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Case No: FD22P00726

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 March 2023

Before :

MRS JUSTICE MORGAN

- -

Between :

OC	**Applicant**
- and -	
CD	**Respondent**

- -
- -

Paul Hepher (instructed by **Wilson Solicitors LLP**) for the **applicant**
Andrew Venables (instructed by **Duncan Lewis Solicitors**) for the **respondent**

Hearing dates: 02.02.23-03.02.23

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Approved Judgment

This judgment was handed down remotely at 10.30am on 13th March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE MORGAN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Morgan:

1. The Father of three children ages 10, 8 and 4 seeks their summary return to Australia from Wales. I will call those children Robert, Brian and Amy in this judgment. They were habitually resident in Australia prior to their retention in Wales on 29 April 2022. The Father was exercising rights of custody in Australia prior to the retention. The Mother accepts that she breached the Father's rights of custody by retaining the children in this country. There is no dispute, and nor could there be, that the mother has wrongfully retained the children in Wales.

2. The mother further accepts that by operation of Article 12 of the 1980 Convention, absent one of the defences contained within Article13 it is mandatory that the children be returned forthwith to Australia

3. The mother raises 3 defences

i. That which arises under Article 13 (b) - there is grave risk that the children's return would expose them to physical or psychological harm, or otherwise place them in an intolerable situation

ii. That the two eldest children object to being returned, and have attained an age and degree of maturity where it is appropriate to take into account their views

iii. That which arises under Article 13 (a) - the Father had acquiesced in the retention

Background

4. Both parties have set out in very considerable detail the background which leads ultimately to the application before me. Inevitably there are differences of perspective as to that background and I neither descend into the detail of that nor engage in determining any but the essential facts which are disputed. What follows is an outline by way of context.

5. The Father was born in the UK and is a British national. The mother was born in Australia. She has British and Australian nationality. The parties met in the UK, and they began living together in 2005. Robert was born in August 2012 and Brian in June 2014.

6. In March 2015, the parents, and the two eldest children relocated to Western Australia. They lived about 30 miles south of Perth. In March 2018 the youngest child was born and the parties married. The parties separated in July 2021.

7. The separation came in circumstances where the Father had started a new relationship. Within the written material and in the submission made by counsel at this hearing I have heard a good deal about the effect that the circumstances of the breakdown of the relationship and in particular the fact that the Father left the mother for another woman have had on the way that this family has functioned since and on the decision-making of each party. It is an aspect which features in the large number of digital messages to which my attention has been directed by counsel for each party and in respect of which each has urged on me their preferred interpretation,

8. In October 2021, the mother sought the Father's agreement to obtain British passports for the children. The Father was worried about the possibility of removal and was explicit that he did not want the children to relocate and so the mother gave reassurances she would not relocate the children without his permission

9. On 22 February 2022, the paternal grandmother paid for return tickets for the Mother and the children to travel to Wales for a holiday. They were to travel out on 5 March 2022 and travel back on 29 April 2022. The mother told the Father of this the same day. The mother and the children left for this trip as planned. The Father took them to the airport and on the basis that it was a holiday he agreed to the trip.

10. During the holiday, on 7th April the Mother sent a message to the Father suggesting that the children were now saying that they would like to stay in Wales. In that message she said she had not made a decision about staying because of the Father. The Father by way of response sent a reply

Hey CD I facetimed the kids when you was at the doctors they all seemed happy and ok, I tried speaking to Robert but he said he was just tired last week when he didn't want to talk to me, I knew he wasn't going to tell me, I didn't bring anything up with them about them staying in the UK because it doesn't seem right over facetime, what would your plan be CD? Would you come back here first on your return flight and get everything sorted and then move back?I know that's extra cost for a flight back but I think it would be nice to discuss this face to face with you and the kids, and if it is what you and the kids really want then I wouldn't stop you moving back CD, obviously I don't want the kids to be on the other side of the world"

11. Continuing through April (the return from holiday being scheduled for 29th April) there were messages exchanges and calls between the parties.

12. On 12 April it was discovered that the house that was the family's home was to be sold by the landlord and that the mother would need to find another house the Father contacted his mother and step-Father to arrange for the mother and children to stay with them until she could make arrangements. The mother gave notice on her house in Australia on 22 April 2022

13. On 28th April the Father and children had a face time conversation in which it is said that they expressed excitement at the prospect of coming home to Australia. The Mother says that this was not representative of their views but that they did not want to upset the Father knowing that he wanted them to return.

14. On 29th April the Mother decided that she and the children would not return to Australia and told the Father of her decision in the early morning of that day. The very next day the Mother made arrangements to enroll the children in school. Her evidence is that she and the children had looked at the school beforehand.

15. In the light of the fact that the home in Australia was to be sold, the Father packed up and/or sold some of the items and arranged to send some other items (wanted by the Mother and children) to the United Kingdom. The Mother's car was amongst those items sold. It is common ground that the money or a share of it raised from the sales he transferred to the mother.

16. On 16th July the Father and his new partner came to the United Kingdom and travelled to Wales to spend time with the children. In advance of that visit there were messages exchanged between the parties making arrangements for the time he was to spend with them.

17. At the conclusion of the holiday the Father indicated to the Mother that he wanted them returned to Australia. On his return to Australia in August he instructed solicitors, and he approached the Australian central authority. Produced to me at this hearing are the papers signed by him on 9th September 2022. Proceedings were issued here on 9th November and a Cafcass officer directed to report pursuant to the directions of Sir Jonathan Cohen on 17th November. Following a PTR before a deputy high Court judge on 13th January 2023 the matter remained contested and was listed before me for a 2-day hearing

The Evidence at This Hearing

18. At this hearing I heard evidence from the Cafcass officer, the Mother and the Father. It is not my intention to recite here all that I have heard or read but I had taken the opportunity to read in advance that which had been put in writing including the large number of digital messages produced as exhibits to statements.

19. Ms Callaghan is an experienced Cafcass officer. She told me her remit was to ascertain the children's views about a return to Australia . She didn't meet with Amy since she is only 4 but at the end of the meeting she had with her brother Brian, she asked him what he thought she would like, and he seemed pretty sure she said that his little sister would want to go back as the weather was much better.

20. The conversations with Robert had had a level of superficiality for example one of the reasons he gave was about not liking his Father's home is that he didn't like the steps but he then could not expand any further. He spoke of there being cockroaches, ants and no one knowing the football rules. Ms Callaghan said that even when he would say something she would perceive as positive he would follow it up with something to counter it such as the pool which he had been positive about he then went on to say had leaves and insects in it.

21. Ms Callaghan said that she did not think this was so much an indication of his maturity as that it gave her the impression that he was very aware of the reason for him coming to see her and of the disagreement between his parents over what should happen. He was speaking to her in a way that felt like it was to convince her it was better to stay than to go back to Australia.

22. Her impression was that both children were loyal to their mother and that Robert was looking for reasons because he did not go into any great depth about any true reasons why he did not like Australia. He had however, experienced the separation of his parents and why that was.

23. She had asked Robert if he has any pets at his home in Wales, and he responded, '*we have no pets in Wales, we live in a two-story house, and it is too small. We have a garden, but teenagers keep putting beer bottles in it. It is next to a creepy alley and garage, so we don't go in it', there are lots of potholes, too many of them*'. This he

followed up by saying, '*we don't play outside in Wales, but I would rather be cold than too hot, we kept getting leaves and bugs in the pool in Australia*'.

24. Although he said he had better friends in Wales his account of life in Australia was that at weekends he would play in the pool and his best friend lived only a three-minute walk away whereas he lived quite far from his friends in Wales.

25. Ms Callagan felt that he was trying during his conversation with her to recover his position when he was aware he was talking in negative terms about his home and so he needed to follow up with being better than it was in Australia.

26. She asked Robert how he would feel if he had to return to live in Australia. He replied, *'I probably wouldn't speak to dad, I will be sad. I don't want to go back; it is a bad education, but dad says it is a good education. There aren't any good universities.*'

27. Robert told her that if he had a magic wish, it would be, ' *to live in Wales with my mum, sister and brother*'. She had asked Robert how he thought his mother would feel about returning to Australia and he replied, '*she would be sad, I am cross with dad about everything, I don't want to go back there'.* I asked Robert about spending time with his Father if he remained living in Wales. He stated, 'N*o, I am not going for a twenty-hour flight just to meet my dad.*'

28. She did not agree that these were strong views for a ten-year-old but rather saw them as an expression that he was cross with his Father.

29. Brian spoke in positive terms about better weather in Australia. The impression Ms Callagan had was that the children spoke positively about Wales because they were there with their mother rather than because of the features of it

30. He spoke, she said, negatively about his Father saying things like ‘we are better off without him, he didn’t pay the rent and he had cheated with T. These were not she thought, things he had been coached or was repeating from his mother but indications that he had been exposed to and was very aware of adult views and issues. It was, she agreed, all one way. His view about his Father was based on the separation which he held his Father responsible for.

31. Both boys were clear that they had come for a holiday. They had neither of them understood that they were coming for anything other than a holiday from which they would return.

32. Brian she had thought was very uncomfortable talking to her. He knew why he was coming; he knew that he was to be asked about returning and his views and it was clear from his body language - lack of eye contact fiddling with his hands - and expression that he felt unhappy to be doing so.

33. Ms Callaghan herself did not raise any anxiety about the children returning beyond the need to ensure there was proper accommodation for them if it were directed because the family home had been sold.

34. The Mother was, I regret to say, a very unimpressive witness. In her oral evidence she started to say that it had been already understood between the parties at the time the Father took them to the airport that if the children liked Wales and wanted to stay then he would give his permission for that. I did not believe her. Furthermore it did not fit with the children's own understanding of the holiday as to which they were transparently clear with the Cafcass Officer. I did not have the impression that she was trying to assist the court or giving a straightforward account during her evidence but rather that she was seeking to consider what might be the effect of her answers on her case before giving them.

35. Her suggestion that but for what she described repeatedly as the children's decision, she would have returned to Australia I found wholly unconvincing. I accept and agree with Mr Hepher that the notion that she had the bags all packed and ready to go but that on the basis of the views of children of the ages of 10 and 8 decided to unpack them and stay is not credible. Even had I regarded that as credible it would have been undermined by the fact that the mother had, by the time she unpacked her bags on the Friday, already considered the question of local schools and been to see the one she wanted, such that she was able to submit an application for places on the Sunday. That is not in my view the action of a woman who is intending to get on a plane. It is the action of a woman who is thinking to stay and is putting in place plans to do so. I have wondered whether it might have been something done in advance of a return to Australia to make an informed application for permission permanently to relocate before the courts there. What drives me to the conclusion that more likely than not it was not, is that there was no hint anywhere in the papers before me or in any of the extensive text communications between the parties that the Mother ever intended to make such an application.

36. There had been not the slightest mention to the Father that she and the children were looking at or considering schools. The first occasion on which he was made aware of it was when she sent him photographs of the boys on their first day at school and Amy in her uniform in anticipation of the start date. One of the aspects of the Mother's evidence before me that I found profoundly unimpressive was that I had the strong impression from her that she saw nothing at all wrong with this either at the time or when it was pointed out to her by Mr Hepher in his most effective cross examination of her.

37. The mother's approach, both in her written and oral evidence that it would be right for children of this age to be making a life-changing decision about where they should live, was one which was completely inappropriate.

38. The Father explained that he simply could not make sense of the way in which the children had seemed to him to be excited to be coming back to Australia on 28th when he spoke to them for 14 minutes, at the end of which call he had been looking forward to seeing them after a gap of 2 months but yet after the mother had told him they were no longer coming the following day , they seemed no longer to want to. On that occasion he had spoken to them for about 17 minutes. He simply could not understand what could have changed their feelings over that short time. He told me that the reason he wanted to speak to them on the second occasion was to try to work out if they really did feel that they wanted to stay or if he was being lied to. He denied when it was put to him on behalf of the Mother that either in the conversation on the 28th or

in the conversation on the 29th he was intending to allow the children's expressed views to him to be allowed to determine what would happen – in effect that the children would make the decision.

39. The Father told me that he felt powerless to do anything about this situation. He said also that he did not seek legal advice or instruct solicitors because he had not wanted to get the courts involved and had wanted to see if they could sort things out between themselves. I did not see in the numerous text messages, however, any in which, after the 29th April he had said to the Mother that he wanted the children sent back. There were many in which arrangements were made for contact. Others still in which arrangements were made to transfer funds and to sell property from the family home which the landlord had decided to sell. Later in the summer there were texts relating to the holiday the Father was taking and for the time he would spend with the children once he had travelled from Australia. He agreed when asked about it in evidence that within that context there were messages in which he spoke about saying goodbye to the children if they were to remain in Wales. There were also messages in which he discussed with the Mother whether it would be better if he just dropped out of the children's lives and no longer had contact with them. This he said came from his thinking that he could do nothing about it. He agreed with Mr Venables that when he said he had no right to stop them, he was talking about no moral right as opposed to no legal right because his was the affair that had wrecked the marriage and broken up the family. It was however not until he returned to Australia after the holiday that he sought legal advice and knew what he described as his 'rights' were. He had to accept when pressed by Mr Venables that he could have gone to a solicitor before then – in May immediately after the mother didn't return. He did not have to wait until August. He also accepted that although he could have sought advice, he in fact did nothing at all. In his oral evidence he repeated that he felt he was powerless.

The Legal Framework

40. There has been before me no disagreement between counsel as to the authorities relevant to and the legal principles governing the decisions which I have to make. What follows is largely taken from the legal framework relied on by Counsel.

41. The 1980 Hague Convention was incorporated into UK law by the Child Abduction and Custody Act 1985. The Preamble to the Convention states:

> "The States signatory to the present Convention, firmly convinced that the interests of children are of paramount importance in matters relating to their custody, desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access, have resolved to conclude a Convention to this effect, and have agreed upon the following provisions."

> **Article 1** includes among the objects of the Convention:
> "to secure the prompt return of children wrongfully removed to or retained in any Contracting State ...."

> **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."

Under Article 12:
"Where a child has been wrongfully removed or retained in terms of Article 3and, 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."

Article 13, so far as relevant, provides:
"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; orb) 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."

Article 13(b):

The leading authorities on this "exception" are the two Supreme Court decisions of *In re E (Children: Custody Appeal)[2011] UKSC 27*, [2012] 1 AC 144 and *Re S (A Child) (Abduction: Rights of Custody)[2012] UKSC 10, [2012] 2 FLR 442*.

In *Re S (A Child)* the Supreme Court repeated and stressed the approach taken in *Re E*: *the terms of Art 13(b) are plain, require neither elaboration nor gloss and by themselves demonstrate the restricted availability of the defence and 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 from that risk; if the evaluation of the protective measures fails to meet the identified grave risk, the court may have to do the best it can to resolve the disputed issues of fact*.

42. The relevant test has been summarised by Mr Justice Macdonald in MB v TB [2019] EWHC 1019 (Fam)where from paragraph 31 he states:

[31] The law in respect of the defence of harm or intolerability under Art 13(b) was examined and clarified by the Supreme Court in Re E (Children)(Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 AC 144. The applicable principles may be summarised as follows:

i. There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.

ii. The burden lies on the person (or institution or other body)opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process

iii. The risk to the child must be 'grave'. It is not enough for the risk to be 'real'. It must have reached such a level of seriousness that it can be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two.

iv. The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'. 'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'

v. Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child's immediate future becausethe need for protection may persist

vi. Where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation would become intolerable the court will look very critically at such an assertion and will, among other things, ask if it can be dispelled. However, in principle, such anxieties can found the defence under Art 13(b).

[32] The Supreme Court made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as ground the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest on the evidence available to the court and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm are identified. It follows that if, having considered the risk of harm at its highest on the available evidence, the court considers that it does not meet the imperatives of Art 13(b), the court is not obliged to go on to consider the question of protective measures.

43. As I have noted above, the burden of proof rests upon the mother to make out her case and establish the particulars of that part of the Art 13 exception she relies upon.

44. Moylan LJ subsequently has stated in Re A (Children) (Abduction Article 13(b)) 2021 EWCA Civ 939, 2021 4.W.L.R. 99:

94. In the Guide to Good Practice, at para 40, it is suggested that the court should first "consider whether the assertions are of such a nature and of sufficient detail and substance, that they could constitute a grave risk" before then determining, if they could, whether the grave risk exception is established by reference to all circumstances of the case. In analysing whether the allegations are of sufficient detail and substance, the judge will have to consider whether, to adopt what Black LJ said in In re K, "the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to anarticle13(b)risk". In making this determination, and to explain what I meant in In re C, I would endorse what MacDonald J said in Uhd vMcKay[2019]EWHC1239(Fam);[2019]2FLR1159,para7, namely that "the assumptions made by the court with respect to the maximum level of risk must be reasoned and reasonable assumptions" (my emphasis). If they are not "reasoned and reasonable", I would suggest that the court can confidently discount the possibility that they give rise to anarticle13(b)risk

45. I have at this hearing been referred to HHCH guide to Article 13 b) which provides:

"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"[para 44].•"The court is not to embark on a comparison between the living conditions that each parent (or each State) may offer. This may be relevant in a subsequent custody case but has no relevance to an Article 13(1)(b) analysis. More modest living conditions and / or more limited developmental support in the State of habitual residence are therefore not sufficient to establish the grave risk exception. If the taking parent claims to be unable to return with the child to the State of habitual residence because of their difficult or untenable economic situation, e.g., because his / herliving standard would be lower, he / she is unable to find employment in that State, or is otherwise in dire circumstances, this will usually not be sufficient to issue a non-return order" [para 60].

Child's Objections

46. Black LJ in *Re M (Republic of Ireland) (Child's Objections)(Joinder of Children as Parties to Appeal)[2016]* Fam 1; [2015] 3 WLR 803; [2015] 2 FLR 1074 identified a gateway stage and a discretionary stage (emphasis added) –at ¶69:

"*In the light of all of this, the position should now be, in my view, that the gateway stage is 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 herviews. Sub-tests and technicality of all sorts should be avoided. In particular, the Re T approach to the gateway stage should be abandoned."

47. If the gateway stage is crossed the court moves to consider its discretion as to whether to order a return -c.f. ¶71:"*.....It would be unwise of me to attempt to expand or improve upon the list in §46 of Re M of the sort of factors that are relevant at that stage, although I would emphasise that I would not view that list as exhaustive because it is difficult to predict what will weigh in the balance in a particular case. The factors do not revolve only around the child's objections, as is apparent. The court has to have regard to other welfare considerations, in so far as it is possible to take a view about them on the limited evidence that will be available as part of the summary proceedings. And importantly, it must give weight to the Hague Convention considerations. It must at all times be borne in mind that the Hague 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. To reiterate what Baroness Hale said at §42 of Re M, "[t]he message must go out to potential abductors that there are no safe havens among contracting states*".

48. At paragraph [46] of*In re M and another (Children)(Abduction: Rights of Custody) [2008] 1 AC 1288; ('Re M')*, Baroness Hale considered what factors are at play at the discretionary stage:"*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 her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances*."

49. In *B v P (Hague Convention: Children's Objections)[2018*] 1 WLR 3657; [2017] EWHC 3577 (Fam), MacDonald J summarised the law:"

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

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

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

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

are one factor to take into account at the discretion stage.

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

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

[61]. 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)."

50. Where one sibling objects and others do not, the court's discretion needs to be exercised 'in the round', see *WF v RJ & Anor[2010] EWHC 2909 (Fam) § [34] –[41]* per Baker J.

Acquiescence

51. In relation to the concept of 'acquiescence', the applicable test has been long established by the decision of the House of Lords in *Re H (Abduction: Acquiescence) [1997] 1 FLR 872*, in which Lord Browne-Wilkinson held as follows:

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

(1) For the purposes of Art 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 inRe S (Minors)'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

52. So it follows that here the onus falls on the mother to establish the question of whether the Father as a matter of fact acquiesced to the children remaining in Wales

53. My attention has also been drawn at this hearing to the Decision of Hale J (as she then was) in *P v P (Abduction : Acquiescence) [1998] 1 FLR 630* and the observations contained in the judgment:

> *This case has all the hallmarks of what no doubt frequently occurs in these cases, of parents seeking to compromise the situation, allowing the abducting parent to remain in the country to which he or she has gone, provided that the wronged parent is satisfied as to the other matters which are in issue between them. Only if there were such a concluded agreement could it be said that there was clear and unequivocal conduct such as to fall within the exception. I have reached the conclusion that acquiescence has not been established in this case, although I acknowledge that it is a comparatively finely balanced matter. But it would be most unfortunate if parents in this situation were deterred from seeking to make sensible arrangements, in consequence of what is usually an acknowledged breakdown in the relationship between them, for fear that the mere fact that they are able to contemplate that the child should remain where he has been taken will count against them in these proceedings. Such negotiations are, if anything, to be encouraged. They should not therefore necessarily fall within the exception or necessarily lead to the conclusion that as a matter of fact there was a subjective state of mind that was wholly content for the child to remain here.*

54. The Court of Appeal decision appeal in *Re S (Abduction : Acquiescence) [1998] 2 FLR 115* in which the court had to consider the question of acquiescence against the backdrop of of a Father seeking legal advice which was incorrect led to a situation which could properly be regarded as acquiescence is one which has, so it is submitted to me, a particular resonance with this case. Reliance is placed on behalf of the Father on the passage of the Judgment which commences at [123]

> *In earlier decisions of this court the lack of knowledge and misleading legal advice have been considered relevant factors to which the court should have regard, see Re A (Minors) (Abduction: Custody Rights)[1992] Fam 106,sub nom Re A (Minors) (Abduction: Acquiescence)[1992] 2 FLR 14 and Re S(Minors) (Abduction: Acquiescence)[1994] 1 FLR 819. InRe AZ (A Minor)(Abduction: Acquiescence) [1993] 1 FLR 682 this court held that it is not necessary, in order for the defence under Art 13 to succeed, to show that the applicant had specific knowledge of the Hague Convention. Knowledge of the facts and that the act of removal or retention is wrongful will normally usually be necessary. But to expect the applicant necessarily to have knowledge of the rights which can be enforced under the Convention is to set too high a standard. The degree of knowledge as a relevant factor will, of course, depend on the facts of each case.*
>
> *In the light of the incorrect legal advice given to the father in January 1997,it would be difficult to treat the attempts to seek agreement on contact and the sending of the belongings to the mother as evidence supporting acquiescence. To that extent I agree with the judge. I part company with the judge however on his assessment of the advice given in April/May 1997. I am satisfied from the father's account of what was*

said to him that first he was given the gist of the Hague Convention which included the advice that he might be successful in having the child returned to Australia but it would be a Pyrrhic Victory since he was unlikely to retain the child in Australia after a hearing in the Australian Family Court. Miss Parker asked us to take into account the evidence of the father in the October 1997 affidavit to which I have already referred. That evidence was in response to the argument in the mother's affidavit that he had been given the information about the Hague Convention in April 1997. The subsequent affidavit, designed to answer that point, conflicts with the earlier affidavit sworn in support of his application and does not to my mind ring true. In my judgment, the judge set too high a standard of requirement of knowledge of rights in his assessment of the April/May 1997legal advice and did not recognise that the father was given adequate and, in my view, realistic advice, as to the long-term outcome of the proposed litigation over the child. Once the father was given the relevant advice in April/May 1997 and did acquiesce in the retention of M by the mother, as I believe he did, his subsequent change of heart for whatever reason in September 1997 is irrelevant, since acquiescence had already taken place. Acquiescence is not a continuing state of affairs and, once given, cannot be withdrawn, see Re A above.

It is significant, in my view, on the issue of acquiescence, that the judge found that the father did not ask for M to be returned even after April 1997until he issued the Convention application. Further, it has never been suggested in any of the documents before us that the father has asked or will ask to take over the care of M himself. The emphasis in this case has been throughout on arrangements for contact. The realistic advice of the second solicitor set out the likely eventual outcome of the litigation and that the child was likely to return to live in the UK. That advice must have had a crucial effect upon a father, not seeking custody or residence, but seeking the best access/contact arrangements he could achieve.

55. Finally within the context of Acquiescence I have been referred to the more recent decisions at first instance of Mostyn J in *JM v RM [2021] 2 WLR 1031* and of MacDonald J in *E v D [2022] EWHC 1216*

The Defence Under 13 (b)

56. The mother had confirmed at this hearing as she had in her written evidence that if a summary return is directed, she will return with the children. I am not therefore faced with the unpalatable prospect of the children feeling the loss of her on a return. The mother raises no issue about the children being with their father – it is not a case in which she suggests he is someone who poses a risk of harm to them. I have been directed by both counsel at this hearing to the messages in which the Mother, in the course of her explaining to the father that it is the children who have chosen Wales, is explicit that she misses Australia and her life there and that left to her own devices would return there.

57. I do not read the argument advanced by the mother as one in which she says she would be returning to significantly more modest living arrangements, and relies on that in support of her 13 b) argument, I disagree with Mr Hepher that this is so. He is correct though that were that her position, it is insufficient to make out this defence.

58. I accept also that the Father offers undertakings as to the arrangements on return which include meeting the rental requirements for mother and children on return. He has provided evidence of the financial contributions he has made (which have included the transfer of money following sale) . He has provided evidence also of his savings and his household income neither of which are disputed. He further accepts before me that he will continue to pay maintenance for the children- which I would expect were there to be a return to be a matter which if disputed would become one for the relevant Australian authorities. The mother is an Australian national. She is able to work and was on the evidence I have about the intentions before she and the children left for the holiday planning on return to be at work. She will also be eligible for benefits in Australia. By the time of the closing submissions of the parties Mr Venables, realistically as I see it, did not in any meaningful way submit that the arrangements could not be sufficient. He submits that a mirror order would be required. It may be that that is something which will be subject to further discussion between Counsel following this judgment.

59. The Mother's evidence and the position advanced on her behalf is that she would have less in the way of emotional support and assistance to call on with childcare. As to the former, that may well be right - I have some limited evidence that she had friends of the 'school run' sort and that there are no remaining family members save some cousins who are not close to her. I regard the Father's suggestions to the extent that he made them in evidence that he would be a source of emotional support to her as unrealistic. As to the second aspect however I am entitled to take account of the fact that were these children to return to Australia they would not be being looked after by one parent as, in effect, a single parent since the other lives on the other side of the world but co parented by two separated parents as many children are. As to that aspect the Father's evidence that he is a source of child support to call on is not unreasonable. It has been urged on me at this hearing that the breakdown of the relationship and the effect that has had on the mother contributes strongly to the situation which she invites me to find would be one which present her (and so the children) with a situation of intolerability on a return is something which has been entirely the Father's doing. Care has been taken not to advance that as in any way suggesting that the Father is now bearing the consequences of his actions still less being punished for them. Although I have heard a great deal about the impact of the relationship breakdown on this family, I have not found it has assisted in establishing this defence.

60. The Mother had not established the defence under 13(b).

Objections to a return

61. Brian and Robert are 8 and 10. Ms Callaghan met both boys on 19th December 2022 and following that meeting set out their expressed views and her impression of the children in her report. Robert she described as ' *articulate and able to express his views very clearly and quite strongly'*. His brother similarly was able to express his views although both in her report and more so orally before me she conveyed a clear impression of his discomfort at the position he was in having to express those views. She told me he knew why he was there. She assessed both children's maturity to be '*generally consistent with their chronological ages'*. So I hold in my mind that when I am thinking about the views that they express they are straightforwardly the expressed

views of 10 and 8 year old boys. Ms Callaghan recognises as do I that they are also views which are likely to have been influenced by the fact that the boys had, by the time she met them, been living with their mother in Wales and away from their Father for some months. Mr Venables sensibly did not take issue with this and Mr Hepher equally sensibly did not seek to suggest that there was evidence that influence here was anything akin to coaching.

62. On behalf of the Mother Mr Venables submitted that looking at the reasons Robert gave for objecting to a return they were not trivial reasons or a mere preference of one place over another but real and good reasons why a ten-year-old boy might not want to live in a particular place. The reasons on which reliance was placed for this submission may conveniently be summarised as follows:

(i) finding it too hot in Australia where temperatures in the summer months might reach the high 30s in contrast with the colder Welsh climate

(ii) that people at his school in Australia , his teachers included, were what he called 'mean' and he did not learn as well as he did in Wales

(iii) that whilst he had friends in Australia his friendships were not as close as those in Wales,

(iv) there were cultural differences about games and sports – in Australia for example people were not as familiar with the proper rules of football

(v)there being too many insects and especially this led to there being bugs in the pool

63. Asked by the Cafcass officer Robert said that he would be sad if he had to return and "*I probably wouldn't speak to Dad*" . Ms Callaghan asked on behalf of mother whether even if figurative rather than literal, this did not indicate a strong sense of feeling, answered carefully that she regarded it as a way of Robert indicating that he would be cross with his dad if he was responsible for a change.

64. Brian also said that he preferred Wales to Australia and the reasons he gave, to which attention is drawn on behalf of the Mother were as follows:

(i) a better education,

(ii) having been able to make more friends because as he put it '*everyone is nicer*',

(iii) making reference, although saying he did not care about it to having been bullied at school in Australia.

Asked how he would feel if he were required to return by this court Brian told Ms Callaghan that he would be sad and that he would feel angry at dad.

65. In assessing the views of these boys it is clear that they do , each of them, say they do not wish to go back to Australia. Ms Callaghan had observed in her report that their comments were of a superficial quality. Asked to expand on this by Mr Hepher she agreed that there was a loyalty to their mother that came through. When for example

she pointed out to Robert that although he had given a negative impression of his experience at school in Australia the reports from the time gave rather a different impression, he said that he was now not the 'smartest' at school which she took to mean he was being challenged more. She did not agree with Mr Hepher that the two boys portrayed Wales in an entirely positive light and Australia entirely negatively, but she did agree that where Robert had felt he had been positive about Australia he needed to find a way of rowing back from that – so having said it was positive to have the pool in the sun for example, there was a follow up about the bugs in the pool. I formed the impression listening to Ms Callaghan of boys who had been drawn too far into matters which were the province of the adults. That impression had a resonance for me when the Mother in her evidence spoke of the children deciding whether they should remain in Wales or not. A decision which in my view should neither be theirs nor permitted to be felt by them to be theirs.

66. There is no evidence that Amy is objecting to a return to Australia or indeed as to her wishes at all except insofar as her brother is asked by Ms Callaghan what he thinks she would want and responds that he thinks she would like to go back. I don't regard that response as telling me anything at all about her wishes, but it does give me more of a sense as to whether her brother really does have a negative view of Australia.

67. I have come close to deciding that these two boys are not in fact objecting to a return. I disagree with Mr Venables that the reasons given by Robert for example, are not trivial reasons seen from the standpoint of a ten year old. In reviewing, as I have, the careful and helpful report of Ms Callaghan, it has seemed to me that much of what she reports has a sense of what Brian and Robert are saying with their lips rather than anything stronger. I bear in mind however the relatively low hurdle that is the first stage and so I have on a narrow basis concluded that these still relatively young boys are in simple terms voicing, as Mr Venables submits, an objection to return. When I come to consider the second discretionary stage however I agree with the submission on behalf of the Father that the situation militates strongly against refusing a return.

68. From the written and oral evidence of Ms Callaghan emerges a picture that the boys have been influenced by i):the fact of their parents' separation – as to which some of their speech has the ring of adult language about adult concerns ii)their alignment to their mother iii) their sense of loyalty to her iv) the time they have spent living with their mother and away from their Father in Wales.

69. I do not regard the expression of their views as authentically their own or that as expressed, the views found a defence under the Article 13 child's objections. In reaching this conclusion I am fortified by the fact that Ms Callaghan who has considered very carefully the situation in which these two boys find themselves – as well as that which may be their situation on a return – does not suggest that they are objections in the Article 13 sense.

Acquiescence

70. The third of the defences on which the mother relies is that the Father has, acquiesced to the retention of the children in Wales. The evidence as to this has been less clear cut and has been the focus of the greater part of the submissions made by counsel. The messages before 29th are heavily relied on by Mr Venables in support of his case that the Father has acquiesced. I accept that Mr Hepher's submission that

acquiescence as distinct from consent must come after the retention undermines Mr Venables argument on that point.

71. Both Mr Hepher and Mr Venables, however, invite me to look at the detail of the messages so as to give the context within which Mr Venables suggests the Father did acquiesce and Mr Hepher that he did not. Inevitably this has resulted in an element of cherry picking on both sides. From Mr Hepher's perspective it is quite correct that there has been no occasion when the Father has given any indication that he wants the children living anywhere other than Australia.

72. The early possible exception to this appears to be in August 2021 when in the immediate aftermath of the separation he sends a message which reads *if you ever wanted to go back to England to be with your family I wouldn't stop you CD because I know it's going to hard for you living here, of course I wouldn't want you too because those kids mean everything to me but I want you to be happy too.*

73. That message however does not give a context of reluctantly going along with something he would rather didn't happen – which Mr Venables submits is what acquiescence may well be, there being no requirement for enthusiasm – once the later messages are added to the context. Thus by early October when the father is seeking reassurances from the Mother before he will agree to passport applications comes this: *CD I don't want to do that I don't want you taking them back to the UK CD their life is here they've got school friends etc. Have you even asked them if that's what they want ? I know this is what you want but what about the kids?*

74. In general terms I accept the proposition that as to context a reading of the whole of the messages (which I remind myself I am being invited to do where the issue is not consent but later acquiescence) is of a father who does not want the children to leave. By mid-April when the Mother is sending messages that suggest she and the children want to stay, the Father's by return give the sense that he does not want her to, pleads with her to return, but that he believes he has no choice in the matter. This as I see it fits with his response to Mr Venables when he confirmed during his evidence that he thought he had not the right ***morally*** to stop her.

75. More problematic for the Father's case however notwithstanding my acceptance of Mr Hepher's submission as to the timing of acquiescence such that whatever the messages from the Father in advance of the retention say they cannot be acquiescing, is that after the 29th April and before the institution of proceedings I cannot see any aspect of them which as a matter of factual evidence shows that the Father is trying to effect a reconciliation or a consensual return. What I find are, as Mr Venables points out messages in which the Father does not say words to the effect of 'bring them back' . By way of illustration on 22nd May 2022, the Father sends a message '.. *I haven't been facetiming since that friday the day before you was supposed to fly out because I'm trying to come to terms with loosing my kids and wondering what to do . Do you think its best I stop all contact with you and let you live your lives in the uk or do I stay in contact and facetime them when I can and fly over once or twice a year to see them ? I don't know how this is going to affect the kids are they better off without me in their lives and they just forgot about me* ?' On one reading that message seems to fall within what Mr Venables characterises as reluctantly going along with it.

76. Later still there are messages exchanged within which arrangements are being made for contact (in advance of the Father's July visit) and for him to see the children. Those do not contain either a request to return or the Father suggesting to the mother that during his visit they might reach an agreement. Rather they contain indications that the Father will come over and say goodbye to the children at the end of his visit as they will be staying in the United Kingdom when he goes back to Australia.

77. So it is that when I come to evaluate Mr Hepher's submission in support of which he reminds me in particular of relevant passages of the Authorities I reflect on what the contemporaneous evidence tells me. I entirely accept Mr Hepher's submission which he roots in the words of Lord Browne-Wilkinson in *Re H and others* that '*Although each case will depend on its own circumstances, I would suggest judges should be slow to infer an intention to acquiesce from attempts by the wronged parent to effect a reconciliation or to reach an agreed voluntary return of the abducted child'* Since my reading of the run of the communications after the 29th April I do not see the Father either saying to the mother anything which suggests he is trying to effect a voluntary return or acting in a way which suggest to her or to me that that is what he was doing, I have had to give very careful thought to whether I should regard that as anything other than what it appears superficially to be and Mr Venables says it is: a man who doesn't necessarily regard the situation with any enthusiasm but who goes along with it.

78. In the course of submissions Mr Hepher advanced two aspects on which he especially relies and which he says should drive me to the conclusion that this is not a Father who has acquiesced. He traces the way in which the Father expresses himself in the digital communications to show that this is a man who is as he expressed in in his skeleton argument ' i*n deep depression and despair talks of the prospect of not seeing the children again is a form of protest from him, an overly emotional statement of how he was feeling, and not a form of consent, approval or acquiescence* ' The messages are, submits Mr Hepher the modern day equivalent of what in Re H and Others Lord Browne Wilkinson referred to as *passing remarks or letters written by a parent who has recently suffered the trauma of the removal of his children*

79. Directing my attention in this part of his submissions to Lord Browne-Wilkinsons approach to the exceptional circumstances in which I may be satisfied from the outward behaviour of the Father that he knowing of his rights acquiesced:

> *My Lords, in my judgment these exceptional circumstances can only arise where the words or actions of the wronged party show clearly and unequivocally that the wronged parent is not insisting on the summary return of the child: they must be wholly inconsistent with a request for the summary return of the child. Such clear and unequivocal conduct is not normally to be found in passing remarks or letters written by a parent who has recently suffered the trauma of the removal of his children. Still less is it to be found in a request for access showing the wronged parent's desire to preserve contact with the child, in negotiations for the voluntary return of the child, or in the parent pursuing the dictates of his religious beliefs.*

80. Mr Hepher submits what the evidence demonstrates here cannot be said to be clear and unequivocal actions by this Father knowing of his rights. Furthermore, he reminds me that it is the mother who has the burden of satisfying me not the Father who has to discharge any burden of proof that he has not acquiesced.

81. The other aspect on which particular emphasis has been placed before me by Mr Hepher in his submissions on the acquiescence point is what is said to be the similarity of the circumstances here with those in *Re S (Abduction: Acquiescence)* [1998] 2 FLR. In that case where, as it happens also in circumstances of an abduction from Australia to Wales, a Father did not know – because the legal advice he sought was wrong- what were his rights in relation to a return. So it was that he did not press for a return. What he did in fact was to behave in very much the sort of way in which the Father in this case has behaved. He arranged for belongings to be shipped from Australia to Wales; he engaged in discussions about contact seemingly on the basis that the Mother would be remaining in the United Kingdom. He made no request for the mother and the children to return.

82. In the course of submissions, I asked Mr Hepher why a man who as here did nothing at all should be regarded as being in the same position as the man who in *Re S* did not just stand by and do nothing but sought advice and understanding (wrongly as it happened) that there was no point trying then did nothing. Is not doing nothing for the three months following the retention indicative of acquiescence as Mr Venables says it is? Mr Hepher had two answers to that. The first is that during that initial time the contemporaneous messages are strongly suggestive of the shocked and traumatised parent whose children have just been removed - as to which as above he relies on the judgment of Lord Browne- Wilkinson. The second is that what matters is the Father's state of knowledge not the detail of how that comes about. Not only the Father's assertion at this hearing that he felt powerless but also the indications in the messages at the time are indicative of a man who did not have knowledge of what he could do. The messages are, submits Mr Hepher more consistent with that interpretation than with that invited by Mr Venables to the effect that the Father elected not to do anything or to take any advice, acquiesced and changed his mind once he had come over to visit.

83. When I consider the approach of the court of appeal in *Re S* , I am satisfied that in the particular factual circumstances of this case, this Father is in the position the Father in *Re S* was at the point when he had the incorrect advice of his first set of solicitors. Notably someone does not have to have detailed technical knowledge of the legal remedies available to them. In *Re S* once the Father had received proper and competent advice, his case at appeal failed for not having acted on it and asking for return. The same does not apply here, once the Father here received advice, he sought a return which is how the application comes before me today.

84. Narrowly, and with an eye on where lies the burden of proof as to acquiescence, I am persuaded by the detailed and skilled submissions advanced by Mr Hepher on the Father's behalf as to acquiescence.

85. I find that the mother has not established it as a defence here.

86. I will direct the return of the children accordingly. I will invite Counsel to draw up an order to reflect my decision. I have received a message that they expect to be able to reach agreement as to the practical arrangements and consequential matters arising from my decision. It therefore remains only for me to express my gratitude to Mr Hepher and Mr Venables for their diligence and care in their presentation of their respective clients' cases.

MRS JUSTICE MORGAN
Approved Judgment