Neutral Citation Number: [2024] EWHC 476 (Fam)

Case No: FD23P00584

**IN THE HIGH COURT OF JUSTICE**
**FAMILY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 February 2024

**Before** :

**MR JUSTICE CUSWORTH**

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**Between :**

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| | **H** | **Applicant** |
| | **- and –** | |
| | **A** | **Respondent** |

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**Mr Paul Hepher** (instructed by **WBW Solicitors**) for the **Applicant**
**Ms Cliona Papazian** (instructed by **Watkins Solicitors**) for the **Respondent**

Hearing dates: 12 and 13 February 2024

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# JUDGMENT

This judgment was handed down on 26 February 2024 by circulation to the parties or their representatives by e-mail and by release to The National Archives on 4 March 2024.

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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 and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

**Mr Justice Cusworth :**

1. There is before me an application under the Hague Convention 1980, made by a father seeking a summary return to Sweden for his 3 children. They are Child A (a boy born on 23.12.2012, so now aged 11), Child B (a girl born 18.01.2016, so now aged 8) and Child C (a boy born 10.04.2018, so now aged 5). Their mother is the respondent to the application.

2. This is an unhappy situation for the children, who have now not seen their father directly since they left Sweden with the mother in July 2022. The parents had separated in 2017, before C's birth, but had managed up to the summer of 2022 to facilitate arrangements whereby the children evidently had regular and positive visits with the father. On one occasion in 2020, the mother left them in his care for up to a week whilst she travelled to England.

3. There is a dispute about the circumstances of their departure. The mother says that the father consented for a removal to X, which is a barely recognised autonomous region within Y, and where the mother has extended family, for a period of 2 -3 years. The father says that his permission was limited to a holiday trip, and that a specific date for the removal was never agreed. What is clear is that the children left with her for X on a date in early July 2022. They were not returned by the beginning of the new school term in Sweden in late August 2022, soon after which the father began expressing concern, and indeed the children's school contacted him after hearing from the mother that she then had a plan to take the children to Canada. X is not a signatory to the Hague Convention 1980. Unable to pursue an application for a summary return order, the father did seek assistance to secure the return of the children to Sweden via the Swedish authorities.

4. The children stayed with the mother in X until (probably) December 2022, when she left them in the care of her family and herself moved to England. She did not return for them until late September 2023, and during that time, they were cared for by maternal family members. In April 2023, the father had commenced court proceedings in Sweden, seeking an order that the children be placed in his care, and after making an interim order on 6 July to that effect, the Swedish Court made a final

order on 13 September 2023, providing for the children to live with the father, in circumstances where they were at that stage living with neither parent.

5. The Swedish Court found that the father had not consented to children's removal in 2022, that the mother was retaining the children in X against his will, and that the father could be expected to provide appropriate care for them. The Court pointed to a Swedish Welfare report prepared in 2021 which had recorded the mother as being comfortable when the children were at the father's house, that she did not have any concern about his ability to care for them, nor think that the children had witnessed violence there, and that the parents could communicate with each other over the children, a position echoed by the children's then school. They were critical of the mother's actions in leaving the children with her relatives in a new country.

6. Strikingly, the mother played a full part in these proceedings, instructing a Swedish lawyer to put her case, including that the father had consented to their removal and that the children should be placed in her care. She indicated to the court that, if the court were so to order, she would comply with any direction that the children should be returned to Sweden.

7. However, after the court's determination went against her, the mother sought permission to appeal the first instance decision. Whilst awaiting that decision she returned from England to X to rejoin the children. On 11 October 2023, the Swedish Appeal Court refused her application for permission to appeal. On 20 October 2023, she returned to England, this time taking all 3 children with her. On 25 October, the Swedish District Court decided to arrest the mother in her absence for what is described as 'a serious case of child abduction', and the prosecutor filed for an international arrest warrant. Subsequently, the family were stopped on arrival at the airport, as the children's immigration status was unclear. The mother notably sent a message to the father inviting hm to come to England to collect the children.

8. The father commenced these proceedings for a summary return under the Hague Convention 1980 on 22 November 2023, not then knowing the children's whereabouts in the UK. The matter first came before the court on the following day, when HHJ Bedford made a location order. On the next day, the mother was located in Bristol and

arrested for the criminal offence of child abduction, and bailed to attend court on 9 February 2024.

9. The matter came before Morgan J on 29 November 2023, prior to the execution of the location order, and then again before Poole J on 11 December 2023, by which time the mother had been located and appeared remotely in person. She confirmed that she was currently in England with the children, and said that when arrested she had been in the process of returning the children back to Sweden from X. However, she did not now wish to return to Sweden. Directions for evidence were given and the matter relisted for 20 December 2023, when both parties were represented.

10. On that day, David Rees KC listed this hearing for final disposal of the father's application over 2 days. Weekly video contact was directed. He also required the mother to address any issues which she had not yet dealt with, including the status of any police investigation pursuant to her arrest on arrival. He directed the father to file a full bundle of documents in the Swedish proceedings, and that an officer of the Cafcass High Court team meet with the children to prepare a wishes and feelings report. That report, prepared by Allison Baker, who has given oral evidence to me, was dated 31 January 2024. She saw the children on 26 January 2024.

11. On 6 February 2024, the application came before Simon Colton KC for a PTR. He rejected an adjournment application made by Ms Papazian, counsel for the mother, and an application on her behalf for a Settlement Report in respect of the children. He recorded the father's position that in default of a summary return order under the 1980 Hague Convention, he would seek a return under the court's inherent jurisdiction. He also asserted a wrongful removal to the UK in October 2023, at a time when the mother denied that the children remained habitually resident in Sweden. Both parties expressed an intention to engage in mediation, but unfortunately, there has been no time for that to commence before the listing of this final hearing. Permission for further statements was given.

12. On 9 February 2024, the mother was due to appear at a case management hearing in the extradition proceedings following on from her arrest on arrival, consequent upon the Swedish proceedings in which she is accused of child abduction. During this

hearing, I was told by Ms Papazian for the mother that as an adjunct to those proceedings, (1) a s.7 Children Act 1989 report had been ordered on 24 November 2023, to be provided by 2 February 2024; and (2) the mother's criminal solicitor had '*commissioned a psychological assessment of the mother and the children*' to consider the impact of a possible separation if the extradition took place. Apparently, the assessment of the mother had taken place by a Dr Donnelly on 19 January, and an assessment of the children on 2 February 2024. None of this information was passed by the mother to her counsel by 6 February, and so was not shared with the court at the PTR on that date, nor with the Cafcass reporter[1]. I was told that the psychological report is expected to be available on 19 February, and that the extradition proceedings are coming back before the court on 26 February 'to assess the outcome of the Hague Convention proceedings'. The final hearing is apparently fixed for 22 March 2024, at which an extradition order could be made in respect of the mother.

13. The Child and Family Assessment prepared by the Local Authority in the Extradition Proceedings was produced by the mother only at the start of the second day of the hearing before me, following a discussion about the document during Ms Baker's evidence on the day before. It had been completed on 29 January 2024, 8 days before the PTR.

14. It records:

    a. That the mother is fleeing domestic violence from the father of the children who is in Sweden. The reporter states that '*this is why they separated and she has come to the UK*'.

    b. There is a court order in Sweden stating that the father has custody. There is no acknowledgment that the mother's case on historic domestic violence was fully advanced by her in the Swedish proceedings.

    c. The mother '*appears to have been living here before returning to Sweden to get the children*'. The reporter has clearly not been told about the 16 months that the children had spent in X immediately prior to their arrival in the UK.

[1] Although by her enquiries she had become aware that the local authority were compiling a Child and Family Assessment.

d. There has been an international arrest warrant for the mother. The father '*has claimed that (the mother) has "kidnapped" the children'*. There is no acknowledgment that the warrant was based on Swedish Court findings after a contested hearing in which the mother was represented and which she then unsuccessfully sought to appeal.

e. The children were seen on 4 January 2024, and the contents of interviews with all 3 are recounted.

f. Aside from A telling the reporter that he prefers living in England to Sweden or X, there is no evidence that the reporter was made aware of the children's circumstances between July 2022 and October 2023, when they were living in X, and from December 2022 until September 2023 without the care of either parent.

g. Aside from the mother stating that in Sweden the children would spend a few days each fortnight with the father, there is no indication that the reporter was made aware that the parents had separated in 2017, and that from then until 2022, there appeared to be functioning contact arrangements for the children.

h. The reporter did speak to the father, but it does not appear that any attempt was made to elicit a detailed chronology of what had happened in the children's lives over the previous 18 months, nor that the mother had been fully engaged and represented in the Swedish proceedings through 2023.

i. The reporter's conclusions include the assertion that the mother '*is currently on bail although it is not clear that she has committed any crime. Rather, it seems that she has taken positive action to protect herself and the children from their father*'.

15. In addition to the Child and Family Assessment, I was also provided this morning with 2 'attendance notes' – one from the mother's solicitor in these proceedings which records partially the contents of various emails from her criminal solicitor, Mr. Pankhania, which include the details of the extradition proceedings as set out above. I

am told that no court papers exist. I also had an attendance note from the same solicitor extracting partial information from emails received from the mother's Swedish criminal lawyer Mr Soderberg. He has apparently asserted that '*if she returns to Sweden she will most likely be put in custody as soon as she enters the Swedish border, and probably stay there until trial*.' Further that if convicted the sentence is '*between 6 months to 4 years in prison'*. Finaly, Mr Soderbeg is apparently of the opinion that, '*it doesn't matter if the father withdraws his complaint in Sweden. The prosecutor will follow this investigation through anyways*.' I have seen no document emanating directly from either lawyer.

16. Finally, after the conclusion of submissions today, I received a response to a question asked of ICACU pursuant to the order of Mr Colton KC made on 6 February, which was: '*whether the mother stands to be arrested and remanded in custody on her return to Sweden pursuant to the arrest warrant issued by the Swedish Prosecution Authority dated November 2023'*. This had in fact been received on Friday 9 February, but been overlooked. The relevant part of the response was: '*If a person is extradited, an additional detention hearing will be held in court in the presence of the person, and it will then be decided if the person shall be detained or not'***.**

17. In those circumstances, the matter has come before me for a 2 day hearing to make a summary determination. The children have already been seen, it will be clear, by the Child and Family Assessor, on 4 January 2024; by the Cafcass Family Court Adviser, on 26 January 2024; and by Dr Donnelly for a 'psychological assessment' on 2 February 2024. The first and last of those interviews had not been revealed to this court before this hearing began, but both are pursuant to the mother's attempts to avoid extradition. Before the hearing commenced, Ms Papazian for the mother indicated that she sought an adjournment of the hearing to enable a Settlement Report to be prepared, notwithstanding that the children had barely been in this jurisdiction for a month when the application for a return order was made. This would of course have required further questioning of the children from Ms Baker. Neither Ms Baker nor I then knowing of the full extent of the questioning that had already taken place, Ms Papazian asked Ms Baker whether she felt that further questions on that topic would be required to provide a fair picture. Ms Baker was very clear that they would not, and that this was not as far as she was concerned a settlement case.

18. Aside from Ms Baker, I have not heard further oral evidence, counsel agreeing that there was no need for the parties to give evidence on the question of consent. Ms Baker's evidence was clear, helpful and persuasive, and I accept everything that she said. I will direct that both her report and this judgment should be made available to the court dealing with the extradition hearing on 26 February.

19. I have been asked to determine the following issues by the mother:

    a. Whether I should investigate if the Swedish Court properly had jurisdiction to make any orders in relation to the children in 2023, notwithstanding that both parties played a full part in those welfare proceedings, and neither took any jurisdictional point before the Swedish Court;

    b. On the basis that by reason of their time in X before arriving in the UK, more than 12 months had elapsed since the children left Sweden before the application under the 1980 Convention was commenced, whether the children should be considered to have become settled in this jurisdiction by the date of the father's application, although by that date they had been here for only 33 days, or whether there was sufficient uncertainty about that point that I should adjourn at the conclusion of the hearing for a report on the issue to be prepared by Ms Baker, after a further interview with the children;

    c. Whether the removal of the children to X in July 2022, or their retention away from Sweden subsequently was effected with the father's operative consent, although the Swedish Court made clear findings about that at the conclusion of the hearing in September 2023, the outcome of which the mother subsequently, unsuccessfully, sought to appeal;

    d. Whether the children's objections defence is made out on the basis of the various reports of interviews with them now before me, and whether, if I took the view that there is currently little evidence of any objection to a return to Sweden in its own right (as opposed to a particular parent), I can assume that their objection would become firmer if they knew that the mother risked

criminal sanction if she returned with them, or they witnessed their mother being arrested;

e. Whether the children are at grave risk of harm or otherwise being placed in an intolerable situation if I were to order their return to Sweden, in circumstances where there is at least a possibility that the mother if she accompanies them may be arrested on arrival, and that such an incident may well be distressing, given that they have not seen their father for 18 months, and have expressed to at least 2 reporters a strong preference to remain in their mother's care.

20. The father through Mr Hepher seeks an immediate return order under the Convention, or if not under the Convention, then under the inherent jurisdiction. If I am not satisfied with the evidence about the likelihood of the mother's arrest and potential imprisonment on any return with the children, he asks me to adjourn to allow that information to be obtained, rather than to dismiss the father's application, in circumstances where so much of the mother's case, and indeed the evidence now before me, has come to light only in the unsatisfactory way explained above.

21. **Jurisdiction.** The 1980 Hague Convention was incorporated into UK law by the Child Abduction and Custody Act 1985. Article 3 provides:

"The removal or the retention of a child is to be considered wrongful where

"a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention …..”

Article 4 provides inter alia:

"The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights."

22. In *Re B (A Child)(Custody Rights: Habitual Residence)* [2016] EWHC 2174 (Fam)*, paragraph 17,* Hayden J encapsulated the principles to be applied when questions of a child's residence are being determined, with the subsequent removal and recasting only of sub-paragraph (viii). I have considered and applied those principles, although

I will not set them all out here as the fact of the children's habitual residence in Sweden prior to their departure with their mother to X in July 2022 is not in issue.

23. Ms Papazian for the mother suggests, and she may be right about this, that by the time of the children's removal from X to England by their mother on 20 October 2023, they had become habitually resident in the former state. However, it is very clear that her removal of the children from Sweden to X in July 2022, and her subsequent retention of them out of Sweden was prima facie wrongful, and in breach of the father's exercised right of custody prior to that removal, given that Sweden was the country of their habitual residence up to that point.. They have not had any direct contact with the father since. I will deal with the mother's case that there was consent to the move later.

24. It was surely on the basis of that established and not challenged habitual residence that the District Court in Umea, Sweden dealt with the parent's cross-applications, and made an order that the mother return the children to the father's care in Sweden. It was surely too on that basis that the mother engaged in those proceedings, filed 3 statements, raised both the issue of consent and her allegations of domestic violence against the father, and then appealed the court's final decision, but on the basis of the welfare analysis performed, and not on the basis that the Swedish Court lacked jurisdiction. None of the various Swedish judges themselves raised their jurisdiction as a possible question. Further the Swedish Court has gone on to issue an arrest warrant based on the mother's failure to comply with its orders. I can therefore see no basis upon which I can question or reconsider the Swedish court's position on jurisdiction in these proceedings – if the mother takes issue with that determination, then she can take it up with the Swedish court.

25. What is also notable is that in her lawyer's submissions on appeal, the mother was at pains to make clear that, if her appeal was rejected, she did intend to comply with the court's ruling and return the children to Sweden, in an undated document which must have been prepared at some time between 13 September and 28 September 2023; in other words at the point when the mother was returning to X, and deciding what next steps to take with the children. She was therefore accepting that Sweden was the court

of primary welfare jurisdiction in relation to these children, only a few weeks before her arrival here with the children, and the father's application.

26. **Settlement.** On that basis, I am satisfied that there is sufficient evidence that the children's removal from Sweden or retention away from Sweden in 2022 was one to which Art.3 of the 1980 Convention applies. Under Article 12 of the Convention:

> "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.
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

27. By the plain language of the convention, the intention behind the second paragraph of Art.12 is that the question of settlement becomes relevant if the child or children in question have been in a second country for a sustained period of time before any application is made – so that there is no longer any element of 'hot pursuit'. In those circumstances, the child's new environment might well have superseded the old as the place of the child's habitual residence, and further significant roots and connections may have been established that render the summary process conducted under the 1980 Hague Convention no longer appropriate, such that the child is now settled.

28. It is noticeable that an application commenced as much as 51 weeks after a removal, and so inevitably determined more than a year after the precipitating event, is not one in which the argument can be made. And that in the absence of settlement, a return remains mandatory, even if the application is made after more than 12 months have passed.

29. Here, the children arrived in England on 20 October 2023, and the application was issued on 22 November. This is plainly not what the drafters of the convention had in mind when the second paragraph of Art.12 was added. However. I recognise that the words of the Article are not explicit, and so I have considered the mother's case on this point – whether settlement is made out on the material before me, and if not,

whether a report should be ordered and the matter be adjourned on that basis. Whilst Mr Colton KC rejected the mother's earlier application for such an adjournment, I acknowledge that he allowed the mother to renew her application before me, the trial judge.

30. In *Re B (A Child)* [2018] EWHC 1643 (Fam), Williams J encapsulated the applicable principles thus:

> 41. The courts have considered the principles of settlement in a number of cases, the principal amongst which are (a) *Re N (Minors) (Abduction)* [1991] 1 FLR 413, (b) *Cannon v Cannon* [2005] 1 FLR 169; (c) *C v C* [2006] 2 FLR 797; (d) *Re M (Zimbabwe)* [2008] 1 FLR 251. A recent example of the application of the principles is *Re T (A Child - Hague Convention proceedings)* [2016] EWHC 3554 (Fam). The principles which can be derived from those cases are these:
>
> (i) The proceedings must be commenced within one year of the abduction. The making of a complaint to police or an application to a Central Authority does not suffice.
> (ii) The focus must be on the child. Settlement must be considered from the child's perspective, not the adult's. The date for the assessment is that date of the commencement of proceedings not the date of the hearing. This is aimed at preventing settlement being achieved by delay in the process.
> (iii) Settlement involves both physical and emotional or psychological components. Physically, it involves being established or integrated into an environment compromising a home and school, a social and family network, activities, opportunities. Emotional or psychological settlement connotes security and stability within that environment. It is more than mere adjustment to present surroundings.
> (iv) Concealment and delay may be relevant to establishing settlement. Concealment is likely to undermine settlement. Living openly is likely to permit greater settlement. The absence of a relationship with a left behind parent will be an important consideration in determining whether a child is settled.
> (v) A broad and purposive construction will properly reflect the facts of each case – it does not require a 2 stage approach but must, to use a probably over-used expression involve a holistic assessment of whether the child is settled in its new environment. It has to be kept in mind that the settlement exception is intended to reflect welfare. The Article 12 settlement exception of all the exceptions is most welfare focused. The underlying purpose of the exception is to enable the court in furtherance of the welfare of the child to decline a summary return because imposing a summary return (i.e. without a more detailed consideration of welfare) might compound the harm caused by the original abduction by uprooting a child summarily from his by now familiar environment.
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> 42. As I have said earlier, there is clearly a degree of overlap between the concepts of settlement and habitual residence. Settlement does not require a complete settlement, any more than habitual residence requires full integration. Settlement is plainly an evaluation which is, to some degree, subjective. There will be a spectrum ranging from the obviously and completely settled to the very unsettled. In between there are many possibilities.

31. Applying those principles in this case, the children were taken by the mother from their home and lives in Sweden to X in July 2022. It is clear that that was not intended by her to be their ultimate destination, even from an early stage, as the Swedish Court papers record her telling the children's school in September 2022 that her plan then was to take them to Canada. There is no suggestion from her that such a move was ever discussed with or proposed to the father. It is also clear that she did not wish to remain there herself for any sustained period. Probably in December (in her Swedish appeal she suggested not until March), she left the children with her extended family and came to England. That was their position throughout the Swedish court proceedings in 2023.

32. There is no suggestion that the children had ever been left for extended periods with her family before this, in a country that was new to them in July 2022. Then, after a period of 9 months without the regular care of either parent – almost entirely indirect contact only – their mother returned in late September 2023, and took them away from her mother and sister, to whose care they might have by now become accustomed, and brought them to this country, where they had never been before, and where the mother does not suggest that she has any previous roots or connections, prior to her arrival in December 2022. At the time when the father's application was made, the children had not yet attended school in England, nor is there any evidence of social integration prior to that point.

33. From the children's perspective, therefore, their lives had been beset with a series of disruptions and uprootings since the summer of the previous year. In all that time they had had no direct contact with their father, with whom they had, according to the Swedish court papers, previously had regular visits. Their immigration status remains uncertain. I am therefore confident that, when the father's Hague application was made on 22 November 2023, these children could not in any real sense be described as 'settled' in this jurisdiction. I have of course considered that just as with any consideration of habitual residence, settlement need not be complete as at the date of assessment, but only sufficient for the court's broad assessment to be such that a discretionary welfare determination could now override what would otherwise be the principles of the Convention. However, I am clear that in this case, the mother does

not come close to establishing the requisite degree of settlement for these children as at the date of the application.

34. I have also rejected any further adjournment for a fourth interview with the children, ancillary to a Settlement Report. It is very hard to see how such an interview conducted in February or March 2024 would enable a reliable assessment of how settled here these 3 children might have been a month after their arrival, now 4 months ago. In any event, I am clear that these children should not be subject to any further interviews as a part of this process.

35. **Consent.** The question of consent is considered under Article 13(a), and not Article 3, of the 1980 Hague Convention; see *Re P (Abduction : Consent)* [2004] 2 FLR 1057). Art.13 reads as follows:

> "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.
>
> 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."

36. The law on consent has recently been summarized in Peter Jackson LJ's judgment in *Re G (Consent; Discretion)* [2021] EWCA Civ 139:

> [25] 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.

[26] … 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.”

37. In this case, there is an evidential issue between the parties about what had been agreed or communicated between them in advance of the children leaving Sweden with their mother in 2022. However, counsel agreed, sensibly, that as both sides’ cases had clearly been set out in their respective evidence, there was no need for further oral evidence on the issue. It is also the case that the mother raised the issue of consent in the Swedish proceedings in 2023, and that court rejected her arguments and found that the father had not consented to the children’s retention in X, based on evidence such as their continued registration as living at their former address in Sweden. Whilst I accept that this point may well be covered by issue estoppel, following *Carl Zeiss v*

*Rayner* (1967) 1 AC 853, to ensure that there can be no doubt over this, I have nevertheless considered the question of consent afresh for the purpose of determining this application.

38. The father has said, consistently, both in these proceedings and in Sweden, that after initial reservations, he had given the mother general permission to visit X with the children, in the expectation that they would always be returned at the conclusion of any school holiday. He denies having known of their specific departure date for this trip, but accepts that there would have been no issue had they returned with their mother before the end of August 2022.

39. Ms Papazian points to what she says are inconsistencies in his evidence, between that case and the assertion found in his Swedish pleading dating from April 2023, where he says he '*reported (the mother) for child abduction when she took the children out of the country without his permission and keeping them there without his permission*'. I do not accept that as a major criticism. I accept that he had not authorised the specific departure date, and it is not suggested that he was aware of the mother's plan, as she relayed to the children's Swedish school in September 2023, to move the children with her to Canada. Her case is rather that he had agreed to allow her to take the children with her to X for a period of 2-3 years. There is no written evidence to support that assertion, and if there were, it is clear from the school communication that it was never the mother's actual plan that she and the children would stay in X for that period.

40. I do also take into account the matters which the Swedish court considered last September, as well as the expectation of their former School in Sweden that they would return, and the fact that the mother suggested after she had left Sweden that a dentist's appointment for A which had been fixed for August be re-fixed later, rather than cancelled. Text conversations which the mother has produced lack context, and could be consistent with the limited permission which the father says was given, just as much as her case. I also take into account the father's consistent opposition to the children staying in X after their removal and throughout 2023. That he told the Swedish social services in 2022 that he was not concerned for the children's safety

then, when their mother was still with them, does not amount to acquiescing in their retention out of Sweden.

41. Overall I am clearly satisfied that the mother did not have operative consent to retain the children away from Sweden beyond the end of the school summer holidays in 2022, and that no discretion in that regard therefore arises.

42. **The Children's Objections.** I next turn to the mother's case in relation to the children's objections. In *H v K (Return Order)* [2017] EWHC 1141 (Fam), MacDonald J summarised the law in this area as follows:

46. The law on the 'child's objection' defence under Art 13 of the Convention is comprehensively set out in the judgment of Black LJ in *Re M (Republic of Ireland)(Child's Objections)(Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26 (and endorsed by the Court of Appeal in *Re F (Child's Objections)* [2015] EWCA Civ 1022) and I have regard to the clear guidance given in that case. In summary, the position is as follows:

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

ii) Whether a child objects is a question of fact. The child's views have to amount to an objection before Art 13 will be satisfied. An objection in this context is to be contrasted with a preference or wish.

iii) The objections of the child are not determinative of the outcome but rather give rise to a discretion. Once that discretion arises, the discretion is at large. The child's views are one factor to take into account at the discretion stage.

iv) There is a relatively low threshold requirement in relation to the objections defence, the obligation on the court is to 'take account' of the child's views, nothing more.

v) At the discretion stage there is no exhaustive list of factors to be considered. The court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available. The court must give weight to Convention considerations and at all times bear in mind that the Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly.

47. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are authentically the child's own or the product of the influence of the abducting parent, the extent to which they coincide or at

odds with other considerations which are relevant to the child's welfare, as well as the general Convention considerations (*Re M* [2007] 1 AC 619)."

48. Finally on the subject of the law applicable in this case, it is always useful to recall that, as pointed out by Mostyn J in *B v B* [2014] EWHC 1804, the objective of the Convention is to ensure that a child who has been removed unilaterally from the country of his or her habitual residence in breach of rights of custody is returned forthwith in order that the courts in that country can decide his or her long term future. It is likewise important to recall that a decision by the court to return a child under the terms of the Convention is, no more and no less, a decision to return the child for a specific purpose and for a limited period of time pending the court of his or her habitual residence deciding the long-term position.

43. Specifically on the question of what it is that the child's objection must go to, Black LJ had said this in *M (Republic of Ireland) (Child's Objections) (Joinder of Children As Parties To Appeal)* [2015] EWCA Civ 26:

42. It is said that the child has to object to returning to the country of habitual residence rather than to returning to particular circumstances in that country, although it has been clear from early on that there may be difficulty in separating out the two sorts of objection.

43. The ground for this acknowledgment of the potential difficulty was laid in what Balcombe LJ said *Re S* [1993] at 782D. However, it may be convenient to rely upon what he said a little later in *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716. Commencing at 729, he set out the principles which he considered were to be deduced from the authorities dealing with child's objections. He described the second of these as follows:

"The second principle to be deduced from the words of the Convention itself, and particularly the preamble, as well as the English cases, is that the objection must be to being returned to the country of the child's habitual residence, not to living with a particular parent. Nevertheless, there may be cases….where the two factors are so inevitably and inextricably linked that they cannot be separated. Support for that proposition will be found in the judgment of Butler-Sloss LJ in *Re M (A Minor)(Child Abduction)* [1994] 1 FLR 390 at p 395…."

44. In *Re M* [1994], Butler Sloss LJ had said:

"It is true that article 12 requires the return of the child wrongfully removed or retained to the State of habitual residence and not to the person requesting the return. In many cases the abducting parent returns with the child and retains the child until the court has made a decision as to the child's future. The problem arises when the mother decides not to return with the child. It would be artificial to dissociate the country from the carer in the latter case and to refuse to listen to the child on so technical a ground. I disagree with the contrary interpretation given by Johnson J in B v K (Child Abduction) [1993] Fam Law

> 17. Such an approach would be incompatible with the recognition by the Contracting States signing the Convention that there are cases where the welfare of the child requires the court to listen to him. It would also fail to take into account article 12 of the United Nations Convention on the Rights of the Child 1989. From the child's point of view the place and the person in those circumstances become the same….I am satisfied that the wording of article 13 does not inhibit a court from considering the objections of a child to returning to a parent."

44. In this regard, I rely on the report dated 31 January 2024 from and oral evidence given by Allison Baker, the Cafcass Family Court Adviser. In her report she records:

    a. *Upon being asked what his parents could do to help him feel better about returning to Sweden, A immediately replied, "If they go back together". He continued "Usually my dad was loving my mum. Then dad went to Egypt and married another girl" which had made A "sad". If his parents reconciled A said, "I would go to Sweden". [19]*

    b. *When asked how much she spoke about what is happening regarding his father and these proceedings. A replied "a lot". When asked how he finds this, he replied "she feels scared because she really wants to keep us. I feel sad when she talks like that. I have a great life with my mum. I don't really want to go to my dad". [22]*

    c. *B said she did not want to go back to Sweden "because it's too boring". The only thing she liked doing there was playing in playgrounds, and she wants the trial Judge to know that she wants to live in England. There is nothing in Sweden that B misses... When I asked if she misses her father, B replied "a little bit". [29]*

    d. *In summary, A, B and C have expressed that they do not want to return to Sweden, but none of them raised major concerns about their life there. The children's most positive comments pertained to their life in X and my assessment is that their priority is to remain in the care of their mother. [34]*

    e. *Some of A's responses regarding his father clearly mirrored his mother's narrative. He confirmed that she had shared information with him about adult*

*matters, which therefore raises some concern about the direct influence she has had upon his wishes and feelings. [35]*

f. *[The children] have experienced adversity arising from the demise of their family, separation from each of their parents for extended periods of time, relocating to different countries, disruptions in their relationships with their wider families in Sweden and in X, and disruptions to their physical, educational and social ties in each of these countries. In addition, they are also reported by their mother to have witnessed domestic abuse. A reports having been hit by his father and he and B complained about their father screaming at them. Given their ages, I believe that A and B may now be experiencing some anxiety about their future. [40]*

45. Overall, the clear picture from Ms Baker's report, and from her oral evidence, was that the children's consistent expression was that they did not want to be separated from their mother, and that they were, if anything, as she put it, clinging to her. Their objections as expressed are not so much objections to Sweden, but objections to being separated from her. A's remark that he would go to Sweden if his parents reconciled was eloquent. I remind myself that to give rise to a discretion, the objection must be to being returned to the country of the child's habitual residence, not to living with a particular parent; although as explained in *Re M*, an objection to returning to a particular parent may, in some cases, be inextricably linked to a return to a particular country.

46. Here, I am aware that there is already in Sweden an order which requires the mother to return the children into the care of their father, although that order was made in different circumstances to those which now surround the children. Then the children were living with the mother's family in X, and neither parent was offering their children daily care, as the direct result of choices and decisions made by the mother to which I have found that the father had never consented, and about which he consistently sought to take issue through the Swedish courts.

47. Following on from the Swedish order, at a time when the mother had not been the children's primary carer for many months, she has returned to care for them, and further removed them to an entirely new environment, again without the father's

consent, and in direct defiance of the Swedish Court order. She has also told the Swedish Court during its process that she would comply with its ruling, and later told Poole J in court on 11 December 2023 that she had been in the process of returning the children to Sweden when she was stopped entering England with them on 20 October 2023, although she did not now wish to return them. However, from the children's perspective, which must be the Court's focus, the circumstances are now very different from those which presented themselves to the Swedish Court in September 2023, when the substantive decision was made.

48. In those circumstances, where there is an order in Sweden giving the care of the children to their father, I consider that the objections which the children are voicing *might* be capable of being classed an objection, subject to my assessment of the children's age and maturity. Asked about this, Ms Baker expressed the view that all 3 children presented as being typical of their respective ages in terms of those characteristics. In that regard, I consider that certainly in respect of A, who is 11, and also, more marginally in respect of B, who is 8, I should give careful consideration to taking those objections into account. For C, aged 5, this would not be the case, but he falls to be considered together with his siblings for these purposes.

49. I am clear that there is no objection expressed to a return to Sweden in itself. In those circumstances, I am ultimately satisfied that the better assessment of the issues presenting themselves in this case is not in relation to the children's objections, but rather in respect of the grave risk that they could suffer harm or be put into an intolerable situation if their return leads to their mother's removal from them and incarceration. I have come to this view in part because of the children's clearly expressed views about wanting to remain with her, which is not the current determination of the Swedish Court. I will deal with the detail of the Art.13(b) defence below. When the Swedish Court made their determination, of course, the children were not living with the mother. I make it clear that there are no sufficient objections to a return to Sweden otherwise that would meet the threshold, and that what I say below about protective measures under Art.13(b) will subsume any residual concerns about the children's expressed views.

50. **Art. 13(b)**. As explained, I consider that the issue of the children's objections is in fact intertwined with the final aspect of the mother's defence, under Art.13(b), which would give rise to a discretion if '*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*'.

51. The relevant test under Art. 13(b) has been summarised by the Court of Appeal in *Re IG* [2021] EWCA Civ 1123, where Baker LJ said:

> "46. The leading authorities remain the decisions of the Supreme Court in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 and *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 AC 257. The principles set out in those decisions have been considered by this Court in a number of authorities, notably *Re P (A Child) (Abduction: Consideration of Evidence)* [2017] EWCA 1677, [2018] 4 WLR 16 and *Re C (Children) (Abduction: Article 13(b))* [2018] EWCA Civ 2834, [2019] 1 FLR 1045. Since the hearing of the present appeal, this Court has handed down judgments in another appeal involving Article 13(b), *Re A (A Child) (Article 13(b))* [2021] EWCA Civ 939 in which Moylan LJ carried out a further analysis of the case law. I do not intend to add to the extensive jurisprudence on this topic in this judgment, but merely seek to identify the principles derived from the case law which are relevant to the present appeal.
>
> 47. The relevant principles are, in summary, as follows.
>
> (1) The terms of Article 13(b) are by their very nature restricted in their scope. The defence has a high threshold, demonstrated by the use of the words "grave" and "intolerable".
>
> (2) The focus is on the child. The issue is the risk to the child in the event of his or her return.
>
> (3) The separation of the child from the abducting parent can establish the required grave risk.
>
> (4) When the allegations on which the abducting parent relies to establish grave risk are disputed, the court should first establish whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then establish how the child can be protected from the risk.
>
> (5) In assessing these matters, the court must be mindful of the limitations involved in the summary nature of the Hague process. It will rarely be appropriate to hear oral evidence of the allegations made under Article 13(b) and so neither the allegations nor their rebuttal are usually tested in cross-examination.
>
> (6) That does not mean, however, that no evaluative assessment of the allegations should be undertaken by the court. The court must examine in concrete terms the situation in which the child would be on return. In analysing whether the allegations are of sufficient detail and substance to give rise to the grave risk, the judge will have to consider whether

the evidence enables him or her confidently to discount the possibility that they do.

(7) If the judge concludes that the allegations would potentially establish the existence of an Article 13(b) risk, he or she must then carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to the risk.

(8) In many cases, sufficient protection will be afforded by extracting undertakings from the applicant as to the conditions in which the child will live when he 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."

52. Macdonald J in *G v D (Art 13(b): Absence of Protective Measures)* [2021] 1 FLR 36 at §39 (approved by the Court of Appeal in *C (A Child) (Abduction: Article 13(b))* [2021] EWCA Civ 1354 at §60) added:

"[39] Finally, it is well established that courts should accept that, unless the contrary is proved, the administrative, judicial and social service authorities of the requesting State are equally as adept in protecting children as they are in the requested State (see for example *Re H (Abduction: Grave Risk)* [2003] EWCA Civ 355, [2003] 2 FLR 141, *Re M (Abduction: Intolerable Situation)* [2000] 1 FLR 930 and *Re L (Abduction: Pending Criminal Proceedings)* [1999] 1 FLR 433). In this context I note that Lowe et al observe in International Movement of Children: Law, Practice and Procedure (Family Law, 2nd edn), at para 24.55 that:

> 'Although, as has been said, it is generally assumed that the authorities of the requesting State can adequately protect the child, if it can be shown that they cannot, or are incapable of or, even unwilling to, offer that protection, then an Art 13(b) case may well succeed. It seems evident, however, that it is hard to establish a grave risk of harm based on speculation as opposed to proven inadequacies in the particular cases.'"

53. However, as Moylan LJ pointed out in *Re W [2018]* EWCA Civ 664 at para 57:

"Putting it simply but, in my view, starkly, if the children were to be returned to the USA without the mother, the court would be enforcing their separation from their primary carer for an indeterminate period of time. It would be indeterminate because the court has no information as to when or how the mother and the children would be together again. These children, aged five and three, would be leaving their lifelong main carer without anyone being able to tell them when they will see her again. In my view it is not difficult to describe that situation, in the circumstances of this case, as one which they should not be expected to tolerate. I acknowledge that the current situation has been caused by the

mother's actions, and that she was herself responsible for severing the children from their father but, as referred to above, the court's focus must be on the children's situation and not the source of the risk."

54. Finally, in the recent decision of *Re T (Abduction: Protective Measures: Agreement to Return)* [2023] EWCA Civ 1415, Cobb J sitting in the Court of Appeal comprehensively addressed the considerations that arise where there is or may be concern about the need for and availability of protective measures. He said this:

45. Five short points about 'protective measures' merit some consideration within this judgment arising from the appeal:

i) The requirement for the parties to address protective measures early in the process;

ii) The importance of the court identifying early in the proceedings what case management directions need to be made, so that at the final hearing the court has the information necessary to make an informed assessment of the efficacy of protective measures;

iii) The need for the court to be satisfied, when necessary for the purposes of determining whether to make a summary return order, that the proposed protective measures are going to be sufficiently effective in the requesting state to address the article 13(b) risks;

iv) The status of undertakings containing protective measures, and their recognition in foreign states;

v) The distinction between 'protective measures' and 'soft landing' or 'safe harbour' provisions.

46. (i) *Early pleading*: In cases under the 1980 Hague Convention, when the article 13(b) exception is raised as an issue, the court invariably needs to consider 'protective measures'. It has been emphasised repeatedly that the parties must address this issue early in the proceedings so that each party has an adequate opportunity to adduce relevant evidence in a timely manner in relation to the need for, and enforceability of, such measures (see HCCH 2020 Good Practice Guide at [45]). There is a risk that if this step is not taken in a timely way (as happened here), delays later in the process could frustrate the objectives of the Convention. The *applicant's* evidence should therefore always include:

"…. a description of any protective measures (including orders that may be subject to a declaration of enforceability or registration under Art 26 of the 1996 Hague Convention or, where appropriate, undertakings) the applicant is prepared, without prejudice to his or her case, to offer for the purpose of securing the child's return, <u>including the extent to which any undertakings offered and accepted in this jurisdiction are capable of enforcement in the requesting jurisdiction</u>". Practice Guidance: PFD: 2023 ([2.9(b)]). (Emphasis by underlining has been added in all citations in this section of the judgment).

And the *respondent's* evidence should always include:

"… details of any protective measures the respondent seeks (including, where appropriate, undertakings and the <u>extent to which any undertakings offered and accepted in this jurisdiction are capable of enforcement in the requesting jurisdiction) in the event</u>

that the court orders the child's return" (ibid. [2.9(d)], and (see also Practice Guidance: PFD: 2023 [2.9(e)]).

47. It is important to note the passages of the text which I have underlined in the paragraph above, because the court will be required to examine "in concrete terms" at the final hearing (see *Re B* at [22]/[23]) the situation which would face a child on a return being ordered:

"In deciding what weight can be placed on undertakings as a protective measure, the court will 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, in the absence of compliance. The issue is the effectiveness of the undertaking in question as a protective measure, which is not confined solely to the enforceability of the undertaking" (Practice Guidance: PFD: 2023 [3.11]).

It follows therefore that where the respondent's Answer raises an exception under article 13(b), the applicant should give immediate consideration, and take steps in the most expeditious way available, to ensure that information is obtained, whether from the Central Authority of the requesting state or otherwise, about the protective measures that are available or could be put in place to meet the alleged identified risks (see the Practice Guidance: PFD: 2023 at [2.9(f)]). As Moylan LJ pointed out in *Re C* at [11] (referencing the predecessor guidance to the Practice Guidance: PFD: 2023), adherence to the guidance is essential to avoid delay.

48. Protective measures are those measures which are designed to address the issues of grave risk or intolerability raised within the article 13(b) exception; they may take one of many forms. In this regard, the HCCH 2020 Good Practice Guide offers this view at [44] and [47]:

"Protective measures may be available and readily accessible in the State of habitual residence of the child or, in some cases, may need to be put in place in advance of the return of the child. In the latter case, specific protective measures should only be put in place where necessary strictly and directly to address the grave risk. They are not to be imposed as a matter of course and should be of a time-limited nature that ends when the State of habitual residence of the child is able to determine what, if any, protective measures are appropriate for the child" (HCCH 2020 Good Practice Guide at [44]).

"Whether in the form of a court order or voluntary undertakings, the efficacy of the measures of protection will depend on whether and under what conditions they may be rendered enforceable in the State of habitual residence of the child, which will depend on the domestic law of this State. One option may be to give legal effect to the protective measure by a mirror order in the State of habitual residence – if possible and available. But the court in the requested State cannot make orders that would exceed its jurisdiction or that are not required to mitigate an established grave risk. It should be noted that voluntary undertakings are not easily enforceable, and therefore may not be effective in many cases. Hence, unless voluntary undertakings can be made enforceable in the State of habitual residence of the child, they should be used with caution, especially in cases where the grave risk involves domestic violence" (HCCH 2020 Good Practice Guide at [47]).

Moreover, the Special Commission recently:

"… underlined the importance of obtaining information on available measures of protection in the State of habitual residence of the child before ordering them, when necessary or appropriate". (Special Commission Conclusions: 2023 at [33]).

49. (ii) *Case Management and protective measures*. It is crucially important that the court identifies at an early stage in the proceedings what case management directions are needed so that at the final hearing the court has the information necessary to make an informed assessment of the efficacy of protective measures. This is emphasised throughout the Practice Guidance: PFD: 2023 as is apparent from the relevant references contained in [2.9(b)], [2.9(d)], [2.11(e)], [2.11(f)], [2.11(g)], [3.5], [3.9], [3.10], and [3.11]. For emphasis in this judgment, I reproduce [3.10] below:

   "[3.10]. With respect to protective measures (including orders that may be subject to a declaration of enforceability or registration under Art 26 of the 1996 Hague Convention or, where appropriate, undertakings) <u>the court is required to examine in concrete terms the situation that would face a child on a return being ordered</u>. Where the court considers that further information is required to answer these questions case management directions should be given, as referred to above, as early in the proceedings as possible".

50. (iii) *Protective measures: Effective measures.* The guidance and the authorities referred to above are clear. Protective Measures need to be what they say they are, namely, *protective*. To be protective, they need to be *effective*. This issue has been addressed in a number of authorities and in the HCCH 2020 Good Practice Guide and it is not, therefore, necessary to deal with it at any length in this judgment. I would just like to make the following points.

51. First, as Baroness Hale said in *Re E* at [52]:

   "The clearer the need for protection, the more effective the measures will have to be".

52. Secondly, as Moylan LJ observed in *Re C* at [49]: "[a]rticle 13(b) is forward-looking" (see also HCCH 2020 Good Practice Guide at [35]-[37]). Thus, when the English court is considering article 13(b), it needs to look at the *future* risk, and:

   "… 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." (*Re E* at [35]).

   To like effect, the Supreme Court in *Re E* pointed out that "specific protective measures as necessary" should be in place "<u>before</u> the child is returned" (at [37]; emphasis added). In other judgments, it is said that the courts need to examine "in concrete terms" what will happen to the subject child if a return is ordered (see *Re B* at [22]/[23]).

53. Thirdly, determination by the domestic court of the *effectiveness* of protective measures in the court of a requesting state can be established in one or more of a number of ways, including:

   i) The parties and the court may consider it necessary to obtain short and focused expert advice from a lawyer specialist in the laws of the requesting state on whether, and if so how, orders which have been made and/or undertakings given in 1980 Hague Convention proceedings in this jurisdiction can be converted into effective (possibly 'mirror') orders in the court of the requesting state;

   ii) The parties may be able to invoke the ordinary administrative, judicial and social service authorities of the requesting state to provide protective measures. Publicly-available information may be available to outline the range of services to assist families where a child may be exposed to domestic abuse – police and legal services, financial assistance schemes, housing assistance and shelters, and health services (see in this

regard *G v D (Art 13(b): Absence of Protective Measures)* [2021] 1 FLR 36 at [39] (quoted with approval by the Court of Appeal in *Re C* at [60]);

iii) Some states, at present only Australia, may produce their own fact-sheets (available through the International Hague Network of Judges) which address the availability of protective measures;

iv) Direct international judicial liaison can have a role, as set out in the Practice Guidance: PFD: 2023 at [3.19];

v) In many cases, parties may be able to rely on the arrangements contained within the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children ("1996 Hague Convention")). The 1996 Hague Convention can add to the efficacy of some protective measures by ensuring that they are recognised by operation of law in other contracting states and can be declared enforceable at the request of any interested party in accordance with the procedure provided in the law of the state where enforcement is sought (see Article 26). As it happens, this is not relevant in this case, as the USA has not ratified the 1996 Hague Convention.

54. (iv) *Undertakings containing protective measures*: A formal undertaking given by a party and recorded in court is equivalent to an injunction (see *Gandolfo v Gandolfo (& o'rs)* [1981] QB 359). Undertakings are often formally given and accepted in the English Courts in order to formalise arrangements for the return of children under the 1980 Hague Convention; this may be entirely appropriate on the facts of a given case, particularly where the undertakings would be enforceable in this jurisdiction. However, both counsel at the hearing on 22 August 2023 expressed reservations about the recognition and/or enforceability of undertakings in some foreign states (see §19 above). They were right to be cautious. As Baroness Hale said in *Re E* at [7], critics of the 1980 Hague Convention have observed that:

"… the courts in common law countries are too ready to accept undertakings given to them by the left-behind parent; yet these undertakings are not enforceable in the courts of the requesting country and indeed the whole concept of undertakings is not generally understood outside the common law world. At all events, the change in the likely identity of the abductor places a premium on the efficacy of protective F measures which was not so apparent when the Convention was signed".

55. This is echoed in the HCCH 2020 Good Practice Guide at page 11 (glossary) and at [47], and in the Practice Guidance: PFD: 2023 at [3.11]:

"… There is a need for caution when relying on undertakings as a protective measure, and undertakings that are not enforceable in the courts of the requesting State should not be too readily accepted. There is a distinction to be drawn between the practical arrangements for the child's return and measures designed or relied on to protect the child. The efficacy of the latter will need to be addressed with care.".

55. Having considered all of the above, at present I am not satisfied that I have sufficient information to determine exactly what is likely to happen if the mother now attempts to return the children to Sweden. There remains a real risk of arrest for her on entry. The ICACU response received after the conclusion of submissions is generic, and not

directly on point. They said: '***If a person is extradited, an additional detention hearing will be held in court in the presence of the person, and it will then be decided if the person shall be detained or not'***. They are there dealing with the situation after a successful extradition process, when the person extradited will be brought before a court after their arrival.

56. What is not covered is the situation where the person who is the subject of the proceedings returns not as a result of the extradition prior to the conclusion of the proceedings, and with the 3 children whose return she has been mandated to effect. Will she then be arrested and detained pending the convening of a hearing? Will the court immediately look to implement the extant order which places the children into the care of the father? Is there any process whereby the children can remain with their mother pending their return to Sweden and the matter coming before the District Court for at least a summary reconsideration in light of the changed circumstances since the original order was made? Is the mother's Swedish lawyer right to say that the father can take no steps to enable that to happen? If he cannot, then how is a situation to be achieved whereby these children can be returned to Sweden without avoidable trauma to allow the Courts there to decide where their welfare interests lie? Finally, what if the mother refuses to comply with a return order, with the consequence that the extradition process goes ahead? From the tenor of the reports being prepared, she is evidently intending to use the children's attachment to her as a shield in those proceedings. Is that a realistic defense, and to what extent will the decision in this Hague application impact upon those proceedings?

57. From the evidence I have of the children's expressed views from Ms Baker, I am satisfied that there is a grave risk of their being placed into an intolerable situation if no positive answers are received to any of the above questions, and that the harm they may suffer includes a possible negative impact on the prospects of their being able to rebuild their relationship with the father, if the mother meets the full force of Swedish law immediately upon her return. I stress that I am very clear that the Swedish Court is the court that should be taking welfare decisions about these children, but their vulnerabilities, which have been exacerbated, if not created, by the mother's behaviour over the past 18 months, in removing them from Sweden, abandoning them in X, returning to collect them after her arguments were rejected in Sweden, and

finally removing them once again to a new and unfamiliar environment in England, are there, and fall to be addressed.

58. I accept the father's case that prior to July 2022 there is no evidence that the time he spent with the children was anything other than positive and beneficial, notwithstanding the mother's allegations of abuse prior to the parties' separation in 2017. However, I have to consider the children's current state of mind and sense of allegiance to their mother, which Ms Baker notes. If arrangements could be put in place which would enable the mother and children now to return to Sweden, without risk of her arrest on entry, and to remain with her until the first hearing could be convened of the court in Sweden charged with dealing with welfare issues in relation to the children – I assume the District Court in Umea – then there may be no sufficient grounds on which the court could exercise its discretion to decline to make a return order.

59. I would repeat the sensible observations of Peel J in *T v G* [2024] EWHC 246 (Fam), (the remitted hearing of *Re T* (above)) where he dealt with the impact of welfare decision already obtained in the court of primary jurisdiction, and their effect on Hague proceedings. He said this:

> 24. It is all too common for the left behind parent to secure orders in the original country (often in the absence of the taking parent) which make significant, wide ranging welfare decisions; in this case, placing T in F's care and providing for supervised contact only. To do so pre-empts, or impedes, the purpose of the Hague Convention, which is to provide for a return of a child to the country of his/her habitual residence, so that welfare decisions may be made in the first country (see Re D (A Child) (Abduction: Rights of Custody) *[2006] UKHL 51*, per Baroness Hale of Richmond at para 48).
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> 25. To seek, and obtain, welfare orders <u>before</u> a return order is made by the second country is arguably to approach these cases the wrong way round, particularly if such orders place the taking parent at an immediate disadvantage in the original jurisdiction. It places the returning jurisdiction (in this case England and Wales) in the invidious position of being asked to order a return to a country where important welfare decisions have already been made. It enhances the need for protective measures. It exacerbates the fears of the abducting parent about what awaits him/her upon return.

60. Here, as I have said, there can be no criticism of the father for obtaining the orders which he did from the Swedish Court whilst the children were living in X, and not in the care of either parent. However, if the children can now return to Sweden, initially

in the care of their mother, for the radically changed situation to be considered afresh, that would inevitably best for everyone concerned. Achieving that end in a safe but expedited manner should therefore be the primary focus of all of the many agencies now involved, whether the Family and Extradition courts in England, and the Family and Criminal Courts in Sweden. All of these proceedings are about the children, who need to remain in primary focus at all times. The mother should desist from any attempt to use them as a shield, and now engage positively with the various different agencies to ensure that she and they return to Sweden safely, but soon.

61. I therefore propose to adjourn the final determination of this application until I have further information in response to the questions which I have set out at para.56 above. I have in mind the sort of enquiries outlined by Cobb J in *Re T* in paragraph 53 of his judgment, set out above. I anticipate that a '*short and focused expert advice'* from a Swedish law specialist will be necessary, as anticipated at his paragraph 53(i). I note that Sweden is a signatory to the 1996 Hague Convention, which should assist if the father can take steps to stay the effects of the September 2023 lives with order in his favour, at least until the matter comes back before a Court in Sweden with the children present in that jurisdiction.

62. However, that adjournment should be only for a limited period. In the first instance I will list an hour's direction hearing on Monday 19 February at 2pm, at which any issues about the enquiries which need to be made can be resolved. This can be vacated if agreed directions are submitted to me by 12pm on 19 February. We can then determine the date for the final determination, but it will be the soonest achievable, reserved to me, once the responses to those enquiries are likely to be received.

63. That an adjournment has become necessary at all is probably in part a result of the fact that no fewer than 6 different judges have dealt with the application in the 12 weeks since it began, and in part of the mother's determination to run every possible defense whilst not focusing on analysis of the positive measures which could be put in place and which would ease the children's passage, with her, back to Sweden. As Cobb J rightly pointed out in *Re T*, this should be done at the beginning of a case, and not at the end.