



Neutral Citation Number: [2018] EWFC 85

Case No: FD18P00685

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

**IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985
INCORPORATING THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS
OF INTERNATIONAL CHILD ABDUCTION.**

AND IN THE MATTER OF COUNCIL REGULATION (EC) NO.2201/2003

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2018

Before:

MR DARREN HOWE QC

SITTING AS A JUDGE OF THE HIGH COURT

Between:

PG	<u>Applicant</u>
- and -	
PR	<u>Respondent</u>

(Hague Child Abduction Convention: Physical Chastisement and Homophobic Abuse)

Mr Mark Jarman (instructed by Anthony Louca Solicitors) for the **Applicant**
Ms Miriam Best (instructed by Harrington Solicitors) for the **Respondent**

Hearing dates: 13 and 14 December 2018

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

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.

Approved Judgment**Mr Darren Howe QC:**

1. This is an application under the 1980 Hague Convention for the summary return of a child to the jurisdiction of Portugal. The child concerned will be 11 years old later this month. I shall refer to him as J.
2. J is a citizen of Portugal. Both J's parents are citizens of Portugal. I shall refer to J's mother as M and his father as F. It is accepted by F that J was habitually resident in Portugal at the time F brought him to England on 10 July 2018.

The Background

3. The parties married in Portugal in 2001. They have 2 children, J who is the subject of this application and N, who is now 16 years old and is not the subject of an application before this court. In December 2016 the Portuguese court granted residence of the children to M, the parties having separated in 2009 and subsequently divorce. There was an agreement for the children to spend time with F, that included them spending time with him in the United Kingdom.
4. F relocated to England in 2014 to gain employment and has resided here ever since. F has travelled to Portugal on 2 or 3 occasions each year to visit the children. Prior to July 2018, J had not spent time with F in England, although had visited Scotland on a family holiday.
5. At some point in the early summer of 2018, M discovered that N now identified as gay. M found intimate photographs of N with another girl. N describes M as a mother who has always used physical chastisement but, upon M discovering N's sexuality, M hit N with a belt, described her as disgusting, broke her mobile telephone and said she should die. When N spoke to the CAFCASS officer who reported in these proceedings, N said that M made jokes about 'gays' and N described her self-esteem as being at "rock bottom". N also reported M saying to her that she should go and live with F, as M was concerned about what people would think of M should they see N in the street with a girl.
6. N confided in her cousin, S, who is now 22 years old. S has provided a statement in these proceedings. That statement supports the account given by N of the events of 28 June 2018, a date when all agree that an altercation took place between M and N. S describes that N began sending her text messages during the early afternoon, expressing fear of M. S collected N from home and they spent the afternoon together. M then made phone calls demanding that N return home. S describes M as being aggressive during the phone call but, despite this, N and S returned to M's address. Upon arrival, S went up to the apartment to speak to M but M took the lift down to S's car. N and S describe M banging on the car windows, trying to force N out of the car. S tried to intervene but M was able to open the door and pull N from the car. Both S and N describe M being in an uncontrolled rage and having her hands around N's throat. S describes that N was eventually released and she took N home with her rather than return to M's flat.

Approved Judgment

7. M accepts that an altercation took place but denies the use of violence, save that she accepts grabbing hold of N's coat in an attempt to prevent her leaving. J did not witness the argument between M and N, as he was on holiday with an Aunt and Uncle in the Algarve.
8. M had booked a holiday for herself to Malaysia and was due to depart on 28 June 2018. Despite the conflict that had occurred between herself and her daughter, she stuck to her plans and left Portugal that evening.
9. At 8.36pm on 28 June 2018, M sent an email to F. The subject line of the email read as "The Kids going to live with you". The body of the email reads as follows:

"I'm exhausted, tired, I can't take it anymore. Besides my children don't seem to be happy with the life I can give them. So, see the schools there for them and the conditions for them to live there with you. I need to operate [on my] knee and I can't because I have no support to do so. They have to go live with you for at least two months."
10. It is F's case that he was contacted by both N and the maternal family and learned of the altercation that had taken place between M and N. He did not reply to M's email but travelled to Portugal on 4 July 2018. Throughout this period both J and N were in the care of S or her mother, as M was on holiday in Malaysia. Following her email on 28 June, M sent no further communications to F.
11. As exhibits to his statements in these proceedings, F produced a number of translations of Facebook and Whatsapp messages, that he says passed between M and members of her family while M was on her holiday. It was argued on his behalf that the content of these messages support F's case that M consented to J's relocation to England.
12. The messages produced are neither dated nor timed. There are no statements from the family members to whom they were sent or official translations of the Portuguese language originals. M denies that she sent these messages and accuses F of manufacturing this evidence.
13. Given the summary nature of applications under the Hague Convention, it is, in my judgment, essential that documentary evidence such as this is put before the court in a manner that enables the Court to assess its reliability, in so far as that can be done in summary proceedings. As the messages were not sent to F, but to other family members, those representing F should have produced short statements from those persons exhibiting the messages that F sought to rely upon. Official translations of the statements and messages should then have been provided. In my judgment, it is always of assistance to the court and to the other parties, for the messages to be copied with the date and time identifiable and within the chain of messages from which they arose, to enable the court to see the context within which they were sent. The Court is required to consider the issue of consent within "the context of the realities of the disintegration of family life" (see Re P-J below) and if adduced into evidence in a reliable manner, contemporaneous communications between the parties are of great assistance to the Court in determining a 'consent' defence.

Approved Judgment

14. Unfortunately, as the messages produced in this case have not been presented as aforementioned, and their authenticity is disputed by M, I have been unable to place any weight on their content.

15. The next email communication between M and F did not take place until 10 July 2018. F sent an email to M at 2.22pm that reads:

“In accordance with your request, I inform that the kids are with me in England.”

F’s flight from Portugal left Porto airport at 10.40am and the parties agree that there were no communications between them prior to the children’s departure.

16. M replied to F’s email at 2.35pm, although it is not clear from the email whether this was Portuguese time or Malaysian time. M’s email reads as follows:

“From what I understand, N wants to be with you. I have nothing against it, if that’s what she wants. When it comes to J, I think he should also be given a choice. If he wants to stay with me or with you. From my part there is no need to go to court and we can reach an agreement. I’ll wait for you to tell me what you think is best.”

17. At 9.16pm on 10 July 2018, F replied in the following terms:

“So that I can take care of everything, I have to have papers, because in the “papers” they are with you. Seeing as we agree, we ask for change to be made through agreement and that will have to be accepted in court.”

18. The “papers” that F refers to are clearly the Court papers from December 2016 that granted residence of the children to M.

19. There then followed a further period of no communication between the parents. Some 7 weeks later, on 31 August 2018, M sent an email to F stating:

“I tried to talk to you but you never replied. My lawyer talked to yours so that our children could return to Portugal in a calm way. I tried to get an answer from you in all ways, with no success. School is starting, they already spent holidays with you. Please bring the kids as soon as possible.”

20. F replied to M’s email on 3 September 2018. He said:

“As you know, your lawyer contacted my lawyer and was informed that the kids will not be going back this school year. Your lawyer is waiting for mine to send her the information regarding the schools they will be attending. N is already registered and I am waiting for the results of J’s registration.

Given the seriousness of what happened, the reports of the aggressions N was victim to by you, I do not wish to subject N or J to the repetition of future situations. We should, like I’ve told you from the beginning, ask together for the change of parental responsibilities together.”

Approved Judgment

21. Neither party has produced correspondence that passed between their Portuguese lawyers during this period.
22. On 5 September 2018, F applied to the Portuguese court seeking a variation of the order of December 2016. On 19 September 2018, F made an application for a child arrangements order to the Family Court in this jurisdiction. Those proceedings have been stayed pending the determination of this application. On 8 October 2018, M made this application for the summary return of the children to Portugal.
23. At the first on-notice hearing in these proceedings, Williams J ordered an officer of the CAFCASS High Court team meet with J to prepare a report in respect of his wishes and feelings and objections (if any) to a summary return to Portugal. The designated officer was also to meet with N and ascertain her wishes in relation to the summary return of J to Portugal. That report is dated 22 November 2018. I also have statements from M and F, S and S's mother. I have read the content of the court bundle and the helpful skeleton arguments from Mr Jarman on behalf of M and Ms Best on behalf of F. I have heard oral evidence from Ms Demery of the CAFCASS High Court team and carefully considered the closing oral submissions of both Counsel.

The Issues

24. F opposes M's application for a summary return of J to Portugal. He relies on 3 defences:
 - (a) M's consent to J's relocation to England,
 - (b) J's objection to being returned to Portugal, and
 - (c) J suffering a grave risk of harm or otherwise being placed in an intolerable situation if returned to Portugal.

The Law

25. Article 1 of the Hague Convention states that its objects are:
 - "(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
 - (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."
26. Article 2 then requires Contracting States to "take all appropriate measures to secure within their territories the implementation of the objects of the Convention", for which purpose "they shall use the most expeditious procedures available".
27. By virtue of Article 3, the removal of a child is to be considered wrongful where:
 - "(a) it is in breach of rights of custody attributed to a person... either jointly or alone, under the law of the State in which the child was habitually resident

Approved Judgment

immediately before the removal...; and

(b) at the time of removal... those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal... ."

28. In *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, Baroness Hale of Richmond observed at para.48:

"The whole object of the Convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their 'home', but also so that any dispute about where they should live in the future can be decided in the courts of their home country, according to the laws of their home country and in accordance with the evidence which will mostly be there rather than in the country to which they have been removed."

29. Article 12 of the Convention states:

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

30. Article 13 provides, amongst other things:

"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 ..."
- (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial ... 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.

In considering the circumstances referred to in this Article, the judicial ... authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

31. The leading case on the question of consent under Article 13(a) is the decision of the Court of Appeal in *Re P-J (Children)(Abduction: Habitual Residence:*

Approved Judgment

Consent) [2009] EWCA Civ 588. At paragraph 48 Ward LJ identified nine principles to be applied when the court is considering a defence of consent:

- "(1) Consent to the removal of the child must be clear and unequivocal.
- (2) Consent can be given to the removal at some future but unspecified time or upon the happening of some future event.
- (3) Such advance consent must, however, still be operative and in force at the time of the actual removal.
- (4) The happening of the future event must be reasonably capable of ascertainment. The condition must not have been expressed in terms which are too vague or uncertain for both parties to know whether the condition will be fulfilled. Fulfilment of the condition must not depend on the subjective determination of one party, for example, 'Whatever you may think, I have concluded that the marriage has broken down and so I am free to leave with the child.' The event must be objectively verifiable.
- (5) Consent, or the lack of it, must be viewed in the context of the realities of family life, or more precisely, in the context of the realities of the disintegration of family life. It is not to be viewed in the context of nor governed by the law of contract.
- (6) Consequently consent can be withdrawn at any time before actual removal. If it is, the proper course is for any dispute about removal to be resolved by the courts of the country of habitual residence before the child is removed.
- (7) The burden of proving the consent rests on him or her who asserts it.
- (8) The enquiry is inevitably fact specific and the facts and circumstances will vary infinitely from case to case.
- (9) The ultimate question is a simple one even if a multitude of facts bear upon the answer. It is simply this: had the other parent clearly and unequivocally consented to the removal?"

32. In relation to the child's objections defence, I have been referred to *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26 [2015] 2 FLR 1074, from which I take the following:

- 1 The court is to first determine whether the threshold has been crossed, namely, that the child both objects to a return and has reached an age and degree of maturity where it is appropriate to take account of his or her views.
- 2 This 'threshold' stage should be confined to a straightforward and fairly robust examination of whether the simple terms of the Hague 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 into account his or her views.

- 3 However, the child's views must still amount to an 'objection' and not anything less, such as a mere preference. The child's views have to amount to objections before they can give rise to an Article 13 exception. Anything less than an objection will therefore not do. This has sometimes been expressed by contrasting 'objections' with 'preferences'".
- 4 The objection must be to returning to the country of habitual residence as opposed to returning to a particular person or particular circumstances in that country, although there may sometimes be difficulty in separating out the two.
- 5 Even if the 'threshold' stage is satisfied, this is in no way determinative of the outcome. The court's discretion at the second stage is 'at large' and there may be many other factors to be weighed in the balance when deciding whether or not to order return - see for example, para.63 of *Re M* in which Black LJ quotes Baroness Hale at para.46 of her judgment in *Re M (Children) (Abduction: Rights of Custody)* [2008] 1 AC 1288.
- 6 At the 'discretion' stage, any number of factors may be relevant. Each case will turn on its own circumstances, but features that are likely to point towards a return of the child, despite objections, may include the child's maturity, the nature and strength of the objections, whether there has been influence of the child by the abducting parent, and whether the children's views are authentically their own.

33. With regard to the Article 13(b) defence, the authority of *Re E (Children)* [2011] UKSC 27 provides guidance, that is helpfully summarised by MacDonal J in *BK v NK (Suspension of Return Order)* [2016] EWHC 2496:

"45. 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] 2 FLR 758. 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

Approved Judgment

'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, as in this case, Art 11(4) of BIIa applies, the court cannot refuse to return a child on the basis of Art 13(b) of the Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return). Where the risk is serious enough the court will be concerned not only with the child's immediate future because the 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)."

34. I have also been referred to the decision of Baroness Hale in *Re D (Abduction: Rights of Custody)* [2007] 1 FLR 961 where the ambit of article 13(b) was articulated as follows:

"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'. It is, as Art 13(b) makes clear, the return to the requesting state, rather than the enforced removal from the requested state, which must have this effect. Thus the English courts have sought to avoid placing the child in an intolerable situation by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting state to protect him once he is there. In many cases this will be sufficient. But once again, the fact that this will usually be sufficient to avoid the risk does not mean that it will invariably be so. In Hague Convention cases within the European Union, Art 11.4 of the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1 expressly provides that a court cannot refuse to return a child on the basis of Art 13(b) 'if it is established that adequate arrangements have been made to secure the protection of the child after his or her return'. Thus it has to be shown that those arrangements will be effective to secure the protection of the child. With the best will in the world, this will not always be the case. No-

Approved Judgment

one intended that an instrument designed to secure the protection of children from the harmful effects of international child abduction should itself be turned into an instrument of harm.”

35. Should I be satisfied that one of the defences relied upon by the father has been proved to the required standard, I then have a discretion whether or not to order J’s return to Portugal. *In re M (Children)* [2015] EWCA Civ 26, Black LJ as she was then, described at paragraph 71 the factors to be taken into account when exercising discretion as:

“The court has to have regard to other welfare considerations, in so far as it is possible to take a view about them from the limited evidence that will be available as part of the summary proceedings. And importantly, it must give weight to the 1980 Convention considerations. It must at all times be borne in mind that the 1980 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 in *In re M*, at para 42, “[the] message should go out to potential abductors that there are no safe havens among Contracting States. ”

The Conduct of this Hearing

36. At the commencement of this hearing, I was invited to hear oral evidence from Ms Demery of CAF/CASS concerning her assessment of J and N’s wishes and feelings. It was also anticipated that I would hear oral evidence from M and F on the issue of consent. Given the parties accepted that all communication took place by email, text or Whatsapp, and there had been no telephone conversations between them, I questioned the need for the hearing of oral evidence from the parents, save perhaps on the issue of whether F had invented the Facebook and Whatsapp messages that he sought to rely upon. When it became clear that Ms Best was unable to cure the inadequate way in which that evidence had been presented in her client’s statement, it was agreed that Ms Demery would be the only witness to give oral evidence.

The Evidence concerning J’s Objections

37. In his statement F describes arriving in Portugal and “the children wanted to come and live me. It was then that I got the full flavor of the Applicant’s behaviour towards them. She would hit them with a brush, shoes, scream and shout at them at regular intervals. The children were too scared to tell me until the above incident as they thought they would not be able to see me or my family if they revealed this abuse to anyone”. Later in the same statement, F says “the children wish to remain with me in the UK and have settled well”.
38. J and N met with Ms Demery on 8 November 2018. Ms Demery was assisted by a Portuguese-speaking interpreter as J struggles to communicate using English. When Ms Demery gave her oral evidence, she explained that J has extra support at school due to English being his 2nd language. Ms Demery described N’s use of English as good and N sat in with J during his meeting with Ms Demery, as J was anxious about meeting with Ms Demery alone. Ms Demery said that N did not in any way seek to

Approved Judgment

influence J during the meeting but was able to assist at one point in the meeting when J became upset and sought comfort from his sister.

39. Ms Demery describes J as a polite but reserved boy. He told her that he likes living in England and has made friends here. He is able to stay in contact with his friends in Portugal by the use of a tablet and mobile phone. He also plays online games with his Portuguese friends.
40. When speaking about the circumstances in which J came to England, J told Ms Demery that he thinks M is mentally unwell and it is safer for him to live in England. It was Ms Demery's opinion that J was unlikely to have formed his own opinion that M suffered poor mental health and he would have most likely have learned this information from family members.
41. J told Ms Demery that he did not know what had happened between N and M as "they think I am too young to know" but he knew it was something bad and he said he felt guilty as he was on holiday in the Algarve and unable to help his sister. J described arriving back at his home and finding that M had gone to Malaysia but F was in Lisbon. J said he knew that something serious had happened as F would not leave the children in Portugal and took them to England.
42. J described that moving to England was a big change for him but said he spoke to his mother 3 times each week. J described that during these phone calls M will try to influence him by telling him that England is not a good country, that it is full of drugs and he will become a drug-dealer. J has found these comments upsetting and told Ms Demery that M knows he wants to stay in England as he has told her himself.
43. J described to Ms Demery that M had hit him with a shoe, a wooden spoon and with a belt. During her oral evidence, Ms Demery said that J was "indignant" about the physical chastisement from his mother as he thought the punishment to be excessive in relation to what he might have done. M had remarried after her divorce from F, a relationship that then also broke down, but J described to Ms Demery that he felt protected by his stepfather as J thought he would have received double the amount of punishment had the stepfather not been present. J told Ms Demery that M does not accept what she has done and that he feels safer with F.
44. During his meeting with Ms Demery, J did not express any negative views about Portugal itself. He was unhappy with M's choice of school for him, as his friends were not attending that school and he thought it was not a very good school, but his negatives views were all directed towards M.
45. Whilst holding negative views of M's treatment of him, J told Ms Demery that he missed his mother "50/50" and would like to see her but not live with her. He also said that he missed his friends and family who remained in Portugal. It was Ms Demery's oral evidence that, had J not been able to acknowledge positive elements to his life in Portugal and his relationship with his mother, she would have been concerned that the views he expressed had been influenced by F and the family in England. Ms Demery said in her oral evidence that she believed J's desire to remain in England was genuinely his own, although she accepted that as he did not know why

Approved Judgment

he had left Portugal, his wishes had to be seen in the context of something happening of which he was not aware and his desire not to be separated from F and N.

46. Ms Demery said that J was close to N and it would be hard for him to return to Portugal without her, but as there is large age gap between them, she was not of the opinion that separating them would be 'intolerable' for J.
47. When asked about his desire to stay in England, J told Ms Demery that, on a scale of 1 to 10, he wanted to stay in England 10 out of 10. He also said that if he was sent back to Portugal he would be 1 out of 10 unhappy, 1 being the most unhappy on that scale. Again, Ms Demery was of the opinion that these views were genuinely J's own.
48. With Ms Demery's assistance, J said he wished to write a letter to the Judge and this reads as follows:

“Dear Judge,
I would feel sad, I would feel insecure if I went back to Portugal. I would be at a different school so I wouldn't be with friends. I think I was already enrolled in a school I didn't want to go to. The worse school in my opinion.
I wouldn't feel safe going back to Portugal. My mother would hit me once a month, no life for a child at my age. She would hit me with my shoes, belt and with a spoon in her hand.”
49. When Ms Delmery spoke to N, N said that J and her grandmother did not know of her sexuality. She described having a counsellor in Portugal who she consults via Skype. N also described that she was struggling with her education in England and aspired to return to Portugal to complete her education.
50. N described J as having a strong personality but she would worry about him if he returned to Portugal. N told Ms Demery that J wants to remain in England and that he likes the new friends he has made and likes his teachers at school.
51. In her oral evidence, Ms Demery said that J was reticent about speaking negatively about M, as he was concerned that she would learn what he said. She repeated that his lack of knowledge of what occurred between M and N could be affecting his wishes and Ms Demery was not aware of any evidence prior to his removal to England that he had expressed a wish to live with F. Indeed, Ms Demery referred to the content of the report before the Portuguese court, where the criticisms made by the children are of F and not of M.
52. J told Ms Demery that he would not get on the plane if ordered to return to Portugal but Ms Demery was of the opinion that J is not a child who would defy an instruction from an adult.
53. Ms Demery remained of the opinion that J has expressed a strong wish to remain in England but, whether that amounted to an objection to a return to Portugal, was a matter for the court.
54. M's statement does not assist when considering whether J objects to a return to Portugal. In her statement M says “J is almost 11 years old. He is well advanced in his

Approved Judgment

education and his unlawful retention in England is having a negative effect on his education and emotional wellbeing. J does not speak fluent English and is also very shy. This together with having no friends in England, a new form of education and being away from his mother (the primary carer) has caused him a great deal of distress. The longer he stays away from Portugal, the more he suffers". M does not allege in her written evidence that J has told her, during her many phone conversations with her, that he has said that he wishes to return to Portugal.

Discussion and Decision concerning the 'Child's Objections' Defence

55. As set out above, I first have to undertake a "straightforward and fairly robust examination of whether the simple terms of the Hague 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".
56. Turning first to J's age and degree of maturity, it was Ms Demery's evidence that J's understanding and maturity was commensurate with his age. As a near 11 year-old, it was Ms Demery's evidence that J does not have sufficient understanding to decide for himself where he should live but I remind myself that I am simply considering whether his views should be taken into account, not that they are in any way determinative. Given his age and Ms Demery's evidence that his views should be taken into account, I am satisfied that he has attained an age and degree of maturity at which it is appropriate for me to take account of his views.
57. J has given reasons why he wishes to remain in England and not return to Portugal. He has not simply repeated information presented to him, save for adopting the family view that M suffers from poor mental health. Aside from this one comment concerning M's mental health, in my finding the views he has expressed are likely to be truly his own. He has been able to express that he misses certain parts of the life he led in Portugal, particularly his friends and family. He was also able to say that he missed his mother and would like to see her, although not live with her. I accept Ms Demery's evidence that he is unlikely to have expressed these opinions, that could be seen to run contrary to the interests of F's case, if he had been influenced by F or by N.
58. However, I have to determine if J objects to a return to Portugal or whether his concern is for a return to M's care. J did not express any negative views about Portugal. He was unhappy with M's treatment of him and of her choice of school but did not give Ms Demery any information that could lead me to a conclusion that he was unwilling to return to Portugal, had he been content with arrangements for his care once there. Indeed, when asked by Ms Demery how he would feel about returning to Portugal with F and N, he said he was only 4 out of 10 unhappy about that. He does not know why he was removed from Portugal and, on the evidence before me, expressed no desire to leave Portugal prior to his removal by F. I applaud both F and N for not exposing J to information he has not needed to know. As stated by Ms Demery, as a teenager with an ever increasing desire for independence, N was likely to have fallen into conflict with M in a very different way to J and, if N's allegations concerning M's homophobic abuse are true, N has very good reason for seeking a change of primary carer. However, there is no evidence before me from

Approved Judgment

which I could conclude that prior to his removal, J expressed any unhappiness about the care he received in Portugal or with Portugal itself.

59. I recognise that J now says that he was physically mistreated by M, and the methods of chastisement employed by F may well be very different to the treatment he received from M. It is, in my judgment, unsurprising that J expresses the desire to stay with his sister and father. However, not wanting to be separated from F and N is not the same as objecting to a return to Portugal. It is F's case, as set out in the statement of S, that both N and J spent a great deal of time in the care of S and her mother so there are options available for J's care in Portugal away from M until such time that the court in Portugal, that is already seized of an application made by F for a change of child arrangements, is able to make a decision.
60. Taking a straight-forward and fairly robust approach, in my judgment, J's objections are to a return to M's care and not to a return to Portugal. F has failed to discharge the burden upon him of proving that J objects to a return to Portugal and, therefore, this defence fails.

Discussion and Decision concerning the Article 13(a) 'Consent' Defence

61. I have set out the communications that passed between M and F in the paragraphs above. It is Ms Best's submission that the content of M's email on 28 June 2018 amounts to a clear and unequivocal consent to J's relocation to England. Mr Jarman submits its wording falls far short of the clear and unequivocal consent that is required.
62. Ms Best relies on the subject line stating "The Kids going to live with you" and the request in the email for F to investigate schools for the children and "conditions for them to live there with you". However, the email also refers to M's need for an operation on her knee and for the children to live with F for "at least 2 months". In my judgment, the wording of this email does not provide clear and unequivocal consent to a permanent relocation. It invites F to investigate arrangements for the children to 'live' with him for at least 2 months but cannot be interpreted as a request and consent for a permanent relocation. The word 'live' can be used interchangeably with 'stay' so I find the use of the word 'live' in this email does not assist in determining the intention of M.
63. If there was a permanent relocation, that was arranged with the consent of M, it is reasonable to expect F to have communicated with M concerning arrangements for travel and the collection of the children's belongings. Had there been such communications, this would have supported F's case that M had consented to relocation. I take into account that F and M's communication was difficult and there were often periods when, on M's account, F did not respond to her emails but the absence of any communications from F to M concerning practical arrangements deprives F of that additional evidence in support of his case.
64. The first communication sent by F to M on 10 July 2018 was not dispatched until after the children had arrived in England. M's reply, in my judgment, then demonstrates that she had not given the clear and unequivocal consent required, as she speaks in terms of J being given a choice, not that the choice had already been made

Approved Judgment

for him. The email also states that the parties ‘can’ reach agreement not ‘have’ reached agreement.

65. Mr Jarman submits that I need to give some weight to the failure by F, when issuing his application for a change of arrangements to the Portuguese court, to refer to the relocation of the children as having been with M’s consent. I accept that submission. In his email at 9.16pm on 10 July 2018, F speaks of having reached an agreement. If that was correct, it was a crucial matter to include within his application to the court in support of claim for a change of arrangements for the children. His failure to do so lends support to M’s case that no consent had been provided.
66. I have some sympathy for F as, on the evidence presented, he was called by his daughter and by M’s niece and/or sister and told of their version of the altercation between M and N. He then flew to Portugal to make arrangements for his children, M appearing to prioritise her own holiday over the needs of her daughter. However, the law requires that the consent provided be clear and unequivocal. F should have sought to protect the children in Portugal and not have removed them to England without M’s clear agreement. It must be consent to a permanent relocation and nothing less. For the reasons I have set out above, the limited communications that passed between M and F fail to establish the clear and unequivocal consent required. Therefore, this defence also fails.

Discussion and Decision concerning the Article 13(b) Defence

67. In these summary proceedings it is not possible to determine the truth of the allegations made by N and J against their mother. I therefore proceed to determine this defence by taking the allegations at their highest. J has very clearly described incidents of physical chastisement by M. I remind myself that such allegations had not been made before and there is no evidence before me that J has made previous complaints, even when interviewed for the purpose for the Portuguese court proceedings in 2016. Nevertheless, J has now said that his mother has struck him with household objects, including beating him with a belt.

68. Paragraph 33 of Re E (above) provides:

“Although ‘grave’ characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as ‘grave’ while a higher level of risk might be required for other less serious forms of harm.”

69. Although J has not described a similar event happening to him, the evidence produced by F from N and S, if true, demonstrates that M can be overwhelmed by rage, unable to control her actions and becomes dangerously violent when so enraged. If N and S’s account of M’s conduct towards N is correct, both in terms of the physical assault and homophobic abuse, I have no hesitation in finding that N would be at grave risk of physical and psychological harm if returned to the care of M in Portugal.
70. I have considered carefully whether a grave risk of physical and psychological harm to N who as a teenager is, on the evidence of Ms Demery, more likely to fall into conflict with M, produces an inevitable conclusion that J faces the same level of risk.

Approved Judgment

I have taken into account that J is described as a polite and reserved boy. He is not yet of an age when any emerging sexual orientation would place him in conflict with his mother. There are unlikely to be any intimate photos of J that will cause M to reject her son by abusive words and behaviour or fear for damage to her own reputation. J is unlikely to feel as rejected by M as N has felt and will, in my judgment, be less likely to test the boundaries of his mother's capacity to control her temper.

71. I also remind myself of Ms Demery's oral evidence in which she described J's indignance at the punishments metered out to him not matching the seriousness of the offence that his M considered he had committed. What I take from this evidence is that the physical chastisement by M was attached to some behaviour by J that she felt required correction but were not random attacks born out of rage and intolerance.
72. I must also take into account the opinion expressed by Ms Demery during her oral evidence, when she said that it would be harmful to J for him to learn of M's views of N's sexuality. Being the judicial reasonable parent that *Re M (Children)* [2017] EWCA Civ 2164 requires me to be, I entirely agree with the views expressed by Ms Demery. However, there is no evidence before me that M has repeated to J the words and insults that N alleges M used towards her.
73. In her statement, when responding to the allegations made by F concerning her conduct on 28 June 2018, M says the following:
"On 28.06.2018, I had discovered that N was forging my signature in school to hide her poor grades – as she was failing almost all school subjects. In addition, I had found indecent images of N in bed with a female (carrying out sexual acts). N was also bringing strangers home. All of these concerns together made me feel very worried for N's safety. N as a teenager has always been rebellious but this was too much."
74. M denies the violence alleged by N but accepts that she "grabbed her by the coat in order to get her home".
75. In my judgment, 28 June 2018 was a clear 'flashpoint' in M's deteriorating relationship with N. I take into account that, at such times, harmful behaviours can occur that would be unlikely to occur again unless a similar factual and emotional situation is replicated. For the reasons I have set out above, in my judgment the same situation is unlikely to be replicated by J's behaviour at this time or in the medium term.
76. M denies that she has ever used violence towards any of her children. They describe otherwise, including the use of what I consider to be weapons to inflict pain upon them. When reflecting on all the evidence given, until such time as another court has heard and determined the conflicts in the accounts given, in my judgment I must determine this application on the basis that M poses a grave risk of harm to J.
77. Whether J will actually be exposed to a 'grave' risk of harm or otherwise be placed in an intolerable situation if returned to Portugal, will depend on the care provided to him in that jurisdiction. Art 11(4) of Council Regulation 2201/2003 applies. The court cannot refuse to return a child on the basis of Art 13(b) of the Convention if it is

Approved Judgment

established that adequate arrangements have been made to secure the protection of the child after his or her return.

78. M volunteers a number of undertakings that will ensure what is described as a ‘soft landing’ for J should I order his return to Portugal. F has now indicated that he will himself return J to Portugal, if required, although he is unable to remain there due to his employment and the need for him to provide care for N in this jurisdiction. M offers an undertaking that J will be placed in the care of the maternal grandmother if returned to Portugal and that M will only have contact with J in the company of the maternal grandmother until such time as the court in Portugal determines otherwise. Mr Jarman directs me to the content of the report before the Portuguese court in 2016 that describes the circumstances in which J has previously lived with M at the maternal grandmother’s home.
79. F takes the view that residing at the maternal grandmother’s home would be insufficient protection for J as, he says, M is able to manipulate the maternal grandmother, although I have not been provided with particular incidents in the past when it is said that this has happened.
80. What is clear from the evidence presented is that both N and J have been supported by S and S’s mother, M’s sister. J was on holiday with M’s sister at the time of the altercation on 28 June 2018. It was M’s plan that J and N would remain in her care throughout the time when she was on holiday in Malaysia. M accepts that J and N had sleepovers with their Aunt and J stayed with the Aunt, who is a schoolteacher, at times when he required assistance with his schoolwork.
81. J has been in England since 10 July 2018. He has missed a full term of Portuguese schoolwork. He will need assistance in ‘catching-up’ if returned to Portugal. He also needs to feel safe and secure, if returned, given the wishes he has expressed to remain here, wishes that I have concluded do not amount to objections. S and her mother have demonstrated that they have acted protectively towards N and given the risks that I have described as grave, it is necessary for the Court to have confidence that those who are to provide care for J, should he be returned to Portugal, recognise those risks and will act to protect J should it be necessary to do so. I have a statement from the Aunt indicating her willingness, ability and availability to provide care for J. I have no statement from the maternal grandmother or any evidence of any kind concerning her views of the children’s allegations. I have been told that she has attended court and can give oral evidence if necessary but given the proven history of S and the Aunt acting protectively, in my judgment they should be the preferred option for J’s care if he is to be returned to Portugal.
82. On the basis that F returns J to Portugal himself and places him in the care of mother’s sister, who I will identify as MTDG, I am satisfied when taken together with the other undertakings offered by M, that adequate arrangements will be in place to ensure J’s protection. I therefore find that the article 13(b) defence fails.

Conclusions and Order

83. In my judgment, J was wrongfully removed from Portugal within the terms of the Convention on 10 July 2018. I have concluded that the defences relied upon by F have

Approved Judgment

not been established. Article 12 of the Convention requires me to order J's return to Portugal forthwith. The parties will need to agree when that return is to take place, the Court being conscious of the time of year and the increased cost of airline tickets. In my judgment, whatever timescale is agreed by the parties, a return needs to take place to ensure that J is settled with MTDG in sufficient time for his return to school in Portugal in January.

84. That is my judgment.