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

Neutral Citation Number: [2024] EWHC 2115 (Fam)

Case No: FD24P00154

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2024

Before :

MS VICTORIA BUTLER-COLE KC
SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

KS — **Applicant**

- and -

CS — **Respondent**

- -
- -

Mr Shama (instructed by **The International Family Law Group LLP**) for the **Applicant**
Ms Kakonge (instructed by **Sharratts Solicitors Ltd**) for the R**espondent**

Hearing dates: 30-31 July 2024
Judgment 31st July 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 31 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MS BUTLER-COLE KC

Ms Victoria Butler-Cole KC:

1. I am concerned with an application by KS, the mother of K who is nearly 15 years old, for K's summary return to the United States pursuant to the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the 1980 Convention").

2. The respondent, CS, is K's father. He opposes the application on two grounds: first that KS was not actually exercising her rights of custody at the time he brought K to the UK, and secondly that K is objecting to returning to the USA and the court should therefore exercise its discretion to refuse the application.

3. I am handing down this judgment on the second day of the hearing having read the evidence in the court bundle, having heard evidence from Ms Demery of CAFCASS, who met K and prepared a report about his wishes and feelings, and having heard submissions from Mr Shama on behalf of KS and Ms Kakonge on behalf of CS. Both KS and CS attended the hearing, KS attending by video link from her home in the USA. I also had a brief meeting over video link with K during the hearing. K had told Ms Demery he wanted to meet the judge, and although Mr Shama did not support a meeting taking place before I had given judgment, I formed the view that it would be appropriate to honour K's request, being careful not to avoid any risk of evidence gathering during the discussion. It was a pleasure to speak to K, who was relaxed and chatty. He did not have any questions about the court process, and appeared happy to meet me and to tell me about his recent performance in the lead role of his school's production of Oliver. I explained to him the decision I had to make which, in practice, was about which country decisions about his future would be made in.

4. The key elements of the factual background to this application are as follows.

5. K was born in 2009 in the USA. His mother is American, his father was born in Jamaica but was living in the USA at the time. Both parents were very young. CS moved to England to live when K was a young child, and is now married with four other children. K's contact with his father was inevitably limited, as he was living in a different country. In 2015, there were proceedings in the court in New Jersey concerning child support, contact between K and his father, and an unsuccessful application by CS to change K's surname. CS and his wife visited the States and spent time with K in 2015 and 2017, and in 2019, KS arranged for K to visit England to stay with CS for a holiday. By 2021, KS had herself married, and had moved, first to California and then to Georgia.

6. K told Ms Demery that as he had grown older, he had been sad not to have his father in his life. He had told his mother he wanted to move to England to live with his father a few years ago, and his mother had strongly objected, but they had eventually sorted things out.

7. On 2 May 2023, KS and her wife were involved in a serious road traffic accident. K had been waiting for them to get home and was worried when they did not arrive. He was woken the next morning to be told they were both in hospital, and he told Ms Demery he broke down at school telling his girlfriend about what had happened. As

neither KS nor her wife were able to look after K while in hospital, he stayed with members of his extended family. On 11 May 2023, CS arrived, having been told about the accident by KS' mother. CS says he was told that KS was seriously unwell, and in consultation with K's grandmother, decided to take K back to England with him. He also says that he obtained legal advice and was told that he should make an application to the US courts. CS and K flew to England on 19 May 2023. There had been no discussion with KS nor is there any evidence of an attempt to communicate with her prior to leaving the country. No application was made to the US courts by CS until around June 2023. That application, which was made to the court in New Jersey, was rejected in September 2023 on the basis that jurisdiction was in doubt, since K had not lived in New Jersey for some years, CS lived in England, and KS lived in Georgia. KS says that at that hearing, the judge made clear that CS should return K to the USA. CS disputes that.

8. KS says that having been discharged from hospital on 2 August 2023, she was expecting K to be returned to her care in time to start the new school term at the end of August. She has provided evidence of messages sent to CS asking when K would be returning. K told Ms Demery that the intention had been for him to return home for the start of the school term. But K did not return, and in February 2024, CS made an application to the family court for orders in respect of K. On 8 May 2024, KS issued this application for summary return, and the family court proceedings were stayed by order of Cobb J the same day.

9. CS initially relied on a defence of grave risk of harm to K if he returned to the USA, citing KS' failure to support his relationship with K, and alleging that KS and her wife had physically assaulted K, beating him if he did not do well at school. Those allegations, which were made for the first time in April this year and were not set out in CS's initial application to the family court, were not pursued. Ms Kakonge confirmed at the outset of the hearing that CS was no longer seeking to rely on the risk of grave harm defence. Ms Demery told me that when K reported the alleged physical assault to her, it was not a burning concern, and did not seem to be playing a big part in his thinking about where he wanted to live.

Legal framework

10. The USA and the UK are signatories to the 1980 Convention. The fundamental objectives of that Convention as set out in Article 1 are:

> *"(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and*
> *(b) to ensure the rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."*

11. Article 3 explains that removal or retention is wrongful if:

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

12. Article 12 providers that where a child has been wrongfully removed or retained under Article 3:

> "[…] *the authority concerned shall order the return of the child forthwith* […] *unless a defence is established by the person who so acted*."

13. In this case, it is not in dispute that K was habitually resident in the USA prior to his travelling to England in May 2023, and that his mother had rights of custody at that point.

14. The defences relied on by CS, as I have indicated, are that KS was not actually exercising those rights of custody at the time – Article 13(a), and that in any event, K is now objecting to returning to the USA – Article 13. I will address the legal framework in respect of each of those defences separately, alongside my analysis of the evidence and submissions.

Exercise of rights of custody

15. In my judgment, KS was exercising rights of custody at the point K was removed, and as she had not given her consent to his removal from the USA, this was a wrongful removal within the meaning of Article 3 (see ***Re D (Abduction: Rights of Custody)* [2007] 1 FLR 961)**.

16. CS contends that KS was in hospital and by reason of her injuries, unable to give or refuse consent. There is a dispute as to whether CS in fact made any efforts to speak to KS and as to what KS' medical condition was at the time. I do not consider it necessary to go into the competing accounts in any detail, since taking CS's case at its highest – that KS was physically unable to communicate – I am still satisfied that she was exercising rights of custody over K.

17. Ms Kakonge was not able to identify any authority for the proposition that a parent who was temporarily incapacitated due to illness, and whose children were being cared for family members as a result of that incapacity, was not exercising rights of custody. The authorities point in the opposite direction:

18. First, day to day care of a child is not a necessary condition to exercising rights of custody. See ***Re H, Re S (Minors) (Abduction: Custody Rights)* [1991] 2 FLR 262 at 272** which confirms that the phrase "exercising rights of custody" "*must be construed widely as meaning that the custodial parent must be maintaining the stance*

and attitude of such a parent, rather than narrowly as meaning that he or she must be continuing to exercise day-to-day care and control."

19. Secondly, a practical inability to provide day to day care, does not automatically lead to a conclusion that rights of custody are not being exercised. Even where a parent is incarcerated, their consent to removal should be sought (***Re A (Abduction: Rights of Custody: Imprisonment)*** **[2004] 1 FLR 1** and ***Re L (A Child)*** **[2005] EWHC 1237 (Fam)**).

20. Thirdly, an inability even to express a view about removal does not necessarily mean that rights of custody are not being exercised. Mr Shama relied on ***JS v SS*** **2003 SLT 344 (Outer House, Court of Session)** (approved by the Outer House in ***AJ v FJ*** **[2005] CSIH 36**). In that case, the child's father was temporarily incapacitated due to mental health problems, including an attempt to take his own life. The court held that "*Having regard to the spirit and purpose of the Convention, looked at as a whole, it would, in my opinion, be wrong, for example, by taking too narrow and technical an approach to the provisions of Article 3(b) to hold that a person, who is in hospital, and has left the custody of the children to one of his or her relatives, during the time in hospital, was not actually exercising his or her rights of custody."* And later that *"I am entirely satisfied that the petitioner cannot be said to have abandoned the exercise of his legal rights or to have ceased the exercise of these during the period that he was mentally ill and compulsorily detained in hospital. Whatever one thinks of the petitioner's reaction, on being told by the respondent that he was not to see the children again, it does not demonstrate that he was not, to use Lord Brandon's words, maintaining the stance and attitude of a parent who had custody rights and wished to exercise them."*

21. I agree with this analysis. It cannot be consistent with the aims of the Convention to say that where a parent with rights of custody is incapacitated due to ill health, the other parent can make unilateral decisions including removal from the country where a child was born and has lived his whole life in the care of the parent who is unwell. KS had not made a deliberate choice to give K to relatives to care for, she had certainly not abandoned him, and she had not in any way suggested that she was not wishing to exercise her rights of custody. She was temporarily unable to provide day to day care, but had she been asked, she may well have either refused consent for K to leave the USA, or only agreed to a short period of time away during school holidays while she recovered.

22. Having reached that conclusion, I do not need to deal with Mr Shama's alternative submission that even if the removal was not wrongful, the retention of K in England beyond the start of the school term in late August 2023 was wrongful. But in case if I am wrong about wrongful removal, I make clear that I would have found that there was wrongful retention. K himself told Ms Demery that the plan had been for him to return to the USA to start the new school term, and I have seen a text message from KS to CS in August asking when K will return. There was, on the evidence I have seen, a plan for K to return to the USA by the end of August 2023, which CS did not implement, instead issuing proceedings in New Jersey.

The objection defence

23. Under Article 13 of the 1980 Convention:

> *"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."*

24. I have reviewed the authorities in this area, and adopt the summary set out by Richard Harrison KC sitting as a Deputy High Court Judge in ***Re R (A Child) (Wrongful Retention: Child's Obligations: Discretionary Return)*** [2023] EWHC 560 (Fam):

> *76. The leading authority on the child's objections exception - at least so far as the so-called 'gateway' stage is concerned - is Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal) [2015] EWCA Civ 26. As to discretion, the leading authority is Re M (Children) (Abduction: Rights of Custody) [2007] UKHL 55.*
>
> *77. In Re Q & V (1980 Hague Convention and Inherent Jurisdiction Summary Return) [2019] EWHC 490 (Fam) at paragraph 50, Williams J summarised the relevant principles to be derived from both of the Re M cases as well as the later decision of Re F (Child's Objections) [2015] EWCA Civ 1022 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 Article 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.*
> *vi) 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.*
>
> *The same summary appears in the judgment of MacDonald J in B v P [2017] EWHC 3577 (Fam).*

78. *As Williams J also pointed out at paragraph 51 of Re Q & V, in some cases an objection to a return to one parent may be indistinguishable from a return to a country.*

79. *Although in Re M (Republic of Ireland) the Court of Appeal distinguished an objection from a preference or wish, they did not set out a positive definition of the term. No such definition is to be found in the 1980 Hague Convention or in the Explanatory Report. The French language version of the Convention uses the reflexive verb 's'opposer' in this context, a verb which can be translated as either 'to object' or 'to oppose'.*

80. *At paragraph 77 of Re M (Republic of Ireland) Black LJ offered the following guidance:*

> *"I am hesitant about saying more lest what I say should be turned into a new test or taken as some sort of compulsory checklist. I hope that it is abundantly clear that I do not intend this and that I discourage an over-prescriptive or over-intellectualised approach to what, if it is to work with proper despatch, has got to be a straightforward and robust process. I risk the following few examples of how things may play out at the gateway stage, trusting that they will be taken as just that, examples offered to illustrate possible practical applications of the principles. So, one can envisage a situation, for example, where it is apparent that the child is merely parroting the views of a parent and does not personally object at all; in such a case, a relevant objection will not be established. Sometimes, for instance because of age or stage of development, the child will have nowhere near the sort of understanding that would be looked for before reaching a conclusion that the child has a degree of maturity at which it is appropriate to take account of his or her views. Sometimes, the objection may not be an objection to the right thing. Sometimes, it may not be an objection at all, but rather a wish or a preference."*

81. *Re F (Child's Objections) [2015] EWCA Civ 1022 the Court of Appeal was critical of the introduction of glosses to the meaning of the word 'objection' including the introduction of the concept of 'a Convention objection' or the suggestion that for these purposes what needs to be established is 'a wholesale objection'. Black LJ made clear that:*

> *"Whether a child objects is a question of fact, and the word "objects" is sufficient on its own to convey to a judge hearing a Hague Convention case what has to be established; further definition may be more likely to mislead or to generate debate than to assist."*

82. *So far as the exercise of discretion is concerned, in Re M (Children) (Abduction: Rights of Custody) Baroness Hale emphasised that once the gateway is crossed, discretion is 'at large': it is not the case that a return can only be refused in exceptional cases. At paragraph 43 she said:*

> *"... in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside*

the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare."
At paragraph 46 she added:
"In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child , courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. 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."

25. The first question for me therefore is whether, as a matter of fact, K objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his views.

26. I am satisfied that K has reached an age and maturity at which it is appropriate to take account of his views. He is not far away from turning 15, and he is an intelligent and articulate child. He has had an extremely difficult year, with his mother and her wife sustaining serious injuries in an accident, being brought to England unexpectedly, not returning home for the new school term contrary to his expectations, starting a new school in a new country (where, I note, he was initially unsettled and there were concerns about his behaviour), and not having any meaningful contact with his mother even after she recovered. I accept, as Mr Shama submits, that while in England, K has been told things about his mother by CS which are not correct and may have undermined K's relationship with her, including that the cause of the car accident was that KS' wife had been drinking alcohol. But I do not consider these points sufficient to say that his views should not be taken into account – they come into play when considering what weight to give those views.

27. Is K objecting? Ms Demery told me that he was not saying he refused to return to the USA or that he didn't want to see his mother and her wife. He was not angry or objecting, but was expressing a preference for remaining with his father in England. K told Ms Demery that he had wanted his father to play a bigger role in his life, and that had now happened – Ms Demery said she thought K was in what she called a 'honeymoon period', where he had rekindled a relationship with a father who had been largely absent during his childhood, had met his half-siblings and step-mother in England, and had really enjoyed aspects of the English school system which contrasted with his experience of school in America, including being rewarded for

doing well, and being able to take part in new extra-curricular activities like the school musical. He also told Ms Demery the weather was better in the USA but that people were friendlier here. He said it had been life-changing living with his father, and that he still wanted to see his mother and spend time with her in the holidays, and that he missed aspects of life in America.

28. In my judgment, Ms Demery is right that K's overwhelming wish is to maintain a relationship with his father, which he had yearned for and which, as Mr Shama put it, might be the only good thing to have come out of the awful car accident in May last year. K told Ms Demery he would be 'depressed' if he had to go back, but Ms Demery said he did not use extreme language such as saying he would be devastated, and in fact Ms Demery did not recall he had used the word 'depressed' until she reviewed her written report. She said he could have meant he would be a bit fed up – she did not form the view that he would be very upset and that she needed to delve deeper into the impact on him of a return. Overall, she felt his views were more of a preference than an objection, but she did think it would be very difficult for him if he did return as he had made a life here over the past year. She also said that the most important thing to K in her view was that he sees his mother as soon as possible: "*He needs to sit down and have time with her and think about everything*" after a "*seismic*" year.

29. I have considered whether K's wishes fall on the side of being a preference or wish, as submitted by Mr Shama, rather than an objection. I have decided that it is appropriate to treat his views as an objection. The dividing line between the two is fuzzy, in my view, and I should therefore err on the side of caution in K's favour. That approach seems to me to afford proper respect to K, who, as a nearly-15 year old, has thought carefully about his situation and engaged with the court process to make his views known. I suspect that K would be surprised to be told that his politely expressed and reasoned wish to stay in England with his father did not count as an objection to returning to America, and that I had therefore not asked myself whether his views should prevail.

30. K's objection is not however determinative, it is one factor to be considered among many, which include both welfare considerations and the policy objectives of the Convention.

31. I have taken into account and weighed up in particular the following factors:

    i) K's expressed wish to stay at school in England and to live with his father. I consider that K does have an authentic wish to stay. He was able to identify a range of reasons, and has fortunately not formed a wholly negative view of his mother or of America in the time he has been in England. However, I do accept, as I have indicated above, that in going over events from his childhood with his father, and in events since the car accident, he has picked up a narrative from his father which is not positive about KS. There is therefore a degree to which his views are influenced by CS. K reported an account to Ms Demery of an incident involving his parents when he was only 2 or 3 years old, which he said he could remember clearly, and which painted his mother in a negative light. I agree with Ms Demery that K could not have such a clear recollection (including the words spoken by his parents) given his very young

age, and that this account was a product of discussions with his father about the past. I take the view that the allegations of assault made against KS' partner which first raised in April by CS and later extended to include KS herself, but which were not spoken of by K with any great concern in his meeting with Ms Demery, are a further example of K picking up on, repeating, and going along with the negative views of CS about KS, in order to bolster the arguments in favour of his staying in England.

ii) If KS' application had been made within a few weeks or months of K not returning to start school in August last year, it would in my view have been a relatively straightforward decision that he should return to the USA. It is however now over a year since K came to England. KS was discharged from hospital in early August 2023, and until September 2023, she thought that K was going to return home. In March 2024 she became aware that CS had made an application to his local family court, and Mr Shama says that it was not until she obtained legal advice having been notified of that application that she realised there were options for her to make an application to the courts here for K's return. In particular, it was not until at least late March that KS was informed that despite her not knowing K's address, this court could take steps to locate him. Inevitably, it took some weeks for her application to be prepared and issued. In the circumstances, I do not think it appropriate to hold KS responsible for the delay, but I accept that it is not now possible to secure the prompt return of K to the USA. The arguments on both sides are now more finely balanced as a result of the time that has passed, with the objectives of the Convention in particular being less weighty than they would have been at an early stage.

iii) Until the car accident, K had lived all his life in the USA. He had a settled and happy life there with his mother and her wife. He had a girlfriend, and attended school, participating in sport and other activities. He was abruptly taken away from that life, with no advance consultation or planning, and has not had any meaningful opportunity to talk to his mother since the accident. He has worries about whether she has changed since the accident, and has been trying to make sense of what happened. Ms Demery said that his experiences over the past year have undermined his relationship with his mother and made it more difficult for him to trust her. I doubt that spending short periods of time with his mother by way of visits in school holidays will enable him to carry out the reparative work that Ms Demery says he urgently needs after the events of the past 12 months. There is in my view a real risk that he will not receive the support of CS to renew his relationship with his mother. CS was, until the start of the hearing, pursuing an argument that KS would inflict psychological and physical harm on K if he returned to the USA, and Ms Kakonge was not able to say that having dropped those allegations, , her client was supportive of K spending time with his mother.. CS has refused to accept K's account to Ms Demery that it was his father who told him his

stepmother in America had been driving under the influence of alcohol, or that there had been a plan for his return last summer, and does in my view hold negative views about KS which are being passed on to K. In contrast, I am satisfied that KS will support K's relationship with his father while the US courts make welfare determinations, as she has previously supported that relationship (for example by her sending K to England in 2019 to stay with his father) and, significantly, she is now aware of how happy K is to have finally built a strong relationship with his father, and how important that relationship is to him.

32. Drawing all these considerations together, and having thought very carefully about the impact on K of not acceding to his wish to stay in England, I have concluded that I should not exercise my discretion to refuse to order K's return. I have reminded myself that my decision is not a decision about K's long term future. It may be that the courts in the USA, who have previously made decisions about K and his parents, ultimately decide that he should return to England to live. It may even be that after a period in the care of his mother, K's parents are able to reach agreement on his future without either fearing that they will be cut out of his life.

33. I have found that K was wrongfully removed from the USA. He has had a very disrupted year, and while there have been some positives, CS should not have decided unilaterally that K should live in England. In my view, K's relationship with both his parents will be better promoted by his returning to the USA. The courts there can evaluate all the welfare considerations fully and decide what is best. The critical need to maintain and promote K's relationship with both his parents throughout his life, against a backdrop of wrongful removal and in the context of the wider policy objectives of the Convention, lead me to the conclusion that KS' application should succeed. I know that this is not the outcome that K wished for, and there will no doubt be some challenges for him going back to life in America, but in my judgment, these worries do not outweigh the other considerations.