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No. FD23P00468

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 23 November 2023

IN THE MATTER OF: THE CHILD ABDUCTION AND CUSTODY ACT 1985
AND IN THE MATTER OF: THE SENIOR COURTS ACT 1981

Before:

HIS HONOUR JUDGE PARKER

(Sitting as a Judge of the High Court pursuant to section 9(1) Senior Courts Act 1981)

(**In Private)**

B E T W E E N :

MOTHER — Applicant

- and -

FATHER — Respondent

MS J. PERRINS (instructed by International Family Law Group LLP) appeared on behalf of the Applicant.

MR P. DIPRE (Direct Access counsel) appeared on behalf of the Respondent.

J U D G M E N T

HHJ Parker:

1 I am dealing with an application made by the mother, M, against the father, F, for the return of their son, C, aged 12, to the jurisdiction of Spain. The mother's application is made pursuant to the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The mother is represented by Ms Perrins, the father is represented by Mr Dipre.

THE BACKGROUND TO THE APPLICATION:

2 The applicant mother was born in England in 1989, the respondent father was born in England in 1988. The mother is of mixed heritage, British, Caribbean, Asian white, the father is black British. The parties met in 2005. The child was born in 2011. The parties separated the same year. The mother met her new husband, G, the stepfather, in 2015. In 2017 the father issued an application for a prohibited steps order preventing the mother from removing the child from the UK. The mother cross-applied for permission to relocate permanently with the child to Spain. Permission to relocate was refused. The order of DJ Ambrose is at p.127 in the bundle.

3 In 2017 the mother moved to A with the child. The respondent father has had regular contact with the child, including overnight.

4 In September 2020 the mother made a further application to the court seeking permission to relocate to Spain with the child and permission was granted by way of an order of DJ Brittain. That order appears in the trial bundle at p.129.

5 In July 2021 the child moved to Spain. He resided with his mother, stepfather and younger half sibling, D, who is the daughter of the mother and G. She is not subject to this application. C attended school in Spain and has Spanish health insurance.

6 In July 2023 the child travelled over to the United Kingdom for an agreed holiday with the father in accordance with the order of DJ Brittain. On 18 August 2023 the father issued a C100 application seeking a "lives with" order and that the mother was prohibited from returning the child to Spain. The matter was dealt with by HHJ Harris at the Central Family Court. The application was dismissed on the basis that the court did not have jurisdiction because the child was habitually resident in Spain. She also concluded that the circumstances were not such that Article 11 of the Hague Convention 1996 was triggered. In other words, she did not consider that it was a case of urgency requiring her to take necessary measures of protection.

7 The mother wrote to the father by email on 22 August saying that the child arrangements order was still in place and active and that she would be at the collection place, (redacted), as planned. On 25 August the father sent an email to the mother stating that, having taken legal advice, the child would not be going back to Spain. The mother sent a WhatsApp message to the father on 25 August urging the father to follow the child arrangements order. On the same day the mother travelled to England with a view to collecting the child from (redacted) in accordance with the order of DJ Brittian.

8 On 28 August 2023 the child was not brought to (redacted) by the father. The mother called the father to say that she was waiting at the station and to ask if he was coming to return the child. The father said that he was not coming and ended the call.

9 On the same day the mother made urgent enquiries with the police who conducted a welfare check. The police could not find the child at the father's address in (redacted). The father and child were then located at an address in (redacted), believed to be the father's girlfriend's address. On 6 September 2023 ICACU processed the mother's application for the child's return under the Hague Convention. On 7 September 2023 she was granted legal aid and on 12 September 2023 her C67 was issued.

10 The matter came before Poole J on 27 September 2023 when he gave directions for the matter to be listed for final hearing before this court for two days.

11 It is accepted by the father that the child is habitually resident in Spain and that the father's retention of him was wrongful within the meaning of Article 3 and 4 of the 1980 Hague Convention. The father is also in breach of the terms of the order of the English Family Court which has been mirrored in the Spanish court. The father is defending proceedings under Articles 13(a), 13(b) and 13(2).

12 In his witness statement beginning on p.41 in the bundle, the father says this:

> "I would also like to point out that in this document I will refer to three of the five defences of the Hague Convention Article 13 as to why C should remain in the UK. There is a grave risk that the child's return would expose the child to physical or psychological harm or would otherwise place the child in an intolerable situation.
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> "The child objects to being returned and has attained an age and degree of maturity which the court can take account of the child's views. The party seeking return consented or subsequently acquiesced to the child's removal or retention.
>
> "The decision to keep C safe with me in (redacted) on 28 April 2023 was by no means taken lightly and had C not added physical abuse from G to his list of emotional and psychological issues I would have had to return him to the mother, even though I understood how damaging and detrimental the effect his family life was having upon his wellbeing."

13 The father, in pursuing the Article 13(a) defence of acquiescence relies on comments in a position statement submitted by the mother on 19 August 2023 in contemplation of a

hearing before HHJ Harris at the Central Family Court, referred to above. In that document the mother set out the following key views:

> "Dear Judge, I write to this court today with a heavy heart as I express my deepest regret and sorrow. It pains me to admit that C, my beloved child, is not content living in Spain and has expressed a strong desire to reside with his father in the United Kingdom. Despite my unwavering efforts to create a nurturing and secure environment for C,, one that would offer him endless possibilities and opportunities, it is evident that his happiness lies elsewhere. C's wishes must be respected and I believe it is in his best interests to listen to his needs. However, I kindly request that a suitable visitation agreement can be established allowing C to spend quality time with myself, his sister, D and G, his stepfather of nine years.
>
> "I would like to emphasise that I am willing to work towards a resolution and improve the co-parenting relationship for the sake of C. I respectfully request that the court consider these concerns and ensure that appropriate arrangements are made to address these uncertainties. It is essential that C's living arrangements, education and financial support are given due consideration and that his best interests are prioritised.
>
> "In conclusion, I urge the court to consider my concerns and take appropriate action to address the issues at hand. I believe that open and effective communication between both parties is essential for the wellbeing of our child. I hope that we can find a way to resolve these issues amicably."

14 The father also says that the mother verbally acquiesced in a conversation with the child the next day on 20 August 2023.

15 The father also argues for the defence under Article 13(b) relying in particular on an incident said to have taken place on 27 July this year. The father in his statement at p.52 says this:

> "C was clearly emotional and upset as he relayed the story of how angry G had become one evening. Apparently there was a dispute about putting out the bins which escalated. G lost his temper and cornered C in the kitchen. G had both hands around C's throat choking C. G then raised one arm to slap C. This was shocking to hear. I cannot imagine how terrifying this would be for anyone, let alone a child, to have to endure the fear and panic C must have experienced. It was C's throat, his life force. If it had gone any further it could have been fatal."

16 C told the Cafcass officer:

> "Once he [G] was doing the bins and there was something sharp in the bottom. He is shouting at me and we get into a big argument. We were all in the kitchen looking at the mess. Somehow it's my fault. The bin slit because I was being rude. He got annoyed and grabbed my neck in the corner of the room. Then he raised his hand [and C demonstrated this], mum looked shocked but she didn't defend me."

17 Later on in the conversation C was asked by the Cafcass officer how often he had been physically threatened in this way and he said, "He pushed me before like the toilet one, about five times." C then informed the Cafcass officer that when he recently called his mother, she changed her story. First, C said that his mother said, "Ggrabbed him by the collar," and now she was saying, "He just backed me in the corner." In any event, the mother argues that protective measures can be put in place to avoid a grave risk of physical or psychological harm or placing C in an intolerable situation.

18 The Family Court Adviser suggests the following; a safeguarding referral should be made to the relevant authorities in Spain in advance of C's return to address the concerns raised by the father in respect of physical harm to C and his broader emotional welfare; the mother should agree that the father does not come into contact with C until a full assessment is completed and any risks to C are considered to be mitigated; the mother should agree to providing her full cooperation with the enquiries made by the Spanish authorities; the Spanish child welfare agency should be provided with the full bundle of documents from these proceedings including this report; similarly, in the event of any subsequent proceedings in the Spanish local court the same papers should be made available.

19 The Cafcass officer continues:

> "It is likely that C would benefit from his father travelling with him to Spain to assist in the reunification with his mother whereby their full focus should be on C's welfare."

20 The mother, through her counsel, Ms Perrins, has said that she will do anything she can to get her son back, she just wants him home.

21 In respect of the Article 13(2) defence, the mother accepts that the gateway stage under Article 13(2) is satisfied in that C is expressing an objection to a return and is of an age where the court should take account of his views. However, the mother argues that the court should exercise its discretion in the circumstances of this case and should still order his return notwithstanding those objections.

THE LAW:

22 Article 3:

> "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. The rights of custody mentioned in sub-para.(a) above may arise in particular by operation of law or by reason of a judicial or administrative decision or by reason of an agreement having legal effect under the law of that State."

23 Article 4:

> "The Convention shall apply to any child who was habitually resident in a contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years."

24 Pursuant to Article 12 when there has been a wrongful removal or retention under the terms of the Hague Convention and less than a year has elapsed between the abduction and the application, the return of a child is mandatory unless the respondent can establish one of the limited exceptions to return under Article 13. The burden is on the respondent to establish

any of the exceptions and even if this burden is discharged, the court then goes on to an exercise of discretion as to whether or not to order the child's return, albeit it was acknowledged by the Supreme Court in *Re E* that if a grave risk of harm is established under 13(b), the court would not go on to order the child's return so as to expose them to that risk.

25 Article 12:

> "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 wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

26 Article 13:

> " Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that;
>
> "(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> "(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

27 Article 13(2):

> "The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."

28 Article 13(a) Consent acquiescence: In the decision of the House of Lords in *Re H & Others (Minors; abduction acquiescence*) [1998] AC 72, Lord Browne-Wilkinson said this at para.90:

> "To bring these strands together, in my view the applicable principles are as follows:

> "1. For the purposes of Article 13 of the Convention, the question whether the wronged parent has 'acquiesced' in the removal or retention of the child depends upon his actual state of mind. As Neill LJ said in *In re S. (Minors; abduction; acquiescence* [1994] 1 FLR 838, 'The court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact.'
>
> "2. The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.
>
> "3. The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law.
>
> "4. There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."

29 It has been held that in order to have acquiesced, a parent must have been aware, at least in general terms, of their rights as against the other parent although a parent does not necessarily need to have had full advice on specific issues under the 1980 Hague Convention; *Re A (Minors: Abduction, custody rights*) [1992] FLR 106; *Re AZ (A minor: Abduction, acquiescence*) [1993] FLR vol 1 682.

30 In *P v P (Abduction: acquiescence*) [1998] FLR 682, a decision upheld by the Court of Appeal, Hale J (as she then was) held:

> "As regards the question of consent, it was common ground that consent had to be real, positive and unequivocal, though it was not necessarily the case that an express statement of consent was required to establish a defence under Article 13 nor that such consent necessarily needed to be evidenced in writing.
>
> "(2) As to acquiescence, the parent in the present case bore all the hallmarks of what frequently occurred in this type of case, namely, that the parent whose child had been abducted agreed that the child should remain in the country to which he had been taken provided that other issues between the parents were resolved. In such cases, only if there was a clear and concluded agreement could it be said that there was clear and unequivocal conduct which amounted to acquiescence under Article 13. In

the present case there had been no such agreement and acquiescence was not established as a defence accordingly.

"Per curiam, it would be unfortunate if parents in this situation were deterred from seeking to negotiate sensible arrangements for the future upbringing of the child, concerned for fear that such negotiations should be taken as evidence of acquiescence at a later stage. Such negotiations were, on the contrary, to be encouraged. The fact that such negotiations had taken place should not necessarily lead to the conclusion that a parent whose child had been abducted was content for that child to remain in the country to which it [he] had been removed.

"Where it is established that a parent did in fact acquiesce but such acquiescence was then quickly withdrawn, it has been held that that will affect the weight to be given to it in the court's exercise of discretion; *Re A (Minors; abduction, custody rights*) [1992] FLR vol 2, 14 and *Re R (Child abduction; acquiescence*) [1995] FLR vol 1, 716.

31 Article 13(b) provides:

"The requested State is not bound to order the return of the child if it is established that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

32 It is well established that Article 13(b), grave risk of harm, exception to return is of restrictive applicant. There is no need for any further elaboration or gloss because the Article is by its terms of narrow application. If this were not the case, then the objection of the Convention would be defeated. In the Supreme Court case of *Re E (Children; abduction, custody appeal*) [2011] UKSC 27 Hale LJ said this at para.32:

"First, it is clear that the burden of proof lies with the 'person, institution or other body' which opposes the child's return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the evidence, the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination.

"Second, the risk to the child must be 'grave.' It is not enough, as it is in other contexts such as asylum, that the risk be 'real.' It must have reached such a level of seriousness as to be characterised as 'grave.' Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a

relatively low risk of death or really serious injury might properly be qualified as 'grave' while a higher level of risk might be required for other less serious forms of harm.

"Third, the words 'physical or psychological harm' are not qualified. However, they do gain colour from the alternative 'or *otherwise*' placed 'in an intolerable situation' (emphasis supplied). As was said in *Re D*, at para 52, '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.' Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: e.g., where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child.

"Fourth, Article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home. Mr Turner accepts that if the risk is serious enough to fall within article 13(b) the court is not only concerned with the child's immediate future, because the need for effective protection may persist.

"There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. Mr Turner submits that there is a sensible and pragmatic solution. Where allegations of domestic abuse are made, the court should first ask 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 ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues."

33 In *Re C (Children; abduction, Article 13(b)* [2018] EWCA Civ 2834 Moylan LJ said that although the court takes evidence at its highest for the purpose of Article 13(b):

"... it was not being suggested that no evaluative assessment of the allegations could or should be undertaken by the court. Of course a judge has to be careful when

conducting a paper evaluation but this does not mean that there should be no assessment at all about the credibility or substance of the allegations."

THE FATHER'S CASE:

34 The father's case is set out in the helpful position statement of Mr Dipre. First, the father relies as a defence to the application for the return of C to Spain under Article 13 of the Hague Convention on the grounds that mother has acknowledge to C and to father by telephone and in writing at p.70-71 that C's wishes and feelings about remaining to live with father in England will be respected.

35 Second, C has disclosed to father that he has been strangled by his stepfather at p.52 on at least one occasion when in Spain and that he has been the frequent victim of belittlement of father by mother and his stepfather. It is father's understand that heated and unpleasant arguments between C and his stepfather have occurred all too often. C is considered to be at risk of further physical and/or psychological harm as well as being placed in an intolerable position should he return to Spain. His expressed wishes and feelings have not improved his relationship with his Spanish family.

36 Third, C has expressed a desire to remain in England to live with his father (see the Cafcass report at 135-150) and is of an age and degree of maturity that makes his wishes and feelings objecting to his return from England to Spain most significant. It is appropriate for this honourable court to take account of his views. Mother has confirmed that C wishes to live with father. C objects to his return to Spain. C expresses perfectly lucid and sensible reasons why he should remain in England. Mother seems to view this issue as being one of C's indiscipline. This latter position does not square well with her expressed view that C's wishes and feelings are to be respected.

37 The case of *DL and H* [2010] FLR 1229, a decision of the then President, Sir Mark Potter, is not at all dissimilar to the facts of the present case. There is nothing to suggest that C lives in a dream world when he makes allegations against his stepfather, G. His objection to a return to Spain are rooted in his deep seated preference for living in England. C is not being capricious. The father is aware that C's views are not necessarily determinative but taken together with mother's acknowledgement that C wants to live in England, this outcome would be the right one.

38 If, and there is no reason to doubt that C is telling the truth about his experienced in Spain, he does run a grave risk of an intolerable situation by way of repercussion from these proceedings, Cafcass in this context opines that his reluctance to return is understandable. C considers himself to be mocked, together with his memory of his father, by the applicant and the stepfather. C does not see in his school at (redacted) as a place of education that allows him to live in a sense of integration in a multi-ethnic society in the way that C plainly desires and recalls from his time in (redacted). C is plainly going to suffer from a profound aftershock if he is returned to Spain. C says he would rather run away. Jurisdictional nicety is not a reason to make a young lad suffer by imposing on him a return to a jurisdiction he manifestly never wished to live in. Backdoor appeals from historical court decisions cannot be countenanced but the instant position in father is no such thing. It has become plain that the prospects of C growing up as a happy young Spanish teenager are basically nil. His objections to a return to Spain should be perceived as sufficiently rational and well-grounded that the proper exercise of the judicial discretion should allow him to remain in England, integrated into a society that he would prefer to live in. The father has not influenced this attitude or brought it about. It is the expression of a profound personal desire of the child. The child deserves to have his wishes respected.

THE VIEWS OF THE FAMILY COURT ADVISER:

39 In his report of 9 November 2023, The FCA sets out from para.34 the child's views, wishes and feelings in respect of returning to Spain:

> "C presented his views using his own language with no sense of rehearsal or scripting. I consider his views and emotional responses were proportionate to the experiences he described. His view about his mother and father are polarised being in alignment with that of his father but there are no indicators that C had been influenced in what to believe or coached in what to say to me. C is aware of his father's support but there was no indication that C presented me with views that are not based on his own experiences. If what he has reported about his life in Spain is true, his resistance to returning to a country heavily associated with his mother and her husband is understandable. C is well able to grasp that the court is involved with his family and that a decision is to be made by a judge as to whether he remains living in England or is returned to Spain.
>
> "C does not want to be returned to Spain and at the current time he does not wish to maintain a relationship with his mother and has previously considered running away from home. His express wish is to remain living in England where he describes his life favourably, not only in respect of the separation from his mother and fear of his stepfather but where he also feels supported and more connected to his heritage. There is a clear sense of C feeling isolated while living in Spain due to a lack of diversity in school and having limited support and family members there.
>
> "Based on what he told me about his life, it is likely that C is enjoying a period of stability in his father's care where he feels safer and no longer exposed to harmful experiences. In the event of a return to Spain, C was quietly resolute in stating that he will simply not get on the plane."

THE CHILD'S MATURITY:

40 At the age of 12, C recognised the gravity of his situation and expressed his views coherently. He demonstrated an ability for critical thinking, for example, his observations in respect of the family dynamics, and empathy in perceiving his mother's unhappiness. His account of life in Spain and England was well-reasoned and based on his personal experience. He had insight into his own behaviour when misbehaving in school in Spain. The school information does not indicate a concern for C's emotional development and I consider his level of maturity to be commensurate with that of his peer group.

THE MOTHER'S CASE:

41 Ms Perrins, on behalf of the mother, identifies that the key issue relied on by the father to justify his actions in this case is the allegation that G was aggressive to C at home in Spain. An altercation is alleged to have happened after a disagreement when C did not take out the bins as asked. C said to the FCA that G has grabbed his neck and raised his hand in the corner of the kitchen. This account has been exaggerated or misinterpreted according to the mother, see her statement at 93-94, where she explained what really happened. She is deeply saddened and distressed by the way the father is using this incident and presenting his case against her, especially his references to strangulation which is not even what C said at its highest. She says she would not stand idly by while her son is being strangled. She has in any event accepted that upon C's return, G would move out of the family home for a period to allow any necessary safeguarding visits by Spanish authorities as recommended by the FCA in his conclusions.

42 The mother is very distressed by the other comments made by C about life at home with her and G as she says she does not recognise this description of home. She says she is very worried about the influence of the father upon C. She explains in her statement how she has to be the disciplinarian when necessary because she is the parent caring for C most of the time. Like many parents of adolescent children, she is having to deal with challenging behaviour by C on occasions. She describes being undermined, unsupported by the father in issues such as C's school work and behaviour and also a general lack of engagement or interest by him; see, for example, an email she sent to him in April 2023 when he was suggesting that C should move back to England.

43 C says some sad and upsetting things about life with his mother but the comments need to be seen in this context and also with one eye on the likely influence he is under at the moment. C also expressed other views about why he prefers life in England to Spain. For example, he referred to the lack of wider family members in Spain and a lack of diversity in school; however, the mother says at best that these issues are being exaggerated and most likely under the father's influence.

44 Other concerning information in the report includes C's reference to his father showing him court papers at p.144 and the fact that his father does not appear to have actively discouraged C from his threats to run away if he does not get his wishes. The mother has exhibited relevant emails about this issue. If the father were really a responsible and blameless parent, as he claims, he would have been much more active in his efforts to discourage C from doing such a thing and he should have done everything in his power to support the stability of C's home with his mother. It seems that instead he has at least tacitly encouraged such ideas, for example, by insisting that C needs access to his phone at all times in case he runs away, rather than engaging with his mother to stop this from happening in the first place, see the emails exhibited by the mother at p.106.

45 It is of further note, it is said, that the FCA contacted C's current English school and was told that he has been involved in some low-level discussion and disruption of others in class. He appears dismissive when he is challenged, see p.136. This echoes the mother's descriptions of having to deal with challenging adolescent behaviour by C in recent times and the way this has led to disagreements because of her need as primary carer to set boundaries and discipline when appropriate.

46 It is also concerning that in the very short time that C has been attending his English school he has already come to the attention of teachers in this way. He only started at the school in

late October and the enquiries made by FCA were in early November. As set out, it is accepted in light of the authorities on the interpretation of Article 13(2) that C does object to a return to Spain based on what he said to the FCA but the mother's position is that the court should clearly still exercise its discretion to return him in the circumstances of the case.

ANALYSIS: 13(a) DEFENCE:

47 The father relies on the mother's email to the court in response to the father's application for child arrangements order and prohibited steps order in the summer of this year and a report of a telephone conversation between the mother and C. In the email she made suggestions or proposals and she sent them into court on the eve of the father's urgent C100 application to HHJ Harris. I agree with the submission of Ms Perrins that the fact that she was willing to consider a scenario where C stayed in this country with the father does not mean that she acquiesced. Furthermore, the mother had virtually no notice and no legal advice at the time of her position statement. She was also out of the country on holiday in Venice when responding to the urgent applications of the father. This is relevant as well because the authorities show that ordinarily a parent needs to understand their rights at least in general terms before they can be held to have forfeited the ability to seek a summary return. I agree that the transcripts and the order of HHJ Harris show that the technical jurisdictional issues had not really been appreciated by either party until they appeared before the judge.

48 It is also relevant that at the time that the father's application was before HHJ Harris the mother was under pressure, both in terms of time and understandably emotionally and also unrepresented and had not had any legal advice of any kind. In my judgment, there was no real positive unequivocal consent or clear and unequivocal acquiescence, depending on the timing of the father's formed intent to retain the child wrongly in this jurisdiction, the child being present in England on holiday with his father. I am also not satisfied on the evidence

of the father that I should find acquiescence on the basis of a purported conversation between the mother and C subsequently. There is simply insufficient evidence of what was said to enable me to reach that conclusion.

49 Even if I am wrong on that, the purported agreement was withdrawn at most within three or four days. The mother then moved expeditiously in seeking C's return both by travelling to London to collect C at (redacted) and also by making an application for summary return under the Hague Convention. This is a hot pursuit, thus her acquiescence, even if established, would, in my judgment, carry little weight in the exercise of discretion. I would exercise my discretion in favour of return were this to be the only defence relied on for the reasons set out in the discretion section below.

50 The mother claims to be very distressed by the contents of the Cafcass report. Her case is that the allegation of strangling by the husband is simply untrue. Unfortunately, there was an argument about C not taking out the bins and the mother has accepted that something occurred but the version of strangling alleged by the father is simply not credible.

51 In my judgment, the allegation of strangling is inconsistent with the version of events given by C to the Cafcass officer in performing the sort of careful evaluation identified by Moylan LJ in *Re C*. I do not consider it appropriate to take the father's allegations at the highest point of strangulation, as there is no evidential basis to support it as the father was not present at the incident and yet he is the only one to have provided the suggestion of strangulation. That may shed some light on his credibility and is at least suggestive of exaggeration. The father's comment referred to earlier in this judgment demonstrates that for him, the key to his decision to wrongfully retain C in this jurisdiction is the risk of physical harm at the hands of G:

> "The decision to keep C safe with me in (redacted) on 28 April 2023 was by no means taken lightly, and had C not added physical abuse from G to his list of emotional and psychological issues I would have had to have returned him to his mother even though I understand how damaging and detrimental the effect of his family life was having upon his wellbeing."

52 This was clearly the determining factor in the father's view and he has, in my judgment, seemingly at least, exaggerated his account.

53 In any event, even taking C's allegations at its highest, and being satisfied that there is a grave risk of physical and/or emotional harm or would otherwise place C in an intolerable situation, there are protective measures that can be taken which, in my judgment, would address the alleged risk. The mother has agreed to do whatever it takes to get her son back including giving an undertaking that her husband will vacate the family home for a period to allow Spanish authorities to investigate and to prepare a risk assessment and she has agreed not to allow her husband to care for C alone pending further order or agreement in Spain.

54 I will set out the required protective measures. An immediate safeguarding referral should be made to the relevant authorities in Spain in advance of C's return to address the concerns raised by the father in respect of physical harm to C and to his broader emotional welfare. The mother should give a formal undertaking that the stepfather does not come into contact with C until a full risk assessment is completed by the Spanish authorities and any risks to C are considered to be mitigated. The mother should also undertake to give her full cooperation with the enquiries made by the Spanish authorities. To that end, G should move out of the family home until the Spanish authorities deem it safe for C that he returns. The Spanish child welfare agency should be provided with the full bundle of documents from these proceedings and, similarly, in the event of any subsequent proceedings in the Spanish local court, the same bundle should be made available to the Spanish court. In terms of the

practical steps that can be taken to enforce these undertakings I will deal with that later in this judgment.

55 It is accepted by the mother, and I find, that the gateway stage under Article 13(2) is satisfied and thus the court may exercise a discretion whether or not to order C's return. Such discretion is at large and the court may take account of any number of relevant circumstances. I remind myself that there is no presumption that a child's views will be upheld and the court must balance all the circumstances of the case to decide whether or not to order a return.

56 In my judgment, the court should in the exercise of its discretion order the summary return of C to Spain. Even if I am wrong in my analysis under 13(a) and/or 13(b) that remains my judgment. The following are important features which lead me to this view in exercising my discretion.

57 Until the wrongful retention, C had always lived with his mother in her primary care. Bearing in mind the mother and father split in 2011, C has never lived with the father as primary carer. He has also lived with his sister, D , since her birth. To move him away from his primary carer and the half sibling with whom he has lived exposes him to a risk of emotional harm. He has also expressed to the Cafcass officer that he does not wish to maintain a relationship with his mother. That, too, is emotionally harmful and I note that since he has been retained here that any contact with his mother has been extremely limited and indeed there was a particularly difficult contact visit on Monday evening of this week and I will return to that later in this judgment.

58 As the interim contact has not worked, there is clearly a risk that the father cannot be trusted to support and promote C's contact with his mother. There is clearly a risk that the contact

with the mother may break down altogether if C remains with his father whereas the mother has a proven track record of compliance with international contact arrangements. In a case such as this where there has been a breach of court orders, holiday contact arrangements and the application has been issued very promptly, the policy of the Convention is a very important factor.

59 In considering the policy of the Hague Convention it is generally accepted that abduction is harmful to children. It is harmful generally if abductors are able to find havens in other jurisdictions. The mother suggests that this is a case where the father is unhappy with the existing court orders and has taken things into his own hands. It is important that the court should retain its court orders and mirror orders. It will also be a great concern if the parents or if parents could not rely upon orders that courts have made.

60 I have been particularly troubled by one passage in the report of the FCA. At para.28 he said this:

> "Regarding the parents' relationship C was clear that they are not friends. A feature of C's criticism of his mother included that 'she is rude about dad, she said things, she made me not like him. There was a point when I didn't want to talk to him. She says things but when I remind her she denies it. It's really frustrating.'
>
> "When asked what mum was saying about dad he said that back in the old house 'dad used to hit her, spit on her and abuse her, he went to jail for drink driving, brought the girls to the house smoking' and also 'she always changed her story a bit so I told dad. He said it wasn't true.' C said he got into an argument with his mum about it and his mum was going to show him the court papers but then changed her mind." He added, 'So I asked to see the papers from dad. He only showed me a little bit. It said mum would have gone to Spain without me.' I asked why his dad showed him the papers and C said, 'Because she was saying mean stuff. He noticed I didn't want to speak to him.' When asked if this changed the way he feels about his mum, C said, 'Well, that's when I believed dad but I don't want to be around her. She never stuck up for me, G, schools, stuff'."

61 This paragraph troubles me for a number of reasons. Clearly this young boy has been drawn into adult issues between the parents in way that is inimical to his welfare. The father made

a decision to show him court papers. The father was extremely selective in what he showed C. What he decided to show him was clearly driven by self-interest and, in my judgment, one can draw the reasonable inference of malevolence.

62 It has clearly had a profound impact on C and how he views his mother. It has led C to form his own version of the truth and he is now in a position where he believes his father and disbelieves his mother. Living here with his father may well serve to reinforce that narrative. It is clear from the papers and the correspondence between the parents that this parental relationship is toxic. It is clear that the father does not support C living in Spain, he was opposed to it at the outset and the mother has complained consistently about a lack of communication between the parents and a lack of support for the father in her desire to establish appropriate boundaries for C. It is also clear from views expressed by C to the Cafcass officer that he associates his father with doing fun things like playing on FIFA. However, it is also clear that he feels loved and supported by his father who gives him hugs and things and he is kind. He also feels that he can talk to his father. These will be important considerations for the mother moving forwards and for any subsequent applications to the Spanish court to alter his living arrangements.

63 The issues at school and general complaints about his life in Spain are also matters which may need to be addressed within the family or in any subsequent welfare proceedings before the Spanish court but, as the father recognised in his statement, they do not justify the father in wrongfully retaining C in this jurisdiction. I agree with the submission of Ms Perrins that much of the father's witness statement is concerned with issues which are relevant to long term welfare issues rather than the summary 1980 Hague Convention proceedings. They are a matter for the Spanish court to consider in due course if required.

64 At para.9 of the report of the Cafcass officer said this:

> "I contacted both parents by telephone to reintroduce myself. I communicated with the father to arrange my appointment with C and subsequently to clarify the father's intentions in the event of a return order being made. In such an event, the father told me that he would wish to travel back to Spain, staying in a hotel for a few days in order to assist C in settling back into his mother's care. He said he will consider making an application for C to be relocated to live in his care in England and that he would be available to travel to Spain intermittently for such a purpose."

65 The family are known to W Children's Services, July to October 2011 when there were two reported incidents of domestic violence between the parties at the point of separation. A Children and Family's Assessment was completed with no further action taken.

66 The father is known to the police for five convictions dated between 2010 and 2011 including two violent offences. The Cafcass officer has communicated with the school that C has been attending in this jurisdiction since October. C has 100 per cent attendance and he is well presented. C has been identified by some teachers as being involved in some low-level discussion and disruption of others in his class. He appears dismissive when challenged although it has not been necessary to make contact with the parents. This information is consistent with the mother's concerns about the importance of imposing boundaries on his behaviour both at home and at school.

67 Finally, I note that HHJ Harris has already declared that the English court does not have jurisdiction to entertain section 8 proceedings here and any welfare proceedings would have to take place in Spain. Furthermore, the English order of DJ Brittain has already been mirrored in Spain and remains in force and enforceable.

68 I consider on balance that the father should transport C back to Spain. Whilst I note that the mother has suggested that she would come to England to reassure C that he is not in trouble for what he has said to the Cafcass officer and his father before he is required to travel back

to Spain, that is a step that she could take in this country during a contact visit and on balance I take the father at his word to the Cafcass officer at para.9 that in the event of a return order being made the father told him that he would wish to travel back to Spain staying in a hotel for a few days in order to assist C in settling back into his mother's care.

69 It will clearly be important that the father approaches his son's best interests before his own wishes and does not approach that task with the intent to undermine a successful return but, rather, to work constructively towards it. I recognise that this will be a test for the father, both in terms of his credibility and also his ability to put his son's welfare first. How and what he does will be important in any welfare evaluation by a Spanish court subsequent to these proceedings.

THE ENFORCEABILITY OF THE UNDERTAKINGS:

70 I am not satisfied that undertakings given to this court by the mother would be directly enforceable in Spain. Spain is a civil law jurisdiction whereas in this country where undertakings are given it is a common law jurisdiction. I have considered whether in those circumstances the mother should obtain mirror provisions in the Spanish court that would have the same effect as undertakings given to this court before C moves back to Spain. However, in my judgment, that is not necessary and proportionate for the following reasons.

71 First, the best information that the court has is that this process would take two to four months and such a delay would be inimical to the child's welfare.

72 Second, the mother has shown herself to be a person who complies with court orders. Her record on her cross-jurisdictional contact shows that. In my judgment, it is likely that she will comply with undertakings that she gives to this court. This matter may well proceed

subsequently in the Spanish courts. The court may be asked to determine whether C should move back to this country. A failure by the mother to comply with her undertakings given to this court designed to safeguard her son would be viewed very badly by the Spanish courts.

73 Third, reports from both of the parties about the contact visit on Monday at McDonalds were of a negative experience for C and his mother. Indeed at one stage he ran off. The father, through his counsel, Mr Dipre, informed the court that the father persuaded C to return back but it was clear that even on his return, the visit did not go well and the mother brought it to an end.

74 In my judgment, the longer C remains in this jurisdiction with his father the more difficult the situation will become and the relationship with his mother will spiral downwards. However, the mother should make an application for a mirror order before C is returned to Spain and that must be evidenced.

75 In my judgment, the father should return C to Spain by 4 pm on 7 December 2023 in 14 days' time. Mr Dipre has urged upon the court that as there is no certainty in respect of the enforcement of undertakings or compliance by the mother with them that the court should decide that there are no protective measures that can be taken and, therefore, decline to return C to the jurisdiction. For the reasons I have given, I am not satisfied that he is right.

76 In addition, I propose to accept the suggestion made by counsel for the mother that the terms should be also set out in an order with recitals to there being measures under the 1996 Hague Convention in addition to the identical undertakings to be offered by her and a penal notice to be attached to them and that those would likely carry effect because the mother is a British citizen who travels back to this country and into this jurisdiction regularly, at which

point they could be enforced. Those are the protective measures, in my judgment, that are necessary and proportionate. That concludes this judgment.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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