Neutral Citation Number: [2019] EWCA Civ 1065

Case No: B4/2019/0982

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY DIVISION OF THE HIGH COURT OF LONDON
MR JUSTICE MacDONALD
FD19P00085

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/06/2019

Before:

LORD JUSTICE FLAUX
LORD JUSTICE MOYLAN
and
LORD JUSTICE HADDON-CAVE

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Re NY (A Child)
(1980 Hague Abduction Convention) (Inherent Jurisdiction)

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- -

Mr M Twomey QC and Mr A Laing (instructed by **Dawson Cornwell Solicitors**) for the Appellant
Mr M Jarman and Mr M Gration (instructed by **Ellis Jones Solicitors**) for the **Respondent**
Mr T Gupta QC and Miss J Renton (instructed by **Freemans Solicitors**) for **Reunite International (as intervenors)**

Hearing date: 18th June 2019

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Approved Judgment

LORD JUSTICE MOYLAN:

Introduction

1. This is the mother's appeal from the order of MacDonald J, dated 17th April 2019, ordering the summary return of her child, NY (aged 2) to Israel. The order was made under the 1980 Hague Child Abduction Convention ("the 1980 Convention") but the judge made it clear that he would have made the same order under the inherent jurisdiction.

2. The issues raised by this appeal are: (a) whether what occurred in this case amounted to a retention within the scope of the 1980 Convention; (b) whether the judge's approach to the issue of protective measures was wrong; and (c) whether the judge was wrong to order NY's summary return to Israel either under the 1980 Convention, if it applied, or under the inherent jurisdiction. I refused the mother permission to appeal from the judge's determination that NY remained habitually resident in Israel at the relevant date or to argue that his approach to the mother's allegations in support of her reliance on Article 13(b) was wrong.

3. In summary, the judgment below largely followed the structure of the parties' respective submissions and in particular the mother's case that NY was habitually resident in England at the relevant date and that the father had consented to NY's removal from Israel so as to bring the case within Article 13(a). This appeal has had a different focus. When I gave permission to appeal, I identified the issues set out at 2(a) and 2(c) above as being the matters which principally justified the grant of permission. The parties' submissions have, consequently, focused on those issues.

4. The mother is represented by Mr Twomey QC (who did not appear below) and Mr Laing. The father is represented by Mr Jarman and Mr Gration (who did not appear below).

5. I also gave permission for Reunite International to intervene by way of written submissions which are authored by Mr Gupta QC and Ms Jacqueline Renton. The issue they addressed was the interplay between Articles 3 and 13(a) of the 1980 Convention when the issue of consent is raised. This was a question which I can see might have appeared from the terms of the judgment below to be relevant in this appeal. However, although I am very grateful to them for these submissions, it has transpired, as set out below, that the issue which they have addressed does not in fact arise in this appeal. I do not, therefore, need to refer to their submissions in this judgment.

Background

6. The background is set out in MacDonald J's judgment: *TY v HY (Return Order)* [2019] EWHC 1310 (Fam) and it is therefore only necessary to include a brief summary.

7. The mother and father were both born in Israel and were married there in 2013. NY was born in November 2016. The family continued to live in Israel until

November 2018. As set out in the judgment below, there is "a large extended family in Israel" and the parents "had a large group of friends". They both had secure employment. NY's primary language is Hebrew "although it is said she also speaks some French and some English". The mother speaks Hebrew and English; the father speaks only Hebrew.

8. In November 2018, following marital difficulties and after some discussion, the parents moved with NY to live in England. The judge found that "both parents had an intention to come to England with NY for a significant period of time with a view to attempting to establish a stable life here", at [55]. There was, however, a dispute as to what had been agreed about the basis of the move. The father alleged that there had been an express agreement that they would return to Israel if matters did not work out in England and that they came "for a few months as a trial period only", at [21]. I deal with this in more detail below but set out here the judge's conclusion as to the existence of such an agreement:

> "[22] … in my judgment the evidence does not tend to support the existence of an express agreement … as contended for by the father. Whilst it is clear that both parties contemplated the possibility that the move to England would not be successful and that a further move or a return to Israel was a possibility, and whilst each party may well have further developed their intentions as to what would happen next as their marriage continued to deteriorate following their arrival in the United Kingdom, the evidence does not tend to support an express agreement to return to Israel in the event the move was not a success having been reached *prior* to their departure from Israel (in) November 2018."

9. Prior to travelling to England, both parties gave up their employment in Israel and NY was removed from her nursery. They acquired accommodation in London and signed a one-year tenancy. The father also obtained employment and NY started nursery here in December 2018.

10. The move to England was not successful and on 10th January 2019, just over 6 weeks after they had arrived here, the parents agreed that they would divorce. Following that decision, the father said "that he wished the family to return to Israel to deal with the end of their marriage".

11. On or about 14th January 2019 the father returned to Israel in the circumstances set out in the judgment below.

12. The father commenced proceedings in the Rabbinical Court in Israel for divorce and custody of NY. The mother issued divorce proceedings in the Rabbinical Court in London and has engaged lawyers in Israel in respect of the proceedings there.

<u>The 1980 Convention Proceedings</u>

13. By letter dated 6th February 2019 the Israeli Central Authority sent an application under the 1980 Convention to the English Central Authority. The father's case, as set out in this document, was that the family had moved to London "for a period of several months as a trial period". It was also stated that the father had only given "limited consent" to the family's move to London, in other words for a limited period, and further that this consent has been obtained "through false representations". The father had "expected that they would" return to Israel as the trial period had been unsuccessful but the mother had refused to do so. In the father's statement in these proceedings he advanced the same case, including that he had "only agreed to move to England for a few months as a trial period only, on the basis that we would all return to Israel in the event that the move was not successful".

14. Following receipt of the application by ICACU on 13th February and the instruction of solicitors on 22nd February, proceedings were commenced in England on 26th February 2019.

15. In the order made on 7th March 2019, the father's case is recorded as being that an alleged wrongful *retention* took place on 10th January 2019. The mother's case is recorded as being that NY was habitually resident in England at that date; that the father had consented to NY's removal from Israel and subsequent retention in England; and that Article 13(b) was established.

16. The mother's allegations advanced in support of her defence under Article 13(b) are addressed in detail in the judgment below and I do not propose to repeat them. As the judge described, she made "extensive allegations of physical and emotional abuse". The father denied the mother's allegations but also relied on proposed protective measures. These included a number of undertakings and the availability of what might be called protective services in Israel for victims of domestic abuse as set out in a letter from the Israeli Ministry of Justice. The latter included support available from welfare authorities and shelters for victims of domestic abuse. The letter also dealt with financial benefits potentially available from the state.

17. The mother's statement also dealt at length with her and NY's "home and life in London". She set out matters which were considered relevant to how the court should exercise any discretion which might arise. This is made clear by the mother's skeleton argument for the hearing below which under the heading "Discretion" made the following submission:

> "24. Given that NY is, on all counts, settled and happy in England, as is her primary carer, with accommodation, money, a nursery place and a solid support network, the court should exercise its discretion not to return NY to Israel."

18. Apart from the issue of discretion, the skeleton arguments for the final hearing before MacDonald J on 15th April 2019 focused on the issues of habitual residence, consent and Article 13(b). The father reiterated that the move had been for a trial period such that he had not given ""clear and unequivocal" consent to

the permanent relocation of NY to England". The mother argued that NY was habitually resident in England on 10th January 2019 and, alternatively, that the father had consented to NY "remaining in England post-10th January". It was submitted that it was not open to the father to revoke his consent to the move to England and unilaterally turn what had been a relocation into an abduction.

19. The judge heard brief oral evidence from the mother, the father and a witness on behalf of the mother.

Judgment

20. At the outset of the judgment, at [2], the judge refers to the mother's contention that NY was habitually resident in England "immediately before the date on which the father alleges she wrongfully retained NY". He then immediately refers to the mother's alternative case that the father had consented to NY being removed from Israel "for the purposes of Article 13".

21. As referred to above, the judge dealt extensively with the matters relied on by the mother in support of her case under Article 13(b). He also made observations about "problematic" elements which impacted on his assessment of the strength of the mother's case.

22. The judge addressed the law on habitual residence; consent and Article 13(b).

23. When dealing with habitual residence, the judge records Mr Laing's submission that, if the court decided that NY was habitually resident in England at the relevant date, "that is the end of the father's application". The judge adds that this "is not strictly true having regard to the terms of Article 18" and the Supreme Court's decision of *In re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre Intervening)* [2014] AC 1017. The judge was there referring to the court's power to make a summary return order under the inherent jurisdiction outside the terms of the 1980 Convention.

24. When dealing with the issue of consent the judge said, at [42], "Were the court to conclude that NY was not habitually resident in England and Wales at the relevant date, the exceptions to summary return relied on by the mother will fall to be considered".

25. The judge summarised his conclusions, at [52]. These were: that NY was not habitually resident in England at the relevant date; that the father had consented to NY's "removal" from Israel; that the Article 13(b) defence was not established; and that, notwithstanding the father's consent, he would exercise his discretion to order NY's summary return to Israel. In addition, the judge stated that, had he been satisfied that NY was habitually resident in England,

> "I would nonetheless have concluded that it was in her best interests for an order to be made under the inherent jurisdiction of the High Court returning her to … Israel for decisions concerning her welfare to be made in that jurisdiction."

26. It appears from the judgment that, once the judge had decided that NY remained habitually resident in Israel, he implicitly accepted that this brought the case within the 1980 Convention, with a presumption in favour of summary return subject to the exceptions, because he immediately went on to consider the grounds relied on by the mother under Article 13.

27. In terms of the issue of consent, the judge addressed this *only* in relation to NY's move to England in November 2018, at [61], when he says:

> "I am satisfied that by agreeing with the mother to move with NY to England, the father consented to the removal of NY from the jurisdiction of Israel for the purposes of Art 13."

28. At this stage, I would simply note that the judge does not identify as an issue the question of how what had happened in this case amounted to a retention which could fall within the scope of the 1980 Convention and does not, therefore, address that issue.

29. As referred to above, the judge rejected the father's case that there had been "an express agreement between the parties prior to their departure to England … that if matters did not work out ... they would return with NY to Israel", at [21]. He determined, at [62], that, whatever the father might have intended, his consent was *not* conditional and that there was no "agreed intention" between the parents about returning to Israel if the move was not successful. The judge was also "not satisfied that the consent of the father was obtained by fraud or misrepresentation", at [63].

30. On Article 13(b), the judge explained that he had "significant forensic concerns" about the mother's allegations. These concerns included a lack of detail, a lack of corroborating evidence, that none of the allegations had been made in Israel and, in circumstances where the mother claimed to have many recordings of the father's verbal abuse, no such evidence being adduced.

31. The judge took these forensic difficulties into account when arriving at, what he described as, "a reasoned and reasonable assumption as to the maximum level of risk (of harm) having regard to the available evidence". On this basis, "at its highest, the risk to the mother comprises one of physical and verbal abuse from the father", at [66]. The judge went on to conclude that the mother had not established a grave risk so as to bring the case within Article 13(b):

> "[67] … subject to confirmation that the arrest warrant in respect of the mother has been discharged in the manner the father assured the court it can be, the protective measures offered by the father as set out above, and the matters set out in the letter to this court from the Israeli Ministry of (Justice), constitute sufficient protective measures in this case if the court orders the return of NY to the jurisdiction of the State of Israel, having regard to the level of risk assumed. I also bear in mind that the parents' relationship is now over and they will be living separately. In addition, the Rabbinical Court of Jerusalem is now seised of this

> matter and both parents have instructed lawyers within those proceedings. The matter will therefore quickly be the subject of judicial consideration in Israel."

32. The judge considered, therefore, that his discretion whether to make a summary return order under the 1980 Convention arose but *only* because the mother had established the "consent exception" under Article 13, the father's consent having been "operative at the time the parents removed NY from" Israel, at [64].

33. The judge sets out his reasons for ordering NY's return which, for ease of reference, I set out in full:

> "[68] In this case, and contrary to the submission of Mr Laing, I am satisfied that, notwithstanding that the mother has made out the exception under Art 13 of the 1980 Convention in this case, I should exercise my discretion to order the return of NY to the jurisdiction of the State of Israel.
>
> [69] The discretion that arises upon an exception being made out permits the court to ensure that the exceptions under the 1980 Convention do not operate in a manner that is antithetical to the child's interests. Within this context, in respect of the consent exception, a distinction can be seen in the authorities between those cases, such as *Re K (Abduction: Consent)* [1997] 2 FLR 212, in which the consent of the left-behind parent will result in the child remaining in the home country of the abducting parent, in which country the child has extended family connections, a common language and sometimes a common nationality, and those cases, such as *Re D (Abduction: Discretionary Return)* [2000] 1 FLR 24, where the consent of the left-behind parent will result in the child remaining in a country in respect of which he or she (and often the abducting parent) has no prior knowledge, no links, no extended family and no common language, meaning that any welfare decision would fall to be taken in a vacuum, or least remote from the proper context for such decisions. In the former cases of consent, the exercise of the discretion in favour of return will be, understandably, rare. In the later cases of consent, the exercise of the discretion to return may be more readily granted.
>
> [70] NY is an Israeli child of Israeli parents with no practical connection to this jurisdiction and whose extended family, identity, culture and history centre on the State of Israel. Whilst I accept that the father consented to NY being removed from the jurisdiction of Israel, in circumstances where the parents' marriage thereafter broke down the result of his consent is now to leave NY in a jurisdiction to which she has no connection, which is remote from the entirety of her close extended family and the country of her nationality and her first language. It is also remote from the jurisdiction in which the genesis of the

> dispute between the parents as to NY's welfare arose and the jurisdiction in which the vast majority of the evidence to determine that dispute is located. This in circumstances where there remain a number of judicial decisions to be made in respect of NY's welfare.
>
> [71] The rules of jurisdiction in the 1980 Convention are, to adopt a characterisation from the jurisprudence in respect of BIIa, shaped in the light of the best interests of the child, in particular on the criterion of proximity. Proximity in this context being the practical connection between the child and the country concerned. In particular, at the heart of the policy considerations driving the 1980 Convention is the recognition that it is of manifest benefit to a child to have decisions regarding their welfare taken in the jurisdiction of their habitual residence.
>
> [72] Within the foregoing context, whilst I accept that it is relatively unusual for court to exercise discretion in favour of return where the consent exception has been found to be established, in this case I am satisfied that the court should exercise its discretion to order the return of NY to country of her habitual residence. Having regard to the matters set out above, and in circumstances where I am satisfied that the protective measures I have summarised are sufficient to meet the assumed risk for the purposes of Art 13(b), it is in my judgment of manifest benefit to NY to have properly informed decisions taken regarding her welfare in the jurisdiction of her habitual residence rather than in a jurisdiction to which she has no prior connection and which is remote from nearly all of the things that bear on the decision save the company of her mother. In my judgment, that benefit greatly outweighs, in this case, the temporary disruption that will result from an order for return of NY after a short period spent in this jurisdiction. I am likewise satisfied that this benefit to NY outweighs the impact on the mother of an order for return, which impact I do not underestimate.
>
> [73] As I have made clear above, I am satisfied that had I concluded that NY was habitually resident in this country, I would have reached the same decision under the inherent jurisdiction pursuant to the principles set out by the Supreme Court in *Re KL* (*In re L*) on the particular facts of this case."

Submissions

34. I am grateful to counsel who have argued the parties' respective cases persuasively.

35. The mother's submissions, in summary, are: (a) that the judge failed to address how there had been a retention within the scope of the 1980 Convention; (b) that,

if he had, he would concluded that there had been no retention in breach of the father's right of custody having regard to his determination that there was no conditional or time limited consent or agreement in respect of the move to England; and (c) that, in the absence of the 1980 Convention applying, the judge was wrong to make any determination under the inherent jurisdiction. In addition, it is submitted that the judge did not sufficiently consider the extent to which the identified protective measures, in particular the undertakings, would be likely to be effective to address or mitigate the alleged risk of harm for the purposes of Article 13(b).

36. Mr Twomey challenges the judge's determination under the inherent jurisdiction both on procedural grounds and substantively. In respect of the former, he submits that it was unfair to the mother because no such application had been made by the father and the question of an order being made under the inherent jurisdiction was not raised during the hearing. In support of this submission, Mr Twomey sought to identify additional evidence which the mother might have adduced and additional submissions which might have been made if this issue had been identified. He also submits that, accordingly, the judge was not in a position to make a sufficient welfare assessment necessary to the proper exercise of the inherent jurisdiction. In addition, the procedural defects impacted on and undermined the fairness of the judge's exercise of his discretion.

37. In respect of his substantive challenge, Mr Twomey submits that the judge's decision under the inherent jurisdiction is not sufficiently reasoned and did not contain a sufficient welfare analysis even for a summary determination. The judge does not expressly refer to the matters set out in the mother's statement about her and NY's life in England and they cannot, therefore, be seen to have been weighed in the balance. He further submits that the focus of the judgment is on the circumstances as they were at 10th January 2019 and not as they were at the date of the hearing.

38. In support of these submissions, we were referred to *In re H (Minors) (Abduction: Custody Rights); In re S (Minors) (Abduction: Custody Rights)* [1991] 2 AC 476; *In Re S (Minors) (Abduction: Wrongful Retention)* [1994] Fam 70; *In re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619; *RS v Poland (Application No 63777/09)* [2015] 2 FLR 848; *In re C and another (Children) (International Centre for Family Law, Policy and Practice Intervening)* [2019] AC 1; and *Re C (Children) (Abduction: Article 13(b)* [2019] 1 FLR 1045. We were also referred to Professor Pérez-Vera's *Explanatory Report* on the 1980 Convention.

39. The father's submissions, again in summary, are: (a) that the judge was right to determine the issue of consent under Article 13(a) rather than under Article 3; (b) that the judge was right to determine that, prima facie, there had been a breach of the father's rights of custody bringing his application within the scope of the 1980 Convention; (c) that the judge was entitled to determine that the measures relied on by the father "constitute sufficient protective measures in this case", at [67], adding that the mother had not challenged the sufficiency or otherwise of the father's proposed undertakings; and (d) that the judge would have been right, alternatively, to have made a summary return order under the inherent jurisdiction.

40. In respect of (a), Mr Jarman argued forcefully that, because the circumstances of this case, prima facie, fall within the scope of the 1980 Convention, any consideration of the issue of consent must take place under Article 13 and not Article 3. This, he submits, is well-established.

41. In respect of the inherent jurisdiction, he submits that this is a power available to the court and which it is open to a court to exercise of its own motion. Further, he submits that there was no unfairness in this case because the court had all the evidence and information necessary to enable it to undertake a sufficient summary welfare assessment. He also submits that it is clear from the judge's determination that he did not consider this a finely balanced case.

42. In support of these submissions, Mr Jarman relied in particular on *In re P (A Child) (Abduction: Custody Rights)* [2005] Fam 293 and *Re P-J (Abduction: Habitual Residence: Consent)* [2009] 2 FLR 1051 as well as *In re L*; *In Re C*; and the *Explanatory Report*.

Legal framework

43. After referring, briefly, to provisions of the 1980 Convention I spend more time dealing with some of the authorities to which we have been referred.

44. The first relevant point is that the 1980 Convention only applies to removals or retentions which are "wrongful". By Article 3, a removal or retention is "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."

As Lord Hughes JSC explained in *In re C* [2019], at [42]:

> "If there is no breach of the rights of custody of the left-behind parent, then it is clear that the Convention cannot bite; such a breach is essential in activating it, via articles 3 and 12."

45. If there has been a wrongful removal or retention within the scope of the 1980 Convention, Article 13 sets out a number of grounds on which the application can be opposed including (a) that "the person … had consented to or subsequently acquiesced in the removal or retention" or (b) that "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation".

46. Article 18 provides that the provisions dealing with the return of a child "do not limit the power of a judicial or administrative authority to order the return of the child at any time". This makes clear that the 1980 Convention is not intended to

impact on any other power a court might have such as, under English law, the power to make a summary return order under the inherent jurisdiction. That, as a matter of domestic law, this power is available when the 1980 Convention does not apply is demonstrated by *In re L* [2014]. As in that case, neither BIIa (Council Regulation (EC) No 2201/2003) nor the 1996 Hague Child Protection Convention apply so as to exclude the use of this power. In saying this I have not overlooked *In re J (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 1291.

47. It is clear that removal and retention are mutually exclusive events and that both occur on a specific occasion: Lord Brandon of Oakbrook in *In re H; In re S* [1991] at p. 499G and p. 500B. Additionally in that case, Lord Brandon dealt with the circumstances in which a wrongful retention might occur, at p. 499A/B:

> "… it appears to me that a child can only come within it (a wrongful retention) if it has first been removed rightfully (e.g. under a court order or an agreement between its two parents) out of the state of its habitual residence and subsequently retained wrongfully (e.g. contrary to a court order or an agreement between its two parents) instead of being returned to the state of its habitual residence … The typical (but not necessarily the only) case of a child within (this category) is that of a child who is rightfully taken out of the state of its habitual residence to another contracting state for a specified period of staying access with its non-custodial parent, and wrongfully not returned to the state of its habitual residence at the expiry of that period."

And, again, at p. 500B/C:

> "For the purposes of the Convention, removal occurs when a child, which has previously been in the state of its habitual residence, is taken away across the frontier of that state; whereas retention occurs where a child, which has previously been for a limited period of time outside the state of its habitual residence, is not returned to that state on the expiry of such limited period."

48. In *In Re S* [1994] Fam, the parents had agreed to leave Israel and stay in England for one year. Their relationship then broke down before the year had expired and the father returned to Israel. In this context Wall J, as he then was, said, at p. 78H to p. 79A:

> "The mere fact that the relationship between the parents has come to an end cannot entitle one parent unilaterally to resile from that which has been agreed between them. The example which springs to mind is an agreement that children should visit a foreign country for a specific time, such as a school holiday. Clearly, a parent in such circumstances could not unilaterally change his mind and demand the return of the children before the term of the contract had expired."

He later observed that, if the mother was intending to abide by the terms of the agreement, she would have "a complete defence … because the father had consented not merely to the removal of the children but, by necessary implication, had consented to their retention in England for a fixed term", at p. 79B/C. I recognise that, in saying the mother would have a complete defence, Wall J said that this would be either because the retention was not wrongful *or* under Article 13(a).

49. More recently in *In re C* [2019], Lord Hughes considered the "general question" of when a wrongful retention occurs. He said:

> "36. This was the question of principle on which leave to appeal to this court was given. If the child has been removed from the home state by agreement with the left-behind parent for a limited period (and thus the removal is not wrongful), can there be a wrongful retention before the agreed period of absence expires? The classic example of the possibility is where the travelling parent announces, half way through the agreed period (say of a sabbatical year of study for the parent), that he will not under any circumstances return the child in accordance with the agreement he made. He might do more. He might effectively make it impracticable to return, by, for example, selling his house in the home state, abandoning his job there, and obtaining residency in the new state for himself and the child on the basis of an undertaking that they will both remain there indefinitely. No doubt other examples could be postulated. The question is whether, if such a thing occurs, there is then and there a wrongful retention, or whether his retention of the child cannot in law be wrongful until the date agreed for return arrives and, as it was graphically put in the American case *Falk v Sinclair* (2010) 692 F Supp 2d 147, the aeroplane lands and the child is not among those who disembark."

Lord Hughes went on to consider the concept of early wrongful retention or "repudiatory retention" in the course of which he said, immediately following the passage I have quoted in paragraph 37 above:

> "… It is clearly true that if the two parents agree that the child is to travel abroad for a period, or for that matter if the court of the home state permits such travel by order, the travelling parent first removes, and then retains the child abroad. It is equally true that both removal and retention are, at that stage, sanctioned and not wrongful. But to say that there is sanctioned retention is to ask, rather than to answer, the question when such retention may become unsanctioned and wrongful.
>
> 43. When the left-behind parent agrees to the child travelling abroad, he is exercising, not abandoning, his rights of custody. Those rights of custody include the right to be party to any

> arrangement as to which country the child is to live in. It is not accurate to say that he gives up a right to veto the child's movements abroad; he exercises that right by permitting such movement on terms. He has agreed to the travel only on terms that the stay is to be temporary and the child will be returned as agreed. So long as the travelling parent honours the temporary nature of the stay abroad, he is not infringing the left-behind parent's rights of custody. But once he repudiates the agreement, and keeps the child without the intention to return, and denying the temporary nature of the stay, his retention is no longer on the terms agreed. It amounts to a claim to unilateral decision where the child shall live. It repudiates the rights of custody of the left-behind parent and becomes wrongful.
>
> 44. The plain purpose of the Abduction Convention is to prevent the travelling parent from pre-empting the left-behind parent. The travelling parent who repudiates the temporary nature of the stay and sets about making it indefinite, often putting down the child's roots in the destination state with a view to making it impossible to move him home, is engaging in precisely such an act of pre-emption."

50. I do not consider that the cases of *In re P* [2005] or *Re P-J* [2009], relied on by Mr Jarman, assist in the determination of this appeal. This is because they deal with the issue of consent and whether it is addressed under Article 3 or Article 13 which, as set out below, is not a legal issue which arises in this case because of the judge's findings as to the basis on which the family moved to England. In saying this, I make clear that, despite Mr Jarman's warning to the contrary, this judgment is not intended to depart from the approach to the issue of consent as set out in those cases.

51. In respect of the inherent jurisdiction, in *In re L* [2014] Lady Hale, with whom the rest of the court agreed, said:

> "28 Article 18 of the Convention provides that its provisions on return of children "do not limit the power of a judicial or administrative authority to order the return of the child at any time". The High Court has power to exercise its inherent jurisdiction in relation to children by virtue of the child's habitual residence or presence here: Family Law Act 1986, ss 2(3) and 3(1). The welfare of the child is the court's paramount consideration: Children Act 1989, s 1(1). But this does not mean that the court is obliged in every case to conduct a full-blown welfare-based inquiry into where the child should live. Long before the Hague Convention was adopted, the inherent jurisdiction was used to secure the prompt return of a child who had been wrongfully removed from his home country: see *In re J (A Child) (Custody Rights: Jurisdiction)* [2005] UKHL 40, [2006] 1 AC 80, paras 26, 27, and the cases cited therein."

52. On the issue of protective measures, it is clear that the court has to determine whether, as the judge said, they are "sufficient to mitigate harm", at [47]. It is also clear that this is not an abstract question but whether, in the particular case, they will be effective in order to mitigate the matters relied on in support of the case under Article 13(b): see e.g. Lady Hale in *In re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144, at [36]; and what I said in *C (Children) (Abduction: Article 13(b))* [2019] 1 FLR 1045, at [43].

Determination

53. First, in my view, it is clear, as agreed by the parties, that this case is about retention not removal. In addition to the father's case being advanced on the basis that there had been a wrongful retention in January 2019, the judge's conclusions in respect of the nature of the agreed move to England left no scope for the father's agreement to that move being vitiated in any way. Accordingly, if the issue of consent was relevant, it would be relevant only in respect of an alleged retention which otherwise came within the scope of the 1980 Convention.

54. Secondly, as a result, I agree with the mother's submission that the judge needed to determine whether the mother's retention of NY in England on 10th January 2019 was wrongful. This was necessary because, if it was not, there was no other basis on which this case came within the scope of the 1980 Convention. As a result, the judge needed to determine, as he did, the basis on which the family moved to England. This was, to repeat, not for the purposes of determining whether the father had consented to the removal from Israel but for the purposes of deciding whether there had been a retention by the mother in breach of rights of custody.

55. Thirdly, I consider that we can determine this issue on the basis of the judge's findings, in particular as to the terms on which the family moved to England in November 2018.

56. The legal approach to determining whether a retention is wrongful within the terms of Article 3 has been explained, as set out above, in *In re H; In re S* [1991] and *In re C* [2019]. The present case does not require any further exploration into the scope of Article 3 and the relationship between "rights of custody" within the 1980 Convention and rights under domestic law. This is because the only evidential basis on which it could be argued that the retention in this case was wrongful was that set out in the application from the Israeli Central Authority and the father's statement, as referred to in paragraph 13 above. This was to the effect that the parents had agreed that the move to England would be conditional or time limited.

57. Such a case could fall squarely within the parameters identified in both of the above authorities. In other words, a retention which was "contrary to … an agreement between" the parents or which meant that NY, who had "been for a limited period of time outside the state of (her) habitual residence, (was) not returned to that state on the expiry of such limited period", adapting what Lord

Brandon said in *In re H; In re S* (see paragraph 47 above). Or, adapting what Lord Hughes said in *In re C* (see paragraph 49 above), a retention by which the mother repudiated an agreement under which the "stay abroad" was "temporary" and, thereby, made a "unilateral decision" which "repudiates the rights of custody of the (father), and becomes wrongful".

58. However, the essential elements of this evidential case necessary to establish a wrongful retention were rejected by the judge. The judge did not find that there was any agreement which provided for a limited or temporary stay in England or which meant that NY's retention in England from 10th January 2019 (or any other date) was contrary to any such agreement. As a result, the mother's decision to remain in England with NY was not a unilateral decision which repudiated the father's rights of custody.

59. The consequence of this conclusion is that, in my view, the answer to the issue set out in paragraph 2(a) above is that what happened in this case did not amount to a retention which falls within the scope of the 1980 Convention at all. There is also no other basis on which what happened could come within its scope, even prima facie as Mr Jarman sought to contend. To adopt again what Lord Hughes said in *In re C*, at [42] (see paragraph 44 above), there was no breach of rights of custody such that the 1980 Convention "cannot bite". To make clear, this is not because of any issue of consent (to the alleged retention) but because of the judge's conclusions as to the basis on which the family moved to England.

60. The next issue I propose to address is that set out in paragraph 2(c), namely whether the judge would have been wrong, alternatively, to order NY's summary return to Israel under the inherent jurisdiction. I put it this way because the judge's order was, in fact, only made under the 1980 Convention.

61. The mother has advanced a procedural challenge to the judge identifying this alternative route to his proposed order. Despite Mr Twomey's submissions on this issue, I am not persuaded by them.

62. I would agree that as a matter of procedural fairness, when an applicant intends alternatively to seek an order under the inherent jurisdiction, this should be made clear. Otherwise, they may well find that the court will not deal with any such application. Clearly, also, when a judge is considering making such an order the parties should be given a proper opportunity to deal with this. However, as Mr Twomey, in my view rightly, accepted during the hearing in answer to a question from Haddon-Cave LJ, in this case the important question is whether, in substance, the points advanced by Mr Twomey would have made a difference to the outcome.

63. The issues, therefore, are: (i) whether the mother was prejudiced by the absence of any such application and by the other matters relied on by her so as to make the judge's determination unfair; and (ii) whether the judge was in a position to make a sufficient welfare assessment necessary to the proper exercise of the inherent jurisdiction.

64. I would add that I would caution against applications under inherent jurisdiction being made save in circumstances when there are real doubts as to whether the 1980 Convention applies.

65. When asked to identify any additional evidence that the mother might have adduced or any additional submissions which might have been made, it would not be unfair to Mr Twomey to say that he struggled to do so. In my view, this was because, as would be expected, the mother's evidence and submissions dealt with those matters which might be relevant to the exercise of the court's discretion under the 1980 Convention and there were no additional matters of substance which would not be relevant to the exercise of that discretion but would be relevant to the discretion under the inherent jurisdiction.

66. The mother's evidential case for contesting a summary return order was set out comprehensively, both evidentially and in submissions. I appreciate that it could be argued that the inherent jurisdiction has a wider canvas based, at it is, on welfare being the court's paramount consideration but, when the court is deciding whether to exercise its discretion to make a return order under the 1980 Convention once a ground for opposing the return has been established, the court will consider the wider canvas in particular when the ground is other than grave harm. This is not to say that a wider canvas may not be relevant when Article 13(b) is established but that once it has been established the court is not likely to make a return order.

67. Further, in so far as submissions were not made to the judge on behalf of the mother directed specifically to the inherent jurisdiction, those submissions would have addressed the same matters as were advanced when seeking to persuade the judge not to exercise his discretion under the 1980 Convention. The judge was expressly referred to the matters to which Mr Twomey referred us, in paragraph 24 of the skeleton for the hearing below (as referred to in paragraph 17 above). In addition, the mother has had ample opportunity in this court to make such submissions.

68. Accordingly, in my view, in answer to the issues I have just identified: (i) the mother was not significantly prejudiced in this case so as to make the judge's determination unfair; and (ii) the judge was in a position to make a sufficient welfare assessment.

69. The next issue on this aspect of the case is whether the judge's decision to make a summary return order was insufficiently reasoned or was wrong. I bring into this consideration the issue set out in paragraph 2(b), namely whether the judge's approach to the issue of protective measures was wrong. Although this issue is not now framed in the context of the 1980 Convention, it remains relevant to the court's inherent power to order a summary return.

70. The judge, as is accepted, correctly summarised the legal approach to this issue under the 1980 Convention, namely whether there are "protective measures sufficient to mitigate harm", at [47]. Further however, in my view, the judge reached an assessment which was open to him and which he has sufficiently explained. He took into account the nature of the risk of harm as assessed by him

and was entitled to conclude that that risk would be effectively addressed by the proposed or identified protective measures. I see no basis for concluding, as submitted by Mr Twomey, that the judge gave too much weight to the father's undertakings because of questions about their enforceability in Israel. This is a well-recognised issue and, although not specifically raised at the hearing, is not one which the judge would have been likely to overlook.

71. Looking more broadly at the judge's decision to make a summary return order, was it insufficiently reasoned? I have set out the judge's reasons at length because, in my view, they explain why the judge decided to make a return order. The judge did not expressly refer to all the matters in the mother's statement but there is nothing which suggests he did not have them in mind. They had featured both in the mother's evidence and in her submissions. Further, the judge's determination as to the exercise of his discretion was inevitably made at the date of the hearing and order. I do not, therefore, accept Mr Twomey's submission that the judge's decision was not a summary welfare assessment at that date.

72. Secondly, has his decision been shown to be wrong? Again, despite the careful and comprehensive submissions of Mr Twomey, in my view, it has not. The judge's reasons contain a clear analysis of why he decided that it was in NY's "best interests", at [52], to make a summary return order. In my view, that analysis fully supports the judge's decision and none of Mr Twomey's submissions have persuaded me otherwise.

73. In summary, therefore, I would answer the issues identified in paragraph 2 above as follows:

    (a) On the judge's findings, there was no retention in breach of rights of custody in this case such that the 1980 Convention does not apply;
    (b) The judge properly took into account the identified protective measures and reached a determination that was open to him;
    (c) The judge was entitled to make an order for NY's return under the court's inherent jurisdiction and his summary welfare decision to do so is fully supported by the reasons he gave.

74. In conclusion, save for substituting the judge's order with an order made expressly under the inherent jurisdiction in place of that made under the 1980 Convention, I consider that this appeal must be dismissed.

Lord Justice Haddon-Cave:

75. I agree.

Lord Justice Flaux:

76. I also agree.