of the father. The court bundle extends to 722 pages and the court has an authorities bundle of over 250 pages.

4. No party sought for any oral evidence to be given and the court heard oral submissions from Mr Gupta K.C. on behalf of the mother, and Ms McKenna K.C. on behalf of the father. The court is very grateful for their comprehensive oral and written submissions.

Relevant background

5. The mother was born in Country B, and has Country B and British citizenship. The father was born in England and has British and Irish citizenship. Both parents are professionals. The mother left Country B when she was about 22 years having completed her university degree there. She initially worked in the US and then came to England in 2010.

6. The parents' relationship began in 2015. The mother purchased a flat here in 2016 and in 2017 was granted British Citizenship.

7. The parents married in May 2018 and X was born in the autumn of 2020.

8. In December 2020 the family went to Country B, with return tickets booked for February 2021. According to the mother, soon after they arrived she decided she wished to remain there. It appears from her recent statement that this was not communicated to the father.

9. For reasons initially related to the complications caused by Covid related travel restrictions, the mother and X did not come back to this jurisdiction until December 2022. More recently, the mother and X did not return due to health related reasons. The father suggests that these were further delaying tactics by the mother thereby acknowledging her reluctance to return here. The father returned here in June 2021 for

work related reasons and then family commitments here. He went to Country B in October 2021 and returned here in February 2022. The mother and X were due to travel with him but X had an ear infection. This happened again at Easter and June 2022. The father visited Country B on four occasions in 2022.

10. During the time in Country B the mother lived in a series of short term rented properties when the father visited, otherwise she and X lived with her parents . In August 2022 the mother rented a property for a year in Country B without consulting the father. He found out about that in October 2022.

11. On 5 October 2022 the father sent an email to the mother to inform her he had issued divorce proceedings in Country B. During this hearing Ms McKenna informed the court the father had consulted solicitors in England in September 2021. The petition was not served on the mother at the time it was issued.

12. The parents exchanged messages looking at options for reconciliation and to repair their marriage.

13. On 18 December 2022 the mother sent the father two documents in the context of plans for the mother and X to travel to this jurisdiction. Document 1 is entitled 'Consent for person under the age of 18 to travel to and from the Republic'. This document was signed by the father on 20 December 2022 after he had made some amendments, removing the reference to X's domicile remaining in Country B and the word 'temporary' regarding the description to the period X will be in this jurisdiction. The signed copy was not sent to the mother until 21 December 2022. Additions were also made to the last part of Document 1 so that it reads *'This affidavit also serves as* ***my irrevocable*** *consent for my minor daughter to travel and be accompanied by her natural mother whose details appear in paragraph 4 above upon the child's return journey to Country B, from London, United Kingdom ['back to Country B' was deleted],* ***whether on 10 June 2023 or before'*** *(bold type are additions).*

14. Document 2 was not signed by the father. It explicitly referred to X's domicile and habitual residence being in Country B, refers to the mother and X travelling to England on 21 December 2022 for a temporary period of six months for the purpose of attempting to restore their marriage relationship and seeks the father's irrevocable consent to allow the mother and X to return to Country B if they decide to proceed with a divorce or should the mother elect not to remain in London.

15. The day after these documents were sent by the mother, the father instructed his solicitors in Country B to serve the divorce petition on the mother on 19 December 2022 in the morning. That petition included the following information:

    (1) The mother's address as being in Country B and the petition accepts she resides in Country B.

    (2) The parenting plan attached to the petition sets out that the father sought contact both *'in the location where the mother and [X] reside'* i.e. Country B, and in the UK with a provision that neither parent should remove X from Country B without the prior consent of the other parent.

16. The mother and X flew to England on 21 December 2022, two days after the father served the divorce petition acknowledging the jurisdiction of Country B, with details of the proposed child arrangements and the day after the father signed Document 1 with the amendments/additions outlined above.

17. Prior to flying the parents had made various arrangements in anticipation of the mother and X travelling to England. A housekeeper and nanny were employed, X was registered with a nursery that she attended for two days in January. That nursery recommended delaying her attendance, and she started attending in late March/mid-April. There was some evidence it may have been at the end of March; the letter from the nursery refers to the April date whereas the child and family assessment refers to her starting in late March. Prior to December 2022 the mother had renewed her practising certificate in this jurisdiction and took on a 6 month contract with a legal firm here that ended in mid-July 2023. The mother and X came here on a return ticket, with the return date 10 June 2023. According to the mother many items of hers and X's were left in Country B.

18. The family lived in the London property that they had lived in prior to going to Country B in December 2020. On 9 February 2023 the parties agreed through their Country B lawyers to extend the time for the mother to file any defence to the Country B divorce petition until 30 June 2023.

19. On 3 March 2023 the mother and X flew to Country B to celebrate the maternal grandfather's birthday, using their return ticket with the date brought forward. X attended a nursery whilst she was in Country B, which she had remained registered at. The father flew out to join them on 8 March 2023 and they all returned to England on 21 March 2023. The mother states she and X had a return ticket booked on 27 April 2023. Although there was no evidence as to why this date had been chosen Mr Gupta, on instructions, informed the court that it had been discussed between the parents and it coincided with a date when the father was travelling to the US for two weeks. This US trip is confirmed in the letter from the father's solicitors dated 2 May 2023.

20. Before they returned to this jurisdiction in March the mother asked to be sent Document 1 again. There was some suggestion that it was re-issued but it is accepted that it was the same document that had been signed in December 2022. The father states it was only asked for as they went through security separately and the mother was unable to find the electronic copy of the document. The mother says it was to give her the reassurance that it was still in place.

21. On 6 April 2023 there was an alleged assault by the father on the mother and the police were called. The father was arrested and released without charge. The father moved into a rental property nearby. The mother informed the father she and X were going to return to Country B on 27 April 2023.

22. As a result of the police involvement a referral was made to the local authority who conducted a child and family assessment. Their report dated 5 June 2023 did not recommend any further involvement by them and for the case to be closed.

23. On 12 April 2023 the father took X's passport without the mother's knowledge. On 18 April 2023 the mother discovered the passport was missing and there was an exchange of correspondence between the parties UK solicitors. The father's solicitors

wrote to the mother on 19 April 2023 confirmed they held X's passport, that the father did not consent to the mother and X travelling to Country B on 27 April 2023, and referred the mother to the prospect of any removal being a criminal offence and that it would amount to a wrongful removal under the Hague Convention. The letter states that the father *'anticipates'* the mother may rely on Document 1 *'as a means to suggest that [the father] does in fact consent to [X's] removal from the jurisdiction. This is not the case. [The father] signed that document on the basis that [X] would remain living in England'*.

24. The mother instructed solicitors who responded on 24 April 2023. Their letter refers to the father's divorce petition that confirms that it is in X's best interests for the parents to exercise their respective parental responsibility and rights in respect of X under the relevant Children Act in Country B. The letter refers to the allegations in the divorce petition that suggest the mother unlawfully retained X in Country B and makes the point that not only did the father decide that Country B was the correct jurisdiction for the divorce, children and financial proceedings he served those proceedings just before the mother and X came to this jurisdiction. The letter continues '*In fact, your client specifically said to our client that it was her insistence on obtaining the comfort of the Affidavit and his irrevocable consent for [X] and our client to return to Country B which led him to serve the divorce papers on her on 19 December 2022'*. The letter continues setting out the options for the mother who wishes to return to Country B with X, including issuing an application for leave to remove X from the jurisdiction. The letter makes clear that in the light of the father's position she will not remove the child and notes as follows: '*Sadly, by his actions, your client is drawing both parties into litigation. The whole purpose of the affidavit offering irrevocable consent was so that there could be no dispute between the parties about the fact that our client and [X] were habitually resident in Country B from 2021 and only returned to England on a temporary and trial basis to ascertain whether there was any hope for their marriage'*.

25. The father's solicitors responded on 25 April 2023 seeking re-assurances on various matters otherwise stating they may apply for a prohibited steps order. In their response on 26 April 2023 the mother's solicitors confirm they had instructions to issue an application for leave to remove X from the jurisdiction, for return of X's passport and for the father to sign a letter of consent enabling the mother to travel with X. The letter states *'My client believed that she had an agreement with your client and informed him of her plans to return home on 27 April. My client has always been open and honest with your client, regarding her return to Country B with [X], and it is your client who now wishes to renege on the agreement reached with my client and put her to the costs to apply to the Court for permission to leave the jurisdiction of this Court to Country B. My client accepts in my letter dated 24 April that absent your client reconsidering his position and agreeing to honour the agreement reached with my client that my client cannot leave the jurisdiction of this Court without the leave of the Court.'* The letter acknowledges that it would not be possible to leave in any event due to the port alert the father had instigated.

26. A further letter was sent by the mother's solicitor on 28 April 2023 stating that unless there is a response from the father they will have no option but to make an application to the court for a prohibited steps and specific issue order in addition to her application for leave to remove X.

27. In their reply dated 2 May 2023 they referred to the fact that the father had been away in the US for two weeks from 27 April and they had not been able to have any detailed discussion with him.

28. The mother's solicitors wrote on 4 and 5 May 2023. In their letter dated 4 May they seek the father's agreement to request disclosure from the police and social services as that would form part of the mother's application for leave to remove. They refer to a trip to Italy to attend a wedding and state *'Your client cannot hold my client as hostage in the UK whilst travelling himself during the currency of this application.'* They sought assurances about the mother and X being able to attend the wedding. In the letter dated 5 May the mother's solicitors repeated a previous request asking when the father's solicitors were first instructed. That information was provided at the hearing. The father first instructed his solicitors here in September 2021, he remained in contact with them until October 2022 when the father issued the proceedings in Country B, and then re-instructed them more recently in April 2023.

29. The father's solicitors responded on 11 May 2023 addressing mediation, the wedding trip and the father's contact more generally. They sent a chasing letter on 17 May 2023.

30. The mother changed solicitors, instructing her current solicitors on 23 May 2023. The mother completed the application for a return through the Central Authority in Country B on 24 May 2023 and these proceedings were issued on 25 May 2023. The mother's solicitor filed a statement in support.

31. Directions were made by Roberts J on 15 June 2023 and 29 June 2023, the latter hearing was mainly concerned with the father's contact arrangements.

32. Both parents have filed statements addressing interim contact and they have each filed a substantive statement regarding the Hague application. In the bundle the court has the details of the Country B divorce proceedings, they are continuing in Country B and both parties have lawyers instructed there.

Relevant Legal Framework

33. There is no significant dispute between the parties regarding the applicable legal framework.

34. In relation to habitual residence. It is a question of fact where the court needs to consider whether there is some degree of integration by the child in a social and family environment. This has been helpfully summarised by MacDonald J in *E v D* [2022] EWHC 1216 (Fam) as follows:

> *"20. For habitual residence to be established the residence of the child must reflect some degree of integration in a social and family environment (Area of Freedom, Security and Justice) (C-532/01) [2009] 2 FLR 1 and Re A (Jurisdiction: Return of Child) [2014] 1 AC 1). Whether there is some degree of integration by the child in a social and family environment is a question of fact to be determined by the national court, taking into account all the circumstances specific to the individual case. Habitual residence must be established on the basis of all the circumstances specific to the individual case (Case C-523/07 [2010] Fam 42). With respect to those*

circumstances, in Re A (Area of Freedom, Security and Justice) and Mercredi v Chaffe [2011] 2 FLR 515, the Court of Justice of the European Union identified the following, non-exhaustive, list of circumstances that might be relevant in a given case:

i) Duration, regularity and conditions for the stay in the country in question.

ii) Reasons for the parents move to and the stay in the jurisdiction in question.

iii) The child's nationality.

iv) The place and conditions of attendance at school.

v) The child's linguistic knowledge.

vi) The family and social relationships the child has.

vii) Whether possessions were brought, whether there is a right of abode and whether there are durable ties with the country of residence or intended residence.

21. In a series of decisions, namely Re KL (A Child) [2014] 1 FLR 772, Re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening) [2014] 1 FLR 772, Re LC (Children) (Reunite International Child Abduction Centre intervening) [2014] 1 FLR 1486, Re R (Children) (Reunite International Child Abduction Centre and others intervening) [2015] 2 FLR 503 and Re B (A child) (Habitual Residence: Inherent Jurisdiction) [2016] 1 FLR 561 the Supreme Court has articulated the following principles of general application with respect to the question of habitual residence:

i) It is the child's habitual residence which is in question and hence the child's level of integration in a social and family environment which is under consideration by the court determining the question of habitual residence.

ii) In common with the other rules of jurisdiction, the meaning of habitual residence 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.

iii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must also weigh up the degree of connection which the child had with the state in which he resided before the move.

iv) 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.

v) 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.

vi) In circumstances where the social and family environment of an infant or young child is shared with those on whom she is dependent, it is necessary to assess the integration of that person or persons (usually the parent or parents) in the social and family environment of the country concerned.

vii) In respect of a pre-school child, the circumstances to be considered will include the geographic and family origins of the parents who effected the move.

viii) The requisite degree of integration can, in certain circumstances, develop quite quickly. It is possible to acquire a new habitual residence in a single day. There is no requirement that the child should have been resident in the country in question for a particular period of time. The deeper the child's integration in the old state, probably the less fast his or her achievement of the requisite degree of integration in the new state. Likewise, 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 or her achievement of that requisite degree. In circumstances where all of the central members of the child's life in the old state to have moved with him or her, probably the faster his or her achievement of habitual residence. Conversely, were any of the central family members have remained behind and thus represent for the child a continuing link with the old state, probably the less fast his or her achievement of habitual residence.

ix) A child will usually, but not necessarily, have the same habitual residence as the parent(s) who care for him. The younger the child the more likely that proposition but this is not to eclipse the fact that the investigation is child focused.

x) Parental intention is relevant to the assessment, but not determinative. There is no requirement that there be an intention on the part of one or both parents to reside in the country in question permanently or indefinitely. Parental intent is only one factor, along with all other relevant factors, that must be taken into account when determining the issue of habitual residence.

22. Restrictions imposed by the COVID-19 pandemic do not prevent the acquisition of habitual residence (see JM v RM (Abduction: Retention: Acquiescence) [2021] EWHC 315 (Fam)).

23. In considering the question of habitual residence, it is not necessary for the court to make a searching and microscopic enquiry (Re B (Minors)(Abduction)(No 1) [1993] 1 FLR 988)."

35. The court is required to undertake a global analysis taking account of the comparative nature of the exercise. Mr Gupta has referred the court to the CJEU case *Proceedings brought by HR* [2018] 3 WLR 1139 paragraphs [41] – [46] and during the hearing referred the court to *In Re LC* [2014] AC 1038 at [35] – [36] which refers to the *Mercredi* case where the CJEU referred to the environment of a young child as *'essentially a family environment determined by reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of. This is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent…'.* As Baroness Hale stated in *A v A [2014] AC 1* at [54] it is *'necessary to*

assess the integration of that person or persons in the social and family environment of the country concerned'.

36. In her skeleton argument Ms McKenna referred to the decision of Hayden J in *In Re B (A Child)(Custody Rights: Habitual Residence)* [2016] EWHC 2174 (Fam) at paragraph [18] where he stressed the importance of analysing the question from the perspective of the child, rather than through the prism of adult disputes. He refers to the need to undertake a *'real and detailed consideration of (inter alia): the child's day to day life and experiences; family environment; interests and hobbies; friends etc and an appreciation of which adults are most important to the child. The approach must always be child driven.'*

37. As regards the question of consent under Article 13a the relevant legal principles are well settled and require that the consent must be real, positive, clear and unequivocal, although it need not take the form of specific words or be reduced to writing; and the burden is on the abducting parents to prove it on the balance of probabilities (see *Re P-J (Children)(Abduction: Consent)* [2010] 1 WLR 1237 (CA) at [48]).

38. In relation to acquiescence the leading case remains *In re H and others (Minors) (Abduction: acquiescence)* [1998] AC 72 at paragraphs [89]-[90].

39. The court has also been referred to *R v R (Residence Order: Child Abduction)* [1995] 3 WLR 425 which refers to the courts obligation when it becomes aware that there may have been a wrongful removal or retention of a child within the meaning of the Hague Convention unless the court was satisfied there has been acquiescence in the wrongful removal or retention.

Submissions

40. In his written and oral submissions Mr Gupta sets out that habitual residence remained in Country B at the relevant time in April 2023. He relies on the following matters:

    (1) The length of time X had spent living in Country B, which was over a two year period and consequently for the majority of her life. She has only remained here since April 2023 due to the father's unwillingness to consent to her return.

    (2) X was fully integrated into Country B due to the length of time she was there, the vast majority of that time had been in the sole care of the mother, together with the mother's wider family; the mother is a Country B national and has an established social network there; X was baptised there in April 2021; in December 2021 the parents looked at properties to purchase in Country B; the mother rented a property for a year in August 2022 and recently looked at properties to purchase there; X is registered in a nursery and pre-primary and primary school starting in 2025 and she has ongoing medical insurance there.

    (3) The father recognised the fact that the mother and X's habitual residence was in Country B in October 2022 when he issued proceedings and in December 2022 when the mother was served with the proceedings two days prior to leaving Country B.

(4) X's habitual residence did not change between 21 December 2022 and 12 April 2023 due to the limited time that was spent here (13 weeks), she had not integrated into a new social or family environment here due to her limited attendance at nursery, the evidence about how unsettled she was, the nanny had only been hired on a temporary basis and how X identified Country B as home as described by the nanny in her statement.

41. Mr Gupta submits that the defence of consent does not get off the ground as the very fact that the father took X's passport without the mother's knowledge demonstrates that the mother was not consenting to the retention. He has referred to the dicta of Wilson LJ (as he then was) in *Re P-J* (ibid) when he stated that a clandestine removal will usually be indicative of the absence in reality of subsistence of consent.

42. Turning to the issue of acquiescence he submits it is a matter of the actual subjective intention of the wronged parent (here the mother), save only where the words or actions clearly show, and led the other parent (here the father) to believe that she was not going to assert her right to summary return.

43. Mr Gupta submits the letters from the mother's first solicitors conveyed the very clear message that the mother sought to return to Country B with X. Any reference in them to the Hague Convention was in the context of the allegations made by the father in the divorce petition that the mother had wrongfully retained X in Country B in 2021. There is no doubt, on the evidence, that the mother has not wavered in her wish to return to Country B with X. The only thing that prevented her from doing so was the father's actions in removing the passport, withdrawing his consent and securing a port alert.

44. He submits the defences are not made out and the court should order a return.

45. On behalf of the father, Ms McKenna submits X's habitual residence was established here at the relevant time in April 2023. She submits the objective factors that were in place in relation to X's day to day life at the time of the alleged wrongful retention mean it is obvious X had some degree of integration in a social and family environment in this jurisdiction.

46. She relies on the following factors: by April 2023 X had a routine and stability to her life here; she was living with both her parents who were jointly caring for her, as illustrated by the WhatsApp messages between them regarding the day to day care arrangements for X; X was living in her family home which Ms McKenna contrasted to the many moves of accommodation X had had in Country B; X remained registered with her GP in London and her 12 month and 24 month checks are recorded here; X has private medical care here; was enrolled for nursery which she attended here and the nursery were able to give information about her from that attendance; X had a live in nanny; X was registered for many extra-curricular activities, such as soccer and ballet; X has extended paternal family members here; when spoken to by the social worker who conducted the assessment she described her home as being the nanny and her parents.

47. Ms McKenna submits when looked at through the prism of the child's eyes her habitual residence is clearly here. She referred the court to what X is reported as saying to the author of the child and family assessment that she refers to home as

being the mother, father and nanny here. She submits that due to the pre-planning and particular circumstances X's habitual residence was quickly re-established here like a *'hand in a glove'.* She rejects any suggestion that X's habitual residence is dictated by the mother's thoughts or intentions and relies on what the mother informed the social worker of her robust support network of friends here (which the mother disputes saying in those terms to the social worker) and relies on the picture conveyed in the WhatsApp messages of the mother's social life and the day to day sharing of parental roles.

48. If she is not successful in her arguments regarding habitual residence, Ms McKenna submits X was living here lawfully with both parents agreement as the mother had agreed to the move here on an unconditional basis. She rejects any significance to the return date in Document 1. She submits the return in December 2022 was *'a return to life in London to make work to repair their marriage. It was clearly for both of them, a move made with no set preconditions as to the 'what if' scenario of the marriage failing. Whilst M may have wished for assurances that she would move back to Country B with [X] in the event the marriage failed – these conditions were not available at the point at which she positively chose to travel to London and remain there with [X]. She voluntarily, and together with F, re-established her own and [X's] lives here'.* She submits until the point of the parents separation the mother was in agreement for the family to live here. She submits the mother *'clearly and unequivocally'* agreed to X living in England. She may have changed her mind post-separation but she cannot withdraw the consent previously given.

49. As regards acquiescence the father relies on the correspondence from the mother's solicitors. She relies on the fact that the mother had been in receipt of legal advice from experienced solicitors both here and in Country B. As a consequence, it is submitted the mother knew far beyond general terms what her rights and obligations were pursuant to the Hague Convention. It was in that context the letters were sent by the solicitors she first instructed here that raised the issue, on more than one occasion, about issuing proceedings here relating to X. As a result, Ms McKenna submits, the mother accepted in the letters written on her behalf by her first solicitors she would not be seeking X's summary return, that the English courts had substantive jurisdiction and X was living in and habitually resident in England. Ms McKenna submits the mother is noticeably opaque, describing in her statement receiving 'full' advice when she instructed her current solicitors but if she is suggesting she blames her first solicitors she has not produced any evidence to support that.

50. Finally, Ms McKenna submits if the court does accept any of the defences are made out and the court gets to the stage of considering whether it should exercise its discretion it should exercise it in a way to refuse to make a return order for the following reasons: X is a British child of British parents, she was born here, her settled home is here, it is more convenient for welfare issues relating to her to be considered in this jurisdiction and the mother has never worked in Country B.

Discussion and decision

51. The 1980 Hague Convention only applies to removals or retentions which are 'wrongful'. By Article 3, a removal or retention is considered wrongful if there is a breach of the rights of custody of the left-behind parent. If there is no breach then as Lord Hughes observed in *In re C* [2019] AC 1 *'it is clear that the Convention cannot*

bite; such a breach is essential in activating it, via articles 3 and 12.' Retention occurs where a child who has been for a limited period of time outside the state of habitual residence is not returned to that state on the expiry of such limited period.

52. If there has been a wrongful removal or retention within the scope of the 1980 Hague Convention, Article 13 sets out a number of grounds on which the application can be opposed.

53. The first issue is habitual residence; it is a question of fact that the court needs to consider having regard to the wide canvas of evidence and undertaking what has been described as a global analysis.

54. It is necessary to consider the evidence of the circumstances in which X left Country B in December 2022, as well as the period before and since.

55. The mother and X had lived in Country B for two years, a significant part of X's life. Whilst initially the trip had been intended to be short term through a combination of Covid travel restrictions and other circumstances, such as ill health of the mother or X, they had remained living in Country B continuously for two years. Whilst it is not disputed that when the father was there they lived in a series of temporary accommodation the mother and X did spend extended times living with her parents. The mother rented a property in August 2022 for a year and whilst it is suggested she spent very little time there it demonstrated a commitment to remain living there. X was cared for full time during this period by the mother and clearly established roots there and was integrated in a social and family environment with the mother and her wider family in the way the mother describes in her written evidence, with the father visiting when he was able to.

56. The father accepts that in December 2022 X's habitual residence was in Country B. He acknowledged that, at least by October 2022 when the divorce petition he issued was based on the mother's habitual residence and he accepted that Country B had jurisdiction in relation to matters concerning X.

57. Having been notified of the divorce proceedings the parties explore the possibility of reconciliation and a way forward was suggested to try that in London and in late November 2022/early December 2022 flights were booked with the mother in her message on 13 December 2022 referring to the return ticket in June 2023. A recurring theme in the WhatsApp messages is the mother seeking continued reassurance that she will be able to return to Country B with X, for example on 16 December 2022 the mother's message included *'.....I also have a few genuine concerns which we need to pleas iron out today. The main one is that things don't work out between us, and that we then still end up getting divorced, I cannot risk being a single mum stuck in London in those circumstances so I would please ask you to undertake that you will not prevent me and [X] from returning to Country B'.* She refers to the divorce proceedings the father had issued and then continues '*….I need this in order to get comfortable to travel over'.* These message exchanges continue that day with reference to undertakings and instructing lawyers and the position remains uncertain as to whether the mother is actually going to go. The mother refers to documents stating *'I have got drafts dealing with the consent (which we need in any event under the imminent act) as well as the undertaking which I can send to you. Refusing it will result in the saddest situation because I am emotionally not in a position to fly*

without it…just keep thinking of the worst case scenario which is that you refuse consent for us to return.' The father takes issue with this referring to the fact that they did not get married and have a child on the understanding if they split *'you would take out child half way across the world.'* He states he will not sign a document that separates him from X in the event of the marriage failing.

58. The mother sends the two documents to the father on 18 December, as described above (Document 1 and Document 2), making it clear she cannot run the risk of coming to England without being able to get back to Country B. The father responds that '*…the ramifications of you not getting on that plane will be terrible for all three of us. You have made your choice.'* He seeks provision for X to be educated in England longer term to be included.

59. On the 19 December 2022 the father instructs his solicitors in Country B to serve his divorce petition on the mother. The mother suggests that she and X could come to England for Christmas she could *'change the return flight to 28 Dec'* so they can *'figure out exactly how the arrangement of life between England and Country B would look'*. A little later the mother responds that she does want X to spend time with the father but '*that doesn't mean I am okay with permanently living in England…so that is the bit we need to agree on'.* The father responds stating *'I have never said you, or we, should permanently live in England…Please, prioritise confirming you are coming over there is a LOT to do and very little time'.*

60. On 20 December 2022 the father sends a message to the mother stating he will get an '*amended form of affidavit signed and witnessed today to allow you to fly with [X]'.* The mother asks for details of any amendments as she needs '*flexibility to come back at any point to enable me to consider the divorce proceedings etc'.* The father responds it will be a straightforward affidavit *'which confirms you can fly with [X] and back'.* The mother makes clear she needs to see the document and the father asks for when the return flights are, confirming they are currently 10 June 2023.

61. The father sent the revised affidavit (Document 1), the mother asked about Document 2 stating *'so that I know you won't withdraw your consent',* the father responded stating *'Why don't I just make the affidavit irrevocable? Ie 'this affidavit also serves as my irrevocable consent…'* reassuring the mother that she could turn up at the airport with X and use it to get on the plane with X without the father. Following further exchanges the father confirmed the affidavit is to enable the mother and X to get through immigration '*both ways'* and regarding the mother's concerns about 'domicile' being removed the father stated *'You have a very clear statement by me in the summons regarding [X's] residential status'* a clear reference to the divorce petition that had been served the previous day. The father reassured the mother that she won't need to feel trapped here, her responses include *'...just promise me you won't stop me from doing that [coming back to Country B]. I need the flexibility… because if I feel trapped there, it won't be good for anyone…For now, and in order to deal with how anxious it makes me feel, it helps a hell of a lot to know I can literally get on the next flight back if necessary. The fact you understand that, helps more that you can every imagine'.*

62. The amended signed version of Document 1 was received by the mother at 12.43 on 21 December. The mother and X flew to London later that day.

63. On the evidence this was not a wholly consensual re-location back to this jurisdiction as the father seeks to suggest in his statement. It was in the context of a very fragile relationship between X's parents, where they were tentatively exploring reconciliation. They had effectively lived separately since mid-2021, the father had issued divorce proceedings, within days prior to the mother and X coming to this jurisdiction she had sought for the father to sign various documents that would give her the security of knowing she and X would be able to return to Country B and two days before they came back here the father served the divorce proceedings on the mother, making it clear he accepted the jurisdiction of the court in Country B in relation to all aspects, namely divorce, children and financial issues. Bearing in mind the timing and context when that was done it can only have been done to give the mother the reassurance she sought in the documents she sent to the father on 19 December, the father confirms that in the message that states that the summons gives a very clear statement regarding X's residential status, namely in Country B. To describe what happened on 21 December 2022 as being a joint consensual decision to effectively re-establish their lives in London simply does not fully reflect the reality. It was, in my judgment, a fragile temporary arrangement in the context of the parents seeing if they could reconcile, where the mother had made clear her position to be able to return back to Country B with X '*on the next flight if necessary' ,* the father had given that by adding 'irrevocable' to document 1, and he had taken the deliberate step of serving the divorce petition on her re-assuring her about X's residential status in Country B. The father also knew about the long stop return date of 10 June 2023 specified in Document 1. I therefore reject any suggestion by Ms McKenna that this case was similar on its facts to *Re NY [2019] EWCA Civ 1065.*

64. It is right, as has been emphasised by Ms McKenna, there were many features of X's day to day life once she arrived in the UK that suggest there was some degree of integration in a social and family environment in England, such as the employment of a nanny, registering her for a nursery, attendance at extra activities and being cared for by both her parents at a home she had lived in for the first four months of her life. On a practical level those arrangements needed to be in place. However, that evidence cannot be looked at in isolation of the context of how those arrangements came into being, the position of the parents, particularly the mother who had been X's main carer over such an extended period and what the circumstances were, namely a short term temporary visit to see if her parents could effect a reconciliation.

65. Whilst it is, of course, important to consider the issue of habitual residence from the perspective of the child, this cannot be done in isolation of the intentions of the adults, in particular their main carer. There is no issue that the mother was X's main carer, certainly prior to December 2022. X was well integrated into a family and social environment there, the evidential window about that is provided in the statement from the mother and the nanny. After that clearly both parents cared for her as they lived under the same roof but they both worked and a nanny was employed. Within a relatively short period of time X returned with her mother to Country B and, according to the mother, she sought the re-assurance of seeing Document 1 again before she returned to England. Document 1 had an end date. The text messages prior to the mother and X returning to the UK on 21 March 2023 make clear the situation remained very fragile, and it being uncertain whether, in fact, the mother and X would fly back from Country B later that day. The mother states *'Well I can't fly if we're not in agreement over the main thing which is where [X] and I live if we get divorced'.*

These messages continue right up until the flight later that day and Document 1 is sent over to the mother again and she responds *'...I take a lot of comfort from this because what it means is that if it all gets too much for me in London, I can get back here'* and she and X get on the plane to the UK later that day taking one a few hours later than the one the father is on.

66. It is right that X is reported to refer to the nanny, and her parents who *'live at home'* when she was spoken to by the social worker who undertook the Children and Family Assessment dated 5 June 2023 but this needs to be balanced with the detailed description by the nanny in her statement as to how X referred to her life in Country B, not only soon after she arrived here but continued to do so. This supports the degree of X's integration in Country B when she lived there, as the mother describes in her written evidence.

67. Having stood back and looked at the evidence as a whole I have reached the conclusion that at the relevant time in April 2023 X's habitual residence remained in Country B. I have carefully weighed in the balance all the points relied upon by Ms McKenna about the way X integrated into a family and social environment here (i.e. nanny, nursery, living in previous home with her parents and undertaking various activities) but also have to weigh in the balance the clear evidence, in my judgment, that in reality this was only a temporary arrangement in the context of the parents seeing whether they could repair their marriage. This is made clear by the messages running up to the departure in December 2022, the active step the father took in serving the divorce petition two days before departure with the express intention of giving the mother the re-assurance she was seeking, Document 1 was time limited and the consent was given on an irrevocable basis. Whilst it is right the words 'domicile' and 'temporary' were deleted, the divorce petition, the addition of 'irrevocable' and the end date of 10 June 2023 gave the reassurance the mother sought. This conclusion is supported by the text exchanges around the time of the return on 21 March 2023. In addition, I have factored in the extent to which X was integrated into the social and family environment in Country B. The mother and X were based at her parents' home, spending time in short term rented accommodation when the father was present in Country B for the reasons given. That did not detract from the roots X had clearly put down in Country B, as described by the mother.

68. In those circumstances, the steps taken by the father in April 2023 in removing the passport without the consent or knowledge of the mother amounted to a retention.

69. Turning to the defences raised by the father. The burden of proof rests on the father to establish them.

70. I reject the defence of consent. There is no evidence the mother clearly, positively and unequivocally consented to X coming to this jurisdiction in the way suggested by the father for the reasons outlined above. It was a temporary, fragile and uncertain arrangement in the context of the parents' marriage breakdown where the father provided many of the assurances sought by the mother for her and X to return to Country B. The consistent theme running through the evidence is the mother seeking reassurance that she could return to Country B with X, if necessary '*on the next plane',* which is wholly inconsistent with the essential requirements for consent under Article 13a. The messages exchanged between the parents on 21 March 2023 confirm this remained the position.

71. Turning to the issue of acquiescence it is right both parties had access to legal advice, the mother confirmed she did in Country B in December 2022 and she instructed solicitors here following her discovery that the father had taken X's passport. The correspondence from the mother's first solicitors make clear the mother's wholesale opposition to the retention and X remaining here. The letters consistently refer to her wanting to take X back to Country B, which is inconsistent with her having acquiesced to X's retention. Ms McKenna invites the court to infer that due to the mother being a solicitor and having taken legal advice in the way that she has she is fully conversant with her rights under the Hague Convention to seek a summary return. What is clear from the correspondence is that she is seeking an immediate return, the only thing that is stopping her are the actions by the father (removal of passport, withdrawal of consent and instigation of port alert). There is no express reference to the Hague Convention in the letters other than in the context of the father's allegations regarding the mother's retention of X in Country B. There are references to making applications to the court here but the mother would have to do that in any event due to the father's unilateral actions and the child being present in this jurisdiction. Having looked at the correspondence as a whole, in the particular circumstances of this case it cannot be said that it led the father to believe that the mother was not asserting or not going to assert her right to the summary return. Therefore, in my judgment, this defence is not established either.

72. As a result of what is set out above, the mother's application for X to return to Country B is granted.