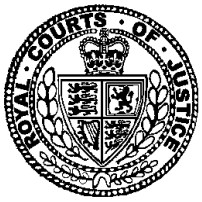

Neutral Citation Number: [2023] EWHC 2162 (Fam)

Case No: FD23P00296

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/08/2023

Before :

JOHN MCKENDRICK KC
(Sitting as a Deputy Judge of the High Court)

- -

Between :

A FATHER — **Applicant**

- and -

A MOTHER — **Respondent**

Re B (A Child) (Consent; Acquiescence; Intolerability)

- -
- -

Mr **Mani Basi** instructed by Ellis Jones Solicitors appeared for the applicant
Mr **Mark Jarman KC** instructed by Dawson Cornwell for the respondent

Hearing Date: 8 August 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 25 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

JOHN MCKENDRICK KC

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.

The Deputy Judge:

Introduction

1. By way of an application, sealed on 9 June 2023, and made pursuant to the Child Abduction and Custody Act 1985 (incorporating, by Schedule 1, the 1980 Hague Convention on the Civil Aspects of International Child Abduction, hereafter the "Hague Convention") the applicant seeks the summary return of his son to the Kingdom of The Netherlands. I shall refer to his son, born in August 2017 and aged six, as B. The respondent to the application is B's mother.

2. The applicant has been represented by Mr Mani Basi. The respondent was represented *pro bono* by Dawson Cornwell and Mr Mark Jarman KC. I am grateful to all the legal representatives for their adroit preparation of the hearing of this summary application. I am particularly grateful to Dawson Cornwell and Mr Jarman KC for their *pro bono* assistance to the respondent, the court and, ultimately, to justice.

The Background and the Dispute

3. The applicant is Dutch and the respondent is British. They met in Amsterdam in 2015 and married in September 2016. B was born in August 2017. They divorced in June 2022. At the same time a Dutch Court made an order that B has his main residence with the respondent and should reside with the applicant from Friday to Monday. The Dutch court noted it had jurisdiction over B's welfare. In May 2022 the respondent left B in his father's full time care. She left The Netherlands. On 6 August 2022 the applicant took B from his home in The Netherlands to the respondent's parents' home in England where she was living. The applicant says this was for the purpose of a three week holiday. The respondent says it was for B to come to England to live permanently. Since then, B has not returned to The Netherlands. The applicant objected to B remaining in England in written correspondence in August 2022. In March 2022 he contacted the Dutch Central Authority. On 9 June 2023 the applicant's application for the summary return of B was sealed.

4. The applicant submits B was habitually resident in The Netherlands on 27 August 2022 and he was exercising custody rights. He submits none of the exceptions are made out and B should be returned. Mr Basi submits the applicant did not consent to the August 2022 relocation and the facts demonstrate he has not acquiesced since. He also submits the case on intolerability is not made out and even if it were to be, there are sufficient protective measures. I am asked to return B and reminded that the Dutch court (which made clear it exercised jurisdiction in respect of B) made a custody order as recently as June 2022, only two months before the removal to England, and an order that B must be returned to his country of habitual residence for the Dutch courts to resolve matters between the applicant and respondent.

5. The respondent submits that the applicant consented to the removal before 6 August 2022. Mr Jarman relies on the respondent's written evidence that there was a conversation between the parties where the applicant agreed to B residing in England because he could not cope. Mr Jarman submits that since 27 August 2023, the applicant

has acquiesced. He points to the limited steps taken by the applicant between August 2023 and June 2023. Further, he submits it would be intolerable for B to return to The Netherlands, given the mother's likely position if she returned and there are not sufficient protective measures. He also submits B was habitually resident in England by 9 June 2023.

6. Case management orders were made by Theis J on 20 June 2023, MacDonald J on 21 July 2023 and more recently by Theis J on 2 August 2023.

Summary of the Legal Principles

Hague Convention Purpose

7. The objective of the Hague Convention is set out in the preamble:

> "Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,"

8. Article 12 of the Hague Convention provides:

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

9. The HCCH 1980 Child Abduction Convention Guide to Good Practice ("the Good Practice Guide") makes clear the wider purpose of the Convention and the need for any court considering these issues to have firmly in mind the principles of international comity between jurisdictions which underpin the Hague Convention. I remind myself of paragraphs 14, 15 and 16 of the Good Practice Guide:

> "The second underlying concept is that the wrongful removal or retention of a child is prejudicial to the child's welfare and that, save for the limited exceptions provided for in the Convention, it will be in the best interests of the child to return to the State of habitual residence.
>
> The third underlying concept is that, as a rule, the courts of the child's State of habitual residence are best placed to determine the merits of a custody dispute (which typically involves a comprehensive "best interests" assessment) as, inter alia, they generally will have fuller and easier access to the information and evidence relevant to the making of such determinations. Therefore, the return of the wrongfully removed or retained child to his or her State of habitual residence not only restores the status quo ante, but it allows for the resolution of any issues related to the custody of, or access to, the child, including the possible relocation of the child to another State, by the court that is best placed to assess effectively the child's best interests. This third underlying concept is founded on international comity, which requires that the Contracting Parties

> "[…] be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them – those of the child's habitual residence – are in principle best placed to decide upon questions of custody and access
>
> The above-mentioned purpose of the Convention and underlying concepts define the narrow scope of the Convention, which deals exclusively with the prompt return of wrongfully removed or retained children to their State of habitual residence, subject only to the limited exceptions provided for by the Convention. In doing so, rights of custody existing in the State of habitual residence are respected in the other Contracting Parties. In dealing with the prompt return of children, the Convention does not deal with the merits of custody and access, which are reserved for the authorities of the State of habitual residence (see para. 15 above)."

10. Mr Basi also draws to my attention the analysis of the Hague Convention by Mostyn J in *B v B* [2014] EWHC 1804 at paragraph 2 and 3:

> The Hague Convention of 1980 is arguably the most successful ever international treaty and it has over 90 subscribers to it, over half the countries in the world. The underlying and central foundation of the Convention is that, where a child has been unilaterally removed from the land of her habitual residence in breach of someone's rights of custody, then she should be swiftly returned to that country for the courts of that country to decide on her long-term future.
> …….
> The Convention does not order a child who has been removed in the circumstances I have described to live with anybody. The Convention does not provide that the parent who is left behind should, on the return of the child, have contact or access in any particular way. The Convention does not provide that, when an order for return to the child's homeland is made, the child should stay there indefinitely. All the Convention provides is that the child should be returned for the specific purpose and limited period to enable the court of her homeland to decide on her long-term future. That is all it decides.

Consent And Acquiescence

11. Article 13 of the Hague Convention states *inter alia*:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of <u>the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that</u>
> a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, <u>or had consented to</u> <u>or subsequently acquiesced</u> <u>in the removal or retention</u> …

12. *Hershman and McFarlane: Children Law and Practice* by McFarlane, Reardon and Laing, published by Bloomsbury has a very useful summary of the principles at paragraph 166AB. I endeavour to summarise their summary. Consent must be proven on the balance of probabilities by the party alleging consent was obtained. Consent is an exception to the principle of return. Consent refers to consent given before the act of removal or retention. Consent need not be proved by evidence in writing or other documentary material as parents may not have reduced their agreed position in respect of their children to a written document. It is appropriate to consider the parents' conduct in the context of all the evidence before the court. Consent is not however a purely private 'state of mind' which need not be communicated. Consent must be seen in the context of family life, not the rules of contract law. Consent can be withdrawn at any time before the actual removal. Consent must be real. The task of the court is to find as a fact whether the parent subjectively intended to and did give unconditional consent to the removal. Had the parent clearly and unequivocally consented to the removal?

13. The issue of consent and acquiescence was raised in *In re P-J (Children) (Abduction: Consent)* [2009] EWCA Civ 588; [2010] 1 WLR 1237. Wilson LJ (as he then was) (with the agreement of Ward LJ) noted the difference between consent and acquiescence at paragraph 53:

> Nowadays not all law can be simple law; but the best law remains simple law. (a) However Professor Perez-Vera may have expressed herself in her Explanatory Report, we have to construe the words "had consented to or subsequently acquiesced in the removal or retention" in article 13(a) of the Hague Convention. The use of the pluperfect tense ("had consented"), contrasted with the qualification of the word "acquiesced" by the word "subsequently", seems clearly to show that the concept of "consent" relates to a stance taken by the left-behind parent prior to the child's removal (or retention) and that the concept of "acquiescence" relates to his stance afterwards.

14. Mr Basi reminds me of Peter Jackson LJ's learning in *G (Abduction: Consent/Discretion)* [2021] EWCA Civ 139 at paragraph 25 to 26 where the principles were summarised as follows:

> '…The position can be summarised in this way:
> (1) The removing parent must prove consent to the civil standard. The inquiry is fact-specific and the ultimate question is: had the remaining parent clearly and unequivocally consented to the removal?
> (2) The presence or absence of consent must be viewed in the context of the common sense realities of family life and family breakdown, and not in the context of the law of contract. The court will focus on the reality of the family's situation and consider all the circumstances in making its assessment. A primary focus is likely to be on the words and actions of the remaining parent. The words and actions of the removing parent may also be a significant indicator of whether that parent genuinely believed that consent had been given, and consequently an indicator of whether consent had in fact been given.
> (3) Consent must be clear and unequivocal but it does not have to be given in writing or in any particular terms. It may be manifested by words and/or inferred from conduct.

> (4) A person may consent with the gravest reservations, but that does not render the consent invalid if the evidence is otherwise sufficient to establish it.
> (5) Consent must be real in the sense that it relates to a removal in circumstances that are broadly within the contemplation of both parties.
> (6) Consent that would not have been given but for some material deception or misrepresentation on the part of the removing parent will not be valid.
> (7) Consent must be given before removal. Advance consent may be given to removal at some future but unspecified time or upon the happening of an event that can be objectively verified by both parties. To be valid, such consent must still be operative at the time of the removal.
> (8) Consent can be withdrawn at any time before the actual removal. The question will be whether, in the light of the words and/or conduct of the remaining parent, the previous consent remained operative or not.
> (9) The giving or withdrawing of consent by a remaining parent must have been made known by words and/or conduct to the removing parent. A consent or withdrawal of consent of which a removing parent is unaware cannot be effective.
>
> All of these matters are well-established, with the exception of the last point, which did not arise for consideration in the reported cases. As to that, there are compelling reasons why the removing parent must be aware of whether or not consent exists. The first is that as a matter of ordinary language the word 'consent' denotes the giving of permission to another person to do something. For the permission to be meaningful, it must be made known. This natural reading is reinforced by the fact that consent appears in the Convention as a verb ("avait consenti/had consented"): what is required is an act or actions and not just an internal state of mind. But it is at the practical level that the need for communication is most obvious. Parties make important decisions based on the understanding that they have a consent to relocate on which they can safely rely. It would make a mockery of the Convention if the permission on which the removing parent had depended could be subsequently invalidated by an undisclosed change of heart on the part of the other parent, particularly as the result for the children would then be a mandatory return. Such an arbitrary consequence would be flatly contrary to the Convention's purpose of protecting children from the harmful effects of wrongful removal, and it would also be manifestly unfair to the removing parent and the children'.

15. At paragraph 166B of *Hersman and McFarlane* the learned authors deal with acquiescence. I summarise again. The exception of acquiescence requires the court to look at the subjective mind of the wronged parent and ask: "has he in fact consented to the continued presence of the child in the jurisdiction to which he has been abducted? Has the wronged parent gone along with the abduction?" Acquiescence is of the actual subjective intention of the wrong parent. It is a pure question of fact for the judge on the material before him. The burden of proof is on the abducting parent to establish the acquiescence has occurred. Earlier misstatements of the law drawing distinctions between 'active' and 'passive' acquiescence are incorrect. The fact there has been *some* active conduct indicating possible acquiescence does not justify ignoring the subjective intentions of the wronged parent (*Re H (Minors) (Acquiescence)* [1998] AC 72). Parents should not be deterred from agreeing sensible arrangements for the future of their

children, the fact such negotiations have taken place should not necessarily lead to the conclusion that there has been acquiescence.

16. The leading case is *Re H and Others (Minors) (Abduction: Acquiescence)* [1998] AC 72. The headnote to the law report states:

> "that English law concepts of acquiescence had no direct application to the construction of article 13 of the Convention; that acquiescence under article 13(a) was a matter of the actual subjective intention of the wronged parent, save only where his words or actions clearly showed, and had led the other parent to believe, that he was not asserting or going to assert his right to summary return and were inconsistent with such return; and that acquiescence was a question of fact, the burden of proof being on the abducting parent, but that judges should be slow to infer an intention to acquiesce from attempts by the wronged parent to effect a reconciliation or to reach an agreed voluntary return of the abducted child."

17. Lord Browne-Wilkinson (with whom the other four Law Lords agreed) framed the issues acquiescence and removal as follows at 84 G-H:

> The primary question in the present case is whether the father, by pursuing his remedies in the Israel Beth Din in accordance with the tenets of his religion rather than promptly bringing proceedings for summary return of the children under article 12, has acquiesced in "the removal" of the children. It is not a case of wrongful "retention" by the mother: it is established by the decision of this House in *In re H. (Minors) (Abduction: Custody Rights)* [1991] 2 A.C. 476 that there is "retention" of the child for the purposes of the Convention only where the child has been lawfully taken from one country to another (e.g. for staying access for a defined period) and there has then been a wrongful failure to return the child at the expiry of that period. In the present case, the mother wrongfully removed the children and the question is whether the father has acquiesced in that removal.

18. Lord Browne-Wilkinson focused on the nature of the Hague Convention and its international application, holding at p. 87 E-G:

> In my view these English law concepts have no direct application to the proper construction of article 13 of the Convention. An international Convention, expressed in different languages and intended to apply to a wide range of differing legal systems, cannot be construed differently in different jurisdictions. The Convention must have the same meaning and effect under the laws of all contracting states. I would therefore reject any construction of article 13 which reflects purely English law rules as to the meaning of the word "acquiescence." I would also deplore attempts to introduce special rules of law applicable in England alone (such as the distinction between active and passive acquiescence) which are not to be found in the Convention itself or in the general law of all developed nations.

19. He held that:

> What then does article 13 mean by "acquiescence?" In my view, article 13 is looking to the subjective state of mind of the wronged parent. Has he in fact consented to the continued presence of the children in the jurisdiction to which they have been abducted? …..In my judgment it accords with the ordinary meaning of the word "acquiescence" in this context. In ordinary litigation between two parties it is the facts known to both parties which are relevant. But in ordinary speech a person would not be said to have consented or acquiesced if that was not in fact his state of mind whether communicated or not.
>
> ….
>
> In my judgment, therefore, in the ordinary case the court has to determine whether in all the circumstances of the case the wronged parent has, in fact, gone along with the wrongful abduction. Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions.
>
> …
>
> Once it is established that the question of acquiescence depends upon the subjective intentions of the wronged parent, it is clear that the question is a pure question of fact to be determined by the trial judge on the, perhaps limited, material before him.

20. He then turned to the effect of a finding of acquiescence in the retention by the wronged parent and held at 89 D-E:

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

21. Lord Browne-Wilkinson held: “Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced.”

22. Mr Basi also relied on *P v P* [1998] 1 FLR 630 where Hale J (as she then was) held:

> “This case has all the hallmarks of what no doubt frequently occurs in these cases, of parents seeking to compromise a situation, allowing the abducting parent to remain in the country to which he or she has gone provided the wronged parent is satisfied as to the other matters which are in issue between them. Only if there were such a concluded agreement could it be said that there was clear and unequivocal conduct such as to fall within the exception….it would be most unfortunate if parents in this situation were deterred from seeking to make sensible arrangements, in consequence of what is usually an

> acknowledged breakdown in the relationship between them, for fear that the mere fact that they are able to contemplate that the child should remain where he has been taken will count against them in these proceedings. Such negotiations are, if anything, to be encouraged. They should not therefore necessarily fall within the exception or necessarily lead to the conclusion as a matter of fact that there was a subjective state of mind that was wholly content for the child to remain here.

23. Mr Jarman referred me to Mostyn J's decision in *JM v RM (Abduction: Retention: Acquiescence)* [2021] EWHC 315 (Fam) and in particular paragraph 46:

> "In my judgment, to succeed in a defence of acquiescence, it is not necessary to show more than the second sense of its meaning, namely that the left-behind parent has passively gone along with the removal or retention. This is not to reintroduce the distinction between active and passive acquiescence disapproved in *In re H*. That distinction had given rise to different legal treatments of the left-behind parent's subjective intentions. That distinction was overturned. Whether the conduct of the left-behind parent was active or passive, his intentions had to be established as a matter of fact."

24. Mostyn J at paragraph 52 states that in an "ordinary" case of acquiescence: "did the father after [the date] subjectively consent to, or go along with, the retention by the mother of the children in England?" By "ordinary", Mostyn J is drawing a distinction with Lord Browne-Wilkinson's exception to the rule in *Re H*, the situation where the wronged parent outwardly consents with a clear statement, but who inwardly objects. This 'exception to the rule' has no application to this case.

25. If the consent or acquiescence exceptions are made out, the court's discretion to order the return is at large, see *Re M and Another (Children) (Abduction: Rights of Custody)* [2007] UKHL 55; [2008] AC 1288.

Article 13 (b) - Intolerability

26. The law in respect of the defence of grave risk of harm or intolerability pursuant to Article 13(b) was considered by the Supreme Court in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27; [2012] 1 AC 144. In *E v D (Return Order)* [2022] EWHC 1216 (Fam) MacDonald J helpfully summarised the relevant principles at paragraphs 29 and 30:

> "i) There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.
>
> ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.

> iii) The risk to the child must be 'grave'. It is not enough for the risk to be 'real'. It must have reached such a level of seriousness that it can be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two.
>
> iv) The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'. 'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'.
>
> v) Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child's immediate future because the need for protection may persist.
> …..
>
> In *Re E*, the Supreme Court made clear that in examining whether the exception in Art 13(b) has been made out, the court is required to evaluate the evidence against the civil standard of proof, namely the ordinary balance of probabilities whilst being mindful of the limitations involved in the summary nature of the Convention process. Within the context of this tension between the need to evaluate the evidence against the civil standard of proof and the summary nature of the proceedings, the Supreme Court further made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as grounding the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm can be identified."

27. Mr Jarman also made reference to the decision of Baker LJ (with the agreement of King and Lewis LJJ) in *Re IG (A Child) (Child Abduction: habitual residence: Article 13 (b))* and his summary of the legal principles at paragraph 46 to 48 which held:

> "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.

The relevant principles are, in summary, as follows.

> (1) The terms of Article 13(b) are by their very nature restricted in their scope. The defence has a high threshold, demonstrated by the use of the words "grave" and "intolerable".
> (2) The focus is on the child. The issue is the risk to the child in the event of his or her return.
> (3) The separation of the child from the abducting parent can establish the required grave risk.
> (4) When the allegations on which the abducting parent relies to establish grave risk are disputed, the court should first establish whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then establish how the child can be protected from the risk.
> (5) In assessing these matters, the court must be mindful of the limitations involved in the summary nature of the Hague process. It will rarely be appropriate to hear oral evidence of the allegations made under Article 13(b) and so neither the allegations nor their rebuttal are usually tested in cross-examination.
> (6) That does not mean, however, that no evaluative assessment of the allegations should be undertaken by the court. The court must examine in concrete terms the situation in which the child would be on return. In analysing whether the allegations are of sufficient detail and substance to give rise to the grave risk, the judge will have to consider whether the evidence enables him or her confidently to discount the possibility that they do.
> (7) If the judge concludes that the allegations would potentially establish the existence of an Article 13(b) risk, he or she must then carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to the risk.
> (8) In many cases, sufficient protection will be afforded by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting State to protect him once he is there.
> (9) In deciding what weight can be placed on undertakings, the court has to take into account the extent to which they are likely to be effective, both in terms of compliance and in terms of the consequences, including remedies for enforcement in the requesting State, in the absence of compliance.
> (10) As has been made clear by the Practice Guidance on "Case Management and Mediation of International Child Abduction Proceedings" issued by the President of the Family Division on 13 March 2018, the question of specific protective measures must be addressed at the earliest opportunity, including by obtaining information as to the protective measures that are available, or could be put in place, to meet the alleged identified risks.

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

> "if the court does not follow the approach referred to above, it would create the inevitable prospect of the court's evaluation falling between two stools. The court's "process of reasoning", to adopt the expression used by Lord Wilson in ***Re S***, at [22], would not include either (a) considering the risks to the child or children if the allegations were true; nor (b) confidently discounting the

> possibility that the allegations gave rise to an Article 13(b) risk. The court would, rather, by adopting something of a middle course, be likely to be distracted from considering the second element of the *Re E* approach, namely "how the child can be protected against the risk" which the allegations, if true, would potentially establish."

28. In respect of protective measures, whilst undertakings are enforceable outside England and Wales, they are in most cases accepted by the court for the limited function of protecting the child prior to the foreign court considering the matter, see *Re C (Children) (Abduction: Art 13b)* [2018] EWCA Civ 2834; [2019] 2 FCR 218.

Discretion (Should it Arise)

29. If one of the Article 13 exceptions is made out the court has a discretion whether or not to order the child's summary return. The leading case on the exercise of the discretion remains *In re M and Another (Children) (Abduction: Rights of Custody)* [2007] UKHL 55; [2008] 1 AC 1288. The headnote states:

> That when exercising the discretion under the Convention there were general policy considerations, such as the swift return of abducted children, comity between contracting states and the deterrence of abduction, which might be weighed against the interests of the child in the individual case; that the Convention discretion was at large and the court was entitled to take into account the various aspects of the Convention policy alongside the circumstances which gave the court a discretion in the first place, and the wider considerations of the child's rights and welfare; that the weight to be given to the Convention considerations and to the interests of the child would vary enormously, as would the extent to which it would be appropriate to investigate such other welfare considerations; that it did not necessarily follow that the Convention objectives should always be given any more weight than any other consideration; and that the further away one got from the speedy return envisaged by the Convention the less weighty those general Convention objectives must be, since the major objective of the Convention could not be met.
>
> That in cases where the child objected to being returned the range of considerations might be even wider than those under the other exceptions to ordering immediate return; that taking account of a child's views did not mean that those views would always be determinative or even presumptively so, but that was far from saying that a child's objections should only prevail in the most exceptional circumstances; and that the older the child was the greater the weight her objections were likely to carry.

30. I also note the more recent decision of the Court of Appeal in *Re G (Abduction: Consent/Discretion)* where Peter Jackson LJ held (with the agreement of Baker and Nugee LJJ) at paragraph 45:

> It is therefore clear that the Judge approached the balancing exercise in this case by attaching significant weight to what he described as Convention considerations favouring return to the extent that he looked to see whether there

were pressing or compelling welfare reasons that might override them. That was an error of approach. His discretion was at large and he was required to identify the relevant factors and attribute to them the weight that they bore in the particular circumstances of the case: that could not be done at the level of theory.

31. If intolerability is made out, Lady Hale described it as being 'inconceivable' that the court would nonetheless exercise its discretion and return a child, see *Re M and Another*.

The Evidence

32. Given the issue of consent was raised I directed that the test of necessity was met for hearing limited oral evidence from the applicant and the respondent on this issue. I ruled it was not necessary for the paternal grandfather to give evidence although I considered his witness statement carefully. Both parties had filed witness statements in the proceedings. I briefly summarise their evidence on the main issues and where appropriate make reference to the written materials in evidence before me. The respondent's second witness statement exhibited a series of audio and video recordings, which, after some delay, I was able to download and listen to and view.

The Applicant Father

33. The applicant is citizen of The Netherlands. He is 39 years old. He met the respondent mother in around 2015 in Amsterdam where he was working and the respondent was on holiday. They became engaged and married in September 2016 in England. They returned to live in The Netherlands. B was born in August 2017. Three months before his birth his parents left Amsterdam and moved to a small town in The Netherlands. The applicant has lived there since.

34. When B was two years old in 2019, the parties' relationship deteriorated. They separated when the respondent raised allegations of domestic abuse in proceedings before the Dutch courts. The court dismissed the allegations, says the applicant, and thereafter the couple reconciled. This was not successful however and the couple separated and were divorced by way of an order from the Dutch courts on 8 June 2022. The same order set out the arrangements for B. The order recorded that: "Dutch District court has jurisdiction to hear and determine the petitions concerning [B]'s main place of residence and care arrangements". The order provided B have his main residence with his mother and reside with the applicant every Friday afternoon until Monday morning. Other orders were made to split the holidays.

35. The applicant's evidence is that until August 2022 there were no issues between him and the respondent with the operation of the Dutch order. The applicant's evidence is that the respondent remains in breach of the Dutch court order.

36. He says that in May 2022, B came to reside with him as the respondent said she had COVID and wished to travel back to England. He says the respondent decided B should live with him in The Netherlands and she would return to reside in England. He was surprised by this and felt it best B lived with both his parents. The respondent sent an email on 28 July 2022 to the applicant. In it she says she is sick with "Corona". She says she is unable to find a house in The Netherlands and cannot stay in hotels as that

would not be stable for B. She writes: "I feel that it is best that [B] is with you". She says she will fix the admin and states she has spoken to mothers in the applicant's town in The Netherlands and has been to a school there and says "I think it is best we make an appointment to see what we can do for [B]. Also. I would like to make sure I am able to see [B] so we can make arrangements together."

37. He agreed to travel to England with B on 5 August 2022 so B could celebrate his birthday on 6 August 2022. His evidence is that he made it clear B could only come for a holiday from 6 August 2022 to 27 August 2022, when he would collect B or the respondent would bring him back to The Netherlands. To clarify this he sent an email on 12 August 2022 which said "[I] give permission for my son [B] to stay with his mother [the respondent] for holiday from 6-8-222 to 27-08-2022…" He says he made contact with the respondent for B to be returned prior to 27 August 2022 and she informed him B was not going to be returned and would stay in England. He says he was "extremely upset", did not agree and confirmed he wanted B returned to "his home" in The Netherlands.

38. He exchanged text messages with the respondent on 2 September 2023. He says these show he was angry that B had not been returned after the August holiday. Mr Basi relies on the following texts to support his case that the father neither consented nor acquiesced:

    A. **'***After I do something for the benefit of everybody and bring him for his bday'*
    B. **'***You broke your promise'* and '*bringing him back'*;
    C. On 02nd September '*… we agreed that B would come to The Netherlands again after 3 weeks and it has been 4 weeks. Can you come to The Netherlands with B this weekend?*' he then proceedings to say '*then I will come by car to pick him up' and he proceedings again to ask about the passport' (which was going to expire in September)*;
    D. At **112** he accused the mother as '*you broke your word. I want him to come to The Netherlands*'. He goes on to state '*I want to stay where he lived for 4 year of his life'.*

39. He said the respondent retained B's Dutch passport which expired on 18 September 2022 to make it more difficult for B to return as he needed the expired passport. He says B's school raised concerns. He says that he hoped he could reach an agreement with the respondent and did not rush to take court proceedings as he found the previous court proceedings very stressful. When he became aware she would not return B, he contacted the Dutch Central Authority on 27 March 2023. He says his solicitors received contact to act on his behalf by the International Child Abduction and Contact Unit after legal aid was granted on or around 5 June 2023.

40. In his second witness statement the applicant responds to various allegations made by the respondent and denies them. He strongly denied being verbally or physically abuse to the respondent and states that the Dutch court found the allegations to be untrue and dismissed them. He accepts he smoked cannabis on occasion (which he says is lawful in The Netherlands) but denied any involvement in crack or cocaine use. He denies various allegations about the involvement of social services. He accepts there was an argument in the UK and the police were involved but denies he was arrested or placed

in a police cell. He denies the severity of issues the respondent describes in respect of his interaction with B's school.

41. As for the abduction, he says he did not pack up all B's belongings. He states due to problems with B's passport and the respondent's refusal to return him he agreed to B going to school in England "on a temporary basis as I did not want his education to be disrupted". He agrees the respondent visited him with B in The Netherlands in May 2023 and he did not mention the return of B to The Netherlands. He says this was because he feared if he did raise matters she would cancel the trip. His evidence is that B and the respondent stayed for one night at his home with him and his new partner.

42. The applicant produced a very late third witness statement. I granted him permission to rely on it. He expands on his denials of the background of abuse, social serves involvement and responds to the greater detail provided by the respondent in her second witness statement. It is not necessary to summarise that further.

43. In terms of the case of acquiescence he says:

> "My family and I have done everything to remain in contact and visit, not in acceptance of the situation but despite the situation, but there have been numerous attempts by the Respondent to derail the contact.
> …..
> I have made it clear numerous times, via email, telephone and face to face and now with this court case that I do not agree to my son permanently living in England. I first sought advice and reported my concerns to the Dutch authority in November 2022 and I exhibit evidence of this hereto and marked **NL2**. It has been a constantly battle with the Respondent since August to have B returned. Every time I raised it I would be shut down or my contact with B would be frustrated. During my visits I made it very clear that I want B to return to The Netherlands and that we agreed to that, which her parents also confirmed. My parents have also raised this and asked the Respondent why she is not returning B. However, I have also been in a difficult position and have not wanted to escalate matters as I am worried about the impact this will have on B, I have tried to make the best of the given situation. It has been difficult to stand up to the Respondent but I have never agreed or changed my position as she is suggesting. I have maintained and stuck to my guns in wanting B to be returned to The Netherlands."

44. Explaining his actions in August 2022 he says:

> "Around the 27th it became clear I wasn't able to pick B up and the Respondent would not bring him back. I felt betrayed after I took all the risk of going to the UK under false assurance that B would just stay for a holiday and then return to The Netherlands. It has been the Respondent's intention from the start to keep B in the UK and she has used my good intentions and efforts to better the situation and contact between both families to her advantage. My lawyer, parents and friends advised against traveling to the UK warning me that this situation would happen. Looking back, I wish I had listened to them and blame myself for being tricked into believing that the Respondent and family would honour their agreement.

45. In his written evidence he offers certain protective measures. Such as:

    a. a non-molestation undertaking;
    b. not to take proceedings against the respondent to 'punish' her for the abduction;
    c. to pay B's reasonable costs;
    d. assisting the respondent with finding accommodation in The Netherlands;
    e. noting he has been ordered by the Dutch court to pay the respondent £ 150 per months, he says he would pay a further £ 450 per month (for 3 months) plus the cost of B's flight.

46. The applicant gave evidence by video link from The Netherlands. He was questioned by the parties' counsel. He was straightforward and clear when answering questions. He said his 12 August 2022 email was sent to make it clear he was only giving permission for a holiday. He told the court he was not informed of the plans to put B in school but when informed thought it was best "in the meantime" and "in spite of the situation". When cross-examined by Mr Jarman he said the bags of belongings were in part toys and in part B's old clothes for a charity shop. When asked about acquiescence he said that: "I hoped we could work it out. We were talking. My parents were talking to her parents." He said that he left B's passport as he felt he needed some form of identity document. He said: "They [the respondent and her parents] single handedly decided to keep him in England". When asked about the positive messages he had sent the respondent's parents he said: "I was making the best of the situation in spite of the situation. They would block off my means of communication with [B]." He said that when he visited the UK in December 2022, he still hoped that mediation would resolve the situation.

The Respondent Mother

47. She provided two witness statements. The first was without the benefit of legal advice and the second was provided with the assistance of Dawson Cornwell. The second witness statement exhibited a number of audio and video files, which, after some technical difficulties and a short delay, I was able to view and listen to.

48. I do not set out her evidence in her first statement in any great deal as much of her evidence was re-worked in her second statement. She set out the background to meeting the applicant and their relationship. She makes allegations of cocaine and 'crack' use by the applicant. She charts the deterioration in their relationship. She says that he was arrested and placed in a police cell on a visit to the UK. She says she left the marital home in 2019 because of emotional and physical abuse. She says he assaulted her. She references the proceedings before the Dutch Court and notes the judge spoke minimal English and her Dutch 'was not so great' and she had no translator. The case was dismissed. She says she moved 40 km from the applicant to feel safe. She says there were incidents between the applicant and B's school and on one occasion he was escorted off the premises. In relation to her return to England with B she says:

> "August I moved back to UK [the applicant] brought B back he packed all his clothes bin bags and told me I can provide for B give him a family. That I have better social skills to provide that. We agreed that B will go to school here. He would visit and I would bring him on vacations."

49. She says B is settled and should not return to The Netherlands. She concludes her first statement by saying:

> "If the court decides [B] has to move back to The Netherlands. I would have to move back with him. As I think it would be best for [B] to still be in my primary care and to maintain his routine. To help him also unlearn. I would also want some safety measures put in place if possible. If the decision was made for his return. I would prefer if [the applicant] can do a few sessions of anger management or counselling to help him with his substance abuse. One momet (sic) [the Applicant] can be calm then change suddenly. Which created a lot of fear in me. I found it very hard to be in male dominated areas and in loud spaces. I am in therapy through trauma from my experience whilst living in The Netherlands."

50. Her second witness statement summarises her 'defences' to return as: consent, acquiescence and grave risk of harm to B and otherwise he would be placed in an intolerable situation. She notes not all records from The Netherlands are available to the court. She describes how B is settled in England. She notes by the time of the hearing B will have been in England for a year. She described the background to meeting the applicant and their marriage. She sets out that the applicant tried to isolate her and that he was emotionally abusive to her. She says their relationship became worse when she was pregnant. She gives examples of incidents in The Netherlands and on visits to the UK. She felt isolated when they moved from Amsterdam to the smaller town. After B's birth she gives further examples of the applicant's abusive behaviour. She sets out more detail about the incident in the UK, when the police were called. She says that in May 2019 he punched her in the face. In July 2019 she moved out of the family home. She says she was pressured into having sex with the applicant after they split and the police became involved and warned him. In October 2019 she moved back in with the applicant as she was short of money. The applicant's behaviour impacted her mental health.

51. She raised moving to England with B and says this:

> "After this, I spoke to [the applicant] about me taking B to live in England. I knew I had to seek [the applicant]'s permission for this. I had previously asked the applicant if I could bring B to England for a holiday (even with the applicant himself) so that B could meet my family. The applicant continuously refused and would say things like 'over my dead body'. I could therefore never bring B on a trip to England, save for one time for B's baptism.
> The applicant said I could not take B to live in England and that I should instead return to him…
> On or around 15 July 2022, I told the Applicant that there was only one week left of the school term and that he needed to ensure he would take B to school. B would need to say goodbye to his friends as he would need to move to a new school near the applicant's house. This was because I was realising that the applicant would never let me take B to England and that I would have to leave and see B for contact…."

52. She sets out her evidence on the applicant's 'consent' to the move to England in August 2022 as follows:

> "I asked the applicant if he could bring B to me (in England). He said he was finding it difficult to balance work and that B had suffered an injury (his front tooth was broken). He said that his family could not look after B properly. I said, 'are you sure' and he said 'yes its time'. I told him I am not going to tell my family unless he was certain as there had been occasions when he had changed his mind. He said to me that he was certain and that he would drive to England so that he could bring B's belongings. There was no weight limit if he drove as he said it would cost him more to check in additional suitcases. The applicant showed me that he booked the ferry (with his car) and I believed him."

53. She says the applicant brought several bags with all of B's belongings. She refers me to two short videos. One shows three blue bags with belongings. One shows the applicant pulling out what looks like some form of gifts from a bag in front of B. The applicant stayed for three days and returned to The Netherlands on 8 August. She says the applicant told her he wanted contact in The Netherlands with B on 2 September 2023. She notes the applicant left B's Dutch passport with her. Her clear evidence is that the applicant brought B to live with her in England. She says that was also her parents' 'impression'.

54. She says she was shocked to receive the email of 12 August 2022. She questioned why he had sent an email rather than on WhatsApp where they usually communicated.

55. She describes that the applicant came to England to have contact with B in December 2022 and that his mother came three times to see her grandson, B. When the applicant visited in December he visited B's school. She says the applicant did not ask for B to return. She visited The Netherlands in May 2023 and again the applicant did not seek B's return.

56. She sets out that B is settled and has lived with her at her parents' house since August 2022. She provides background about his wider family and his school. She describes his friends and hobbies.

57. She sets out that she is "deeply anxious and affected by my experience in The Netherlands and [the applicant]'s treatment of me." She references the abusive behaviour. She does not feel she could be protected in The Netherlands. She says it would be intolerable for B as she does not have anywhere to live. She raises concerns about domestic abuse, housing, financial support and healthcare in The Netherlands. She sets out details of protective measures she says would be necessary if B is returned.

58. The respondent mother gave evidence in person. The video screen which the applicant appeared on was behind her and when I raised Practice Direction 3AA at the outset of the hearing, no further measures were sought. The respondent's evidence was also clear. When cross examined by Mr Basi about the 28 July 2022 email, she confirmed this was a reference to a Dutch school. She then said: "I asked [the applicant] if I could bring [B]. He said he would not allow [B] to come to the UK. I felt powerless". In respect of the 12 August 2022 email, she said that: " I have a history with [the applicant]. He will go back on decisions. There are last minute changes of mind. I didn't take the email

seriously". When questioned about the text message/WhatsApp exchange on 2 September 2022 she said that the text message did not reference B coming to "stay" and were a reference to a weekend visit. Mr Jarman noted that Mr Basi had not challenged the respondent's written evidence at paragraph 41 of her second witness statement.

Paternal Grandfather

59. The respondent's father filed a short witness statement in support of her case. He said he knows the applicant has been aggressive to the respondent and says there were situations when he was violent towards her. He says the respondent told him the applicant would bring B to live permanently in England. He says his wife spoke with the applicant "about the exact items he should bring to with him to England". He says the applicant brought "many blue bags" when he brought B on 6 August 2022. He said that before the applicant left he gave him B's passport and told him he brought B to "live with us and for us to care about him. He has never mentioned that he came for a purpose of a holiday". He says his wife communicates with the applicant and "wants to keep the peace". He says that the applicant has never said to his wife that he wants B returned to The Netherlands, nor did the applicant's mother on her three visits.

Analysis

Consent

60. It is for the respondent to prove her case that the applicant consented to B coming to England to reside in late July/August 2022. The standard of proof is the civil standard. She must demonstrate that the applicant clearly and unequivocally consented to B's removal from The Netherlands to reside in England. In my judgement, she has not discharged that evidential burden. I find as a fact, therefore, that the applicant did not clearly and unequivocally consent to B's removal.

61. The respondent's own written and oral evidence was that the applicant was opposed to B residing in England. As recently as 28 July 2022, she had emailed the applicant making plans for an appointment to be made for B's school in the Dutch town where the applicant lives. She says in that email that "I would like to make sure I am able to see [B]," which I consider is a reference to her wanting to have contact with B given he will reside with his father. She had also placed B in her father's full time care for some months before she left for England. Her email of 28 July 2022 notes her unstable life in The Netherlands given she was unable to find a house and she goes on to write that "I feel it is best that [B] is with you". As set against this background, the respondent's written evidence has to be received by the court with some caution, namely:

> I asked the applicant if he could bring B to me (in England). He said he was finding it difficult to balance work and that B had suffered an injury (his front tooth was broken). He said that his family could not look after B properly. I said, 'are you sure' and he said 'yes its time.'

62. The applicant's evidence was to deny this conversation took place. His third witness statement states:

> In response to paragraph 41, the Respondent never asked for me to bring B to the UK and confirmed in an email that she thought it would be best that B would stay in The Netherlands in my care. I only ever agreed to B travelling to the UK for a holiday.

63. I do not consider that I can take from the videos, evidence in support of the respondent's case that the bags (shown in the videos) demonstrate that the applicant was moving his son to England with all his belongings. One video showed three blue bags. I would be surprised if this was all B's belongings and given it was his birthday, and on the basis of the shorter video, it does seem more likely than not that the applicant was removing gifts from the bag. The applicant also says there were some of B's clothes which were too small for him which were for charity. I also heard argument about why the applicant left B's passport with him. I do not accept that evidences consent for B to reside in England and accept the applicant's evidence that he felt his son should have some form of identification. I also note it was not clear whether the applicant would pick him up at the end of the holiday or the respondent would return him to The Netherlands, so it made sense for the passport to remain with B.

64. Of course I am primarily looking at the evidence before 6 August 2022 to determine whether consent was given. But in assessing which of the two parties is telling the truth it is helpful to look at the wider evidence and the evidence after 6 August 2022. When the 'consent' is checked by reference to the applicant's email of 12 August 2022, in which he is clear that he has only agreed to a holiday, I do not find support for the respondent's case that the 'consent' conversation (on some unknown date) took place. I note the respondent's first witness statement on the issue of consent (see paragraph 39) is quite different to the account in her second witness statement. This is not simply a matter of legal assistance.

65. Mr Jarman suggested that the applicant had agreed to B residing in England and then when he had returned home to The Netherlands, he had changed his mind and with regret wished to make clear he was withdrawing his consent. I can understand why that was an inference that might be drawn, but seen against all the evidence, it is clearer to me that the more likely inference is that he was concerned the agreed holiday might last longer and to make his position clear, and perhaps to reassure himself, he sent the 12 August 2022 email/letter. I do not find it likely that the applicant – who had always resisted B residing in England - would have made plans for him to attend a Dutch School in late July, then changed his mind in a matter of days and agreed for him to reside in England and then in a matter of a few further days changed his mind back. There is no wider canvass of evidence to support this and no plausible reason is put forward for such changes of mind by the respondent.

66. Furthermore, the follow-up emails between the father and the mother after the 12 August 2022 letter do not support the mother's paragraph 41 case in respect of the consent conversation. Her email, in particular of 13 August 2022 written at 11:21 is not consistent with her written evidence and her initial email of 10:13 does not mention the conversation she describes in her written evidence to explain the basis for the 'clear and unequivocal' consent to relocation.

67. Having regard to all the written and oral evidence and noting that the respondent was not specifically asked by father's counsel about the consent conversation, I am satisfied

that the evidence shows that the applicant did not consent to his son residing in England. I am also satisfied that it was clear to both parties the 'conversation' regarding the 'consent' was disputed and as such 'putting this matter' to the respective witnesses was not likely to advance either parties' case.

68. Seen overall, it seems that once it became clear to the applicant that the respondent was content for B to reside with his father full time and that she would remain in England, he arranged for B to come to England for a holiday to see his mother who he had not seen for some time, before he returned to The Netherlands to begin school.

69. I find as a fact that the respondent has not demonstrated evidence of clear and unequivocal consent from the applicant for B to relocate to England from The Netherlands.

Acquiescence

70. I observed at the hearing that the Hague Convention exceptions to return of 'consent' and 'acquiescence' could only be in the alternative. Either the applicant consented to the removal, in which case there would be no role for acquiescence. Alternatively if there was no consent then it was open to the court to consider acquiescence to the wrongful removal. There could not be an exception to return of both consent and acquiescence. Counsel accepted this analysis.

71. Lord Browne-Wilkinson was clear that the question of acquiescence is one for the trial judge. He also formulated the test clearly as:

> In my judgment, therefore, in the ordinary case the court has to determine whether in all the circumstances of the case the wronged parent has, in fact, gone along with the wrongful abduction. Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions.

72. That is the approach I apply to the oral and written evidence before me. It is clear, having heard the applicant father's oral evidence and having read his written evidence, that he has not acquiesced in the retention of his son in England at the end of the three week holiday. His email of 12 August 2022 and his emails of 13 August 2022 made clear he expected his son to return to The Netherlands. They clearly express his position when he came to understand that the respondent was not likely to return B to The Netherlands at the end of the three week holiday. When that did not happen, I accept he took minimal outward steps to communicate to the respondent that B should be returned.

73. On balance, I consider his 2 September 2023 messages support his case as they make clear he brought B to England for his birthday and the respondent broke her promise. Looking at the texts in context and against the wider evidence in respect of the communication in August 2022, I do not read the messages to set out the father's disappointment B was not retuning for a holiday. The applicant states: "you lied and deceived me again" and the respondent replies: "You don't even remember that you brought [B] here. You dropped his clothes." He then writes: "Yeah for a holiday and to see, you make me sad with your lies." She then writes: "Ok. I have the emails and

messages anyways". No messages or emails have been produced by the mother which demonstrate the applicant consented. She relies on her account of a conversation. Furthermore this exchange clearly evidences the fact the father is not content with B being retained in England and he points out that B is Dutch. I do not accept this discussion was only in relation to the respondent not taking B to The Netherlands for a holiday in September.

74. Although the applicant did not communicate his opposition in a sustained manner, in my judgment, it is clear the subjective state of his mind did not support his acquiescence in B's relocation to England. There were WhatsApp communications on 2 September 2022, as discussed. He consulted a lawyer on 2 September 2022. He filled out a draft request to the Dutch Central Authority in November 2022. He issued an application for B's summary return on 27 March 2023. On 8 June 2023 his application for return was issued. None of these steps evidences the subjective mind of the applicant to have acquiesced.

75. Mr Basi relies on *Re H, R and E (Abduction: Consent: Acquiescence)* [2013] EWHC 3857 (Fam); [2014] 2 FLR 385 at paragraph 51 where Keehan J held that attempts at reconciliation and/or waiting does not indicate someone as acquiesced. The facts of each case are of course different, but this statement demonstrates that acquiescence is not made out because some months pass with limited or no action without more.

76. The respondent's case is that from September to June there was no communication to the respondent of the applicant's wish for B to return to The Netherlands. The applicant's written evidence was that he was trying to get his son to come back but that he was anxious about formal litigation and was concerned to continue to have access to B. I accept he was in reality making the best of the situation he did not agree with.

77. Mr Basi is correct to draw my attention to *P v P* and I respectfully adopt the observations of Hale J that it would be not be right to hold that the wronged parent has acquiesced in circumstances where they are seeking to compromise or are making sensible arrangements for the child. Plainly, given B was in England, it was sensible for the applicant to focus on B's needs. In my judgement it was much better for B that he was in education, had regular contact with his father and enjoyed visits from his paternal grandmother and visited The Netherlands in May. A court should be slow to consider child focused arrangements in the interim as making out a case for acquiescence.

78. I also note the voice recordings exhibited to the respondent's second statement. These are relied on to assist to show the applicant had acquiesced and was not raising issues with B returning. Without any particular submission being made to me on the recordings, it seems to me these simply demonstrate that the applicant engaged in constructive conversation with the respondent's family in respect of B's welfare.

79. I also understand there was a delay from the applicant contacting the Dutch Central Authority in March 2023 to him being awarded legal aid in June 2023. It would not be fair to hold that period of delay against him to conclude it is a further period of acquiescence. It may however have been better if the applicant had told the respondent that he had contacted the Dutch Central Authority, but he took the judgement call not

to do so as he was worried the May visit would have been cancelled and he would not have seen B.

80. The applicant was clear in August 2022 that he objected to B remaining in England. He has not passively 'gone along' with the respondent's plan for B to reside in England. His subjective state of mind was one of opposition. After surveying the evidence, I do not find as a matter of fact that the applicant has acquiesced in B's retention in England.

Article 13 (b): Intolerability

81. Mr Jarman's written case is that it would be intolerable for B if he had to return to The Netherlands with his mother, given "she would be homeless, unemployed and [at] the mercy of the father's controlling and coercive behaviour. Her mental health would again be at risk." No case was advanced (contrary to the respondent's second witness statement) in respect of grave risk of harm to B. This was confirmed in the oral submissions.

82. The respondent's written evidence raises a number of very serious allegations. The father's written evidence denies them. Given the summary nature of the proceedings I did not hear oral evidence in respect of these matters. However, I note that the Dutch court made a custody order providing for B to spend weekends and many holidays with his father in June 2022, long after the allegations were raised. I also note the Dutch court dismissed the mother's proceedings which raised domestic abuse. It is also the case the mother placed B in her father's sole care for several months up to August 2022. She also stayed with B at the applicant's home in May 2023, albeit briefly and in the presence of the father's new partner.

83. That plainly provides some significant context to the various allegations. On balance, I am persuaded the correct course is to assume the mother's allegations of domestic abuse have not <u>all</u> been dealt with by the Dutch courts and that taken at their highest there is a risk to B. The court cannot confidently discount all risks. Taking the respondent's case at its highest, and without making any findings of fact of domestic abuse, there is a risk of the mother being placed in a situation of having communication and co-parenting with the applicant until the Dutch courts can resolve the long term issues. This may plainly impact on B and place him in an intolerable situation.

84. I also hesitate to accept the mother's claim that for the months that may be required for the Dutch authorities to consider B's long term welfare, her lack of housing, resources and employment would place B in an intolerable situation. I am not entirely clear as to her employment status since August 2022. The applicant asserts she has some self-employment. She lives with her parents. The father's unchallenged evidence is that her parents support her financially. Her own evidence about the high cost of apartments in The Netherlands was not altogether persuasive, particularly if only short term arrangements are required. Again, however, the court cannot confidently discount all risks and again without making findings of fact and taking the respondent's case at its highest, I proceed on the basis that the combination of these factors could place B in an intolerable situation. The respondent's mental health was also raised but there is no up to date medical information before me and I cannot simply assume a relocation to The Netherlands to permit the Dutch courts to consider matters would impact her mental

health to the extent that it would be intolerable for B in the future. That case has not been made out on the evidence filed.

85. I turn to the question of the protective measures. I can, and do, safely assume the Dutch judicial, administrative and social services apparatus is as effective as protecting B as the English authorities. No issue has been raised in respect of the Dutch authorities ability to protect B, other than a complaint that the respondent did not have a translator in earlier proceedings which raised domestic abuse issues. The respondent's evidence on this issue has not been tested and I do not have the court papers before me, but I am entirely satisfied the Dutch courts can entirely fairly and effectively resolve any issues in respect of B and the respondent.

86. It is of course necessary to focus on B and on his concrete situation of being returned to The Netherlands and to consider the issues of future risk to him.

87. Having considered the appropriate protective measures I am satisfied that the Article 13 (b) exception is not made out. The Dutch court as recently as June 2022 made custody orders in respect of B. Should these need to be revisited because of further or different allegations of domestic abuse, or if some form of non-molestation order is required in the interim, no evidence has been put before this court to support a conclusion that it would be neither possible nor effective for the Dutch courts to deal with these matters. It is likely to be open to the respondent to seek to vary the June 2022 custody order made by the Dutch court and/or to seek any interim protection.

88. Furthermore the applicant has offered to given an undertaking that he will: "not molest, harass, pester or interfere with, or use or threaten violence against the respondent or to encourage anyone else to do so." The combination of the effective Dutch judicial, law enforcement, social services authorities and this undertaking is more than sufficient to protect B if returned against future risks, until such time as the courts can resolve B's long term future.

89. I will also require an undertaking from the applicant that he will not support, whether by himself or through his lawyers, agents or any other person any criminal, or civil proceedings in respect of the B's removal from The Netherlands and retention in England in August 2022.

90. In terms of the respondent's housing situation, I note the Dutch court requires the applicant to pay around £ 150 per month. I will require an undertaking from the applicant to pay the reasonable costs of B's return travel to The Netherlands and to pay the respondent an additional £ 450 each month for three months from the date of her return with B to The Netherlands. He is also to assist her in searching for and arranging accommodation, if she were to accept this. This places the respondent in a sufficiently stable position to deal with any steps required before the Dutch courts.

91. In the light of the effective Dutch system, these further undertakings/protective measures will protect B from the future risk of any intolerability. Therefore the Article 13 (b) exception to return is not made out.

Habitual Residence

92. Mr Jarman submitted that by 9 June 2022 B was habitually resident in England. He submits B is settled and attends school. He referred me to *A v A and Another (Children: Habitual Residence)* [2013] UKSC 60; [2014] 1 FLR 11 and to the decision of Hayden J in *Re B (Habitual Residence)* [2016] EWHC 2174 with the endorsement and 'significant amendment' added by Moylan LJ in *Re M (Children) (Return Order: Habitual Residence)* [2020] EWCA Civ 1105. I was also referred to the helpful summary set out by Cobb J at paragraphs 23-26 of *FB v MG* [2022] EWHC 2677 (Fam).

93. Mr Jarman submits that B was integrated into family life by June 2023 "when the father made his application and therefore [was] habitually resident. As such the applicant fails to establish the burden pursuant to Art 3 and the application must fail."

94. With respect, I do not follow this submission. B was plainly habitually resident in The Netherlands on 6 August 2022 when he was removed to England. He remained habitually resident in The Netherlands on 27 August 2022 when he was retained. The applicant was exercising custody rights as provided for the in the order made by the Dutch court only two weeks earlier. Article 3 of the Hague Convention states:

> "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 ….."

95. No exception has been argued on the basis of 'settlement'. Plainly one year had not passed when the applicant's application was issued. As I am satisfied B is under 16, was habitually resident in The Netherlands in August 2022 and that his father was exercising custody rights, and given that I have found none of the three exceptions to return are made out, then B will be the subject of a return order. I do not understand the question of his habitual residence on 7 June 2023 to be determinative of the Hague Convention application. I was not referred to any authority that held that the question of the child's habitual residence at the date of the application impacted on whether a removal was wrongful for the purposes of Article 3.

96. In any event, whilst I note all the factors raised at paragraph 32 of Mr Jarman's helpful skeleton argument, I am not persuaded B was habitually resident in England and Wales on 7 June 2023. It is correct that he had been at school since September and had made friends. However, given the father has made clear since August that B should be returned to The Netherlands, notwithstanding the connections that he may have built up, B's presence in England and Wales remains temporary and that is particularly so in circumstances where this Hague Convention application has been brought. His father, as I have found, has not acquiesced or consented to his relocation which adds to the temporary nature of B's presence in England Wales.

Conclusion

97. I will make a return order. The Dutch court settled the disputed welfare matters for B in June 2022. Two months later he came to England and remained here, in breach of that Dutch order. I have carefully considered the three exceptions relied on by the respondent, but they are not made out. I dismiss the exceptions based upon consent, acquiescence and the risk of intolerability. In the circumstances it will be for the Dutch courts once again to determine B's long term welfare.

98. I thank all solicitors and counsel and ask that they draft an order to give effect to this decision.

Postscript

99. A draft embargoed judgment was provided to solicitors and counsel on the morning of 24 August 2023. Mr Jarman sought permission to appeal on behalf of the respondent. Helpfully, he was able to quickly formulate outline grounds of appeal, which are:

> "On behalf of the respondent mother, I seek permission to appeal on the following prospective grounds"
>
> 1. That you failed to attach sufficient or any weight to the time between early September 2 when the father indicated a certain view about the return of B and the date of his application, in consideration of the issue of acquiescence.
> 2. That you failed to attach sufficient or any weight to the lack of any indication post September 2022 from the father that he would seek a return of B to the Netherlands, leading the mother to understand the child would remain in England.
> 3. That in terms you were wrong in light of the evidence in not finding the father acquiesced in B remaining in England, either attaching too much weight to the father's subjective intention in light of his lack action in either asking for or seeking the return of the child or that he passively went along with the child's situation in England.
> 4. That you failed to consider the practical circumstances and impact of the mother's return to The Netherlands and that whilst you have sought financial undertakings from the father, they bear no reality to the cost of accommodation in The Netherlands, where the mother will not be able to work, there is no evidence of any benefits she would be entitled to and where she was previously unable to afford accommodation. In such circumstances you were wrong not to find a return of the child would be intolerable."

100. I was pleased to read the respondent now has the benefit of legal aid. Mr Jarman informed me he also sought a stay on the return order. He asked for a stay until the Court of Appeal is in a position to consider the application for permission to appeal, should it be refused by me. He informed me that due to pressure of work the soonest the respondent's legal team could draft the necessary documents for the Court of Appeal would be the week of 4 September 2023.

101. Mr Basi opposes the grant of permission to appeal on behalf of the applicant. The applicant seeks a summary return of B to The Netherlands on 2 September 2023, in the light of the impending Dutch school term beginning. He submitted that: "The father is concerned in respect of the child commencing a new term of school, which coincides

with the timing of a new term in the Netherlands. Further, the respondent mother is also bound by a Netherlands Family Court order which is being breached due to the passage of time, in that the father is not having contact as per the order as a result of the retention."

Permission To Appeal

102. Technically, of course, the respondent is appealing the order. I understand at the time of drafting, counsel are preparing a draft order for my consideration. To avoid any delay, I will deal with permission to appeal that order, albeit I have not yet formally approved it, but it will follow the clear indications set out in the judgment above.

103. I do not consider the respondent's appeal would have a real prospect of success nor do I consider the order made is wrong. Permission to appeal is refused for these brief reasons.

104. Grounds one to three challenge the finding that the applicant did not acquiesce in B's wrongful retention from August 2022. First, I did attach weight to both the passage of time from September 2022 until issue of the application in June 2023 and the applicant's limited indications of seeking B's return post September 2022. At paragraph 72 above, I noted: "*I accept he took minimal outward steps to communicate to the respondent that B should be returned*" and at paragraph 79 I returned to that theme in respect of the May 2023 visit to The Netherlands. I also noted it would be unfair to penalise the applicant for the March to June 2023 delay, which I understand was caused by legal aid matters.

105. However, I accepted, as I was entitled to, the applicant's evidence to explain why he took minimal (but some) steps, as set out at paragraphs 43 and 76, above. I attached appropriate weight as the trial judge having heard the oral evidence and having read the written evidence. In assessing all the factors, I placed greater weight on the 12 August 2022, 13 August 2022 and 2 September 2022 communications in writing, which would have left the respondent in no doubt that the applicant had not acquiesced in her plan to retain B in England, contrary to the Dutch order. That position was never withdrawn. The respondent candidly admitted in oral evidence that she did not take the email of 12 August 2022 seriously. She should have.

106. The applicant, as I have stated, made decisions focused on B's welfare but in my judgement, a court should be slow to interpret child focused welfare decisions in the interim as indicators of acquiescence. As I reminded myself at paragraph 15 above: "The fact there has been *some* active conduct indicating possible acquiescence does not justify ignoring the subjective intentions of the wronged parent."

107. In relation to acquiescence, there is no error of principle nor is the conclusion *plainly* wrong. I reject permission to appeal on grounds one to three.

108. Ground four relates to intolerability. I have sufficiently considered the practical circumstances for B on his return and the risks to him. He is six. He will likely be at school. He has supportive grandparents in the Netherlands. His mother will have access to £ 600 or so per month from the applicant alone for three months. This may not provide for the type of accommodation she would want. However, I am satisfied, for

the short period I am concerned with, that it would not place B at risk of being put in an intolerable situation. I also think it likely, as I explained above, the respondent's parents will assist her and therefore B. In an ideal world the court would have had greater evidence of resources of the applicant, the respondent and the costs of a range of accommodations in various appropriate towns in the Netherlands. However this is a summary jurisdiction and a prompt resolution of the issue means the court must do the best it can on the evidence available. Therefore, I do not consider it is arguable that I have made an error of approach or approached the issue of protective measures in a manner that is *plainly* wrong.

A Stay of the Return Order

109. I regret not being in a position to hand down judgment before 25 August 2023. I had hoped to do so in the week of 14 August 2023. However the notional judgment writing time that week had to give way to a very urgent Court of Protection matter. I was acutely conscious of the impact on B of his return to school. Time is now very limited. That being said, justice requires that the respondent should be able to properly instruct her legal team to prepare an appeal. It is important I also note that comity between the Dutch and English and Welsh judicial authorities counts against unnecessary delay, given the on-going breach of the Dutch order.

110. Seeking to strike a balance between B's imminent return to school and fairness to the respondent, I will grant a stay until such time as the Court of Appeal can determine the proposed application for permission to appeal, on the condition that the respondent must file and serve her appeal notice and all necessary documents by 16.00, 31 August 2023. If the respondent does not do so, the stay will end and the return order will come into force, subject of course to any order made by the Court of Appeal to vary my order on the stay.

111. I am grateful to counsel and solicitors for dealing with the post-judgment matters promptly and ask that the draft order is filed for my approval today.