Neutral Citation Number: [2020] EWHC 3340 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

IN THE MATTER OF M, A CHILD

IN THE MATTER OF THE 1980HAGUE CONVESTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION AS INCORPORATED BY THE CHILD ABDUCTION AND CUSTODY ACT 1985

AND IN THE MATTER OF THE SENIOR COURTS ACT 1981

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/12/2020

Before:
Mr Justice Poole
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Re: M (A Child: Hague Convention)

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Henry Setright QC and Charlotte Baker (instructed by **Bindmans LLP**) for the Applicant Father
Edward Devereux QC and Rob George (instructed by **Dawson Cornwell**) for the Respondent Mother

Hearing date: 9 to 11 November 2020
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Approved Judgment

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.

Mr Justice Poole:

Introduction

1. The applicant is the father and the respondent the mother of M, an eight year old boy. His parents were both born in Poland and are Polish nationals. They formed a relationship there in 2011 but the relationship lasted only for three months and ended before M was born. The Polish courts determined that M should live with his mother and limited the father's parental authority so that he had a right to share in the making of important decisions about M. In 2015 the Polish courts ordered contact with the father to include alternate weekends and holiday contact. The mother brought M with her to England in July 2018 and, other than a short visit to Poland after Christmas that year, and a period in that country from April to May 2019 which is described more fully below, M has lived in England for nearly two and a half years.

2. The father applies for a return order under the 1980 Hague Child Abduction Convention. His application has reached me having been heard in the High Court once before and after having been remitted by the Court of Appeal. The parties are now each represented by leading and junior counsel. The e-bundle for the hearing stretches to 819 pages and further evidence was submitted during the hearing. Page references in this judgment appear in square brackets. I allowed oral evidence from the parents restricted to the issue of retention but due to a combination of factors, including the use of interpreters, occasional technical problems with the remote hearing, and the manner in which some questions were answered, the oral evidence was more protracted than had been envisaged. To ensure that the hearing concluded within a reasonable time I heard oral submissions restricted to one hour for each party but permitted supplementary written submissions which I have gratefully received.

3. Many of the issues that can arise in Hague Convention applications arise in this case. The evidence has resulted in submissions directed to removal, retention and repudiatory retention, habitual residence, settlement, consent, acquiescence, child's objections, grave risk of harm or intolerability, and discretion. More specifically the issues for me to determine are:

    - On what date, if at all, was M retained in the jurisdiction of England and Wales?
    - At that date where was M habitually resident?
    - If M was habitually resident in Poland at that date did the father subsequently acquiesce to the retention?
    - If acquiescence is established should the child nevertheless be returned to Poland?
    - If the retention took place more than one year before the issue of proceedings on 29 October 2019 is the child now settled in his new environment?
    - Is the article 13(b) defence of grave risk of harm or intolerability established? Notwithstanding the comment by Lord Justice Moylan in the Court of Appeal that "*I would agree with Mr Setright that the circumstances of this case are far from engaging Article 13(b)*", the mother is entitled to argue that defence. Several months have elapsed since the Court of Appeal's judgment, and there is new evidence including in the form of a further Cafcass assessment.
    - If the test under Art 13(b) is met, should the court exercise its discretion not to order M's return to Poland?
    - Does M object to return to Poland and is he of an age and maturity that his objections should be taken into account?
    - If so, should the court exercise its discretion not to order M's return to Poland?

4. There are many disputed facts, but although this case has a long history and the evidence and matters in dispute have expanded as the case has progressed, I remind myself that these are summary proceedings and that I have to evaluate the evidence focusing on the issues that I have to determine, rather than make findings about each and every matter in dispute. In this judgment I shall set out a history of events and the parties' respective positions, refer to the legal framework, evaluate the evidence, and then address the issues set out above. I shall then summarise my conclusions.

History of Events

5. In July 2018, with the father's agreement, the mother travelled with M (and with the mother's older daughter, then aged 18) to England for a holiday. The mother says that they arrived on 6 July 2018 and stayed in the South West of England with R, who is now her husband, in his two-bedroom rented flat. R has two sons of similar age to M. He is separated from their mother but they stay with him for two days a week in term times and for half of their school holidays. The arrangements were the same in 2018.

6. In late August 2018, the mother informed the father that she wanted to remain in England for a few months to do further work on a business she was setting up. The father was working and living in Germany at that time. He was not in Poland. There is a chain of messages at [C34-42] partly repeated at [C445], which begins with a message apparently dated 29 August 2018 from the mother to the father, in which she says: "*just got a great contract and it's possible I'll have to stay for a few months to get everything done* …" [C34]. In response to the father's concern about M's nursery attendance which had been planned to begin in Poland, the mother said, "*He'll have to go to school here and there we'll book a space for him".* At [C42] there is an interchange, the father messaging the mother, "*the thing is, if M is supposed to be in England, then we have to change dates of winter breaks, holidays and Christmases for longer ones*". The mother's message in response was, "*But he's not staying permanently in England – I said that if I manage to get going, I will have to stay a while, and then regardless I'm coming back – I want to live in Poland, not here….".*

7. In her second statement at [C407] the mother says at para. 22 that the message from the father "*could be translated by, "The point is that if M is to be in England permanently, then the dates for Christmas Easter time, winter half term and holidays may need to be changed to longer ones."* She says in her statement: "*I was reassured to see that he understood that I had decided to stay here permanently. He did not seem to oppose it."* I shall evaluate the evidence later in this judgment but plainly her statement that the father understood that she had decided to stay here permanently is at odds with her message to the father at the time that she and M were not staying permanently.

8. The father's case was that he was not happy about an extension of time for M to stay in England but that he acceded to an extension on the basis that M would be returned to Poland by the end of the year. At para. 11 of his first statement at [C72] he says, "*I made it clear to* [the mother] *that I was not happy for M to stay in England but provided that M was returned to and living in Poland by the end of 2018 I told* [her] *that if she had to stay in England temporarily then she had to stay. …"*

9. The mother enrolled M in a local school which R's sons also attended. She informed the father of this plan and he texted her at the end of September 2018 to ask when M was starting school. He told me that he had checked the location of the school on the internet. M started school in England on 15 October 2018. As well as R's sons, M also knew two other young friends who were pupils at the school. The mother says that he quickly settled in and made a good network of friends, attending playdates and birthday parties. I have seen evidence to show that the mother registered M with a GP, she applied for a national insurance number for herself and in August she was named as an occupier of the flat for the purposes of council tax. Nevertheless the mother says, "*Even though I had decided to stay in* [England] *permanently, knowing how hard it is to secure a place in M's usual nursery in Poland, I told* [my daughter] *on 1st September 2018, the day she left to finish her study in Poland, to keep paying for the nursery just in case*"- para. 29 of her second statement at [C410]. She only stopped those payments, she says, at or about Christmas time in 2018 when she was reminded that she was still paying.

10. In the autumn of 2018, the father was working in Germany but visited England twice to see M. He visited towards the end of October after Michael had started school and again in November 2018. The mother says that she became engaged to R on 10 November 2018 but in her detailed second statement she does not say that she told the father of the engagement. Under cross-examination she maintained that she told the father of her engagement on 1 January 2019 when both parties were in Poland. The father maintained that the first he knew of the engagement was in May 2019 when he saw a social media post by R. Even then he did not know the date of the engagement. A curious feature of this case is that although Mr Setright QC for the father makes the engagement a central plank of his case on retention, the father himself says that he does not believe that the mother and R became engaged on 10 November 2018. He says in his first statement, para. 43: "*I now believe that* [the mother] *is lying about their engagement happening earlier on, in order to paint a picture of false stability in respect of her relationship with R in the hope that this will bolster her application to relocate.*" [C81]

11. After Christmas in England in 2018, the mother and M returned to Poland for what she says was a holiday. R travelled with them. It was a relatively short visit. M spent time with his father, and then returned to England with the mother and R to begin his second term at his English school. The father's account of discussions with the mother at this time is set out at para. 13 of his first statement at [C73]:

    "*During the Christmas period in 2018* [the mother] *returned with M to Poland…* [she] *told me that she would be returning to England with M for a further temporary period and explained that she would come back to Poland permanently, either at the end of the winter holidays in February 2019 or by Easter 2019… I made it clear to* [her] *that I did not agree to M's prolonged retention in England and told her that she was now making a mockery of me, in refusing to confirm any concrete plans. I voiced my disapproval to* [her] *because she had dragged out her temporary stay in England but I did not take any formal steps to prevent her from returning.* [The mother] *ignored my concerns and removed M from Poland without my consent in early January 2019."*

12. The father took no steps to prevent M leaving for England in early January 2019 or to seek his return to Poland. Soon after M's return the mother told the father that she was planning on staying in England with M until July 2019 when he would have finished his school year. The father came to England to see M again in February 2019 during M's half term, and then the parties agreed that M should visit Poland at Easter 2019. As he did in October and November 2018, the father spent part of his visit in February 2019 staying with the mother, R and M at their flat.

13. At [C459] there is a message from the father to the mother on 15 February 2019 during a discussion about the father visiting for contact, which has been translated as "*The point is that I do not know when I can come to you and not that I do not know when I have the time to come... you are a family now so you probably have plans for a trip or other ways of spending the half term with the children hence my question of when M has the time for his father to visit him."* The father says that he was being sarcastic and trying to "*point out*
that I was hurt that she was always prioritising R's relationship with M above my own, even though I was M's real father." [C511]. The mother says that in or around February 2019 the father offered to bring M's possessions over to England but he denies this, saying that he only brought with him one of M's toys.

14. As had been agreed between the parties, M travelled to Poland with his father on 8 April 2019. The father had just moved back to Poland after working in Germany. He had been in a relationship that had lasted several months but which had recently ended. M was due to be returned to his mother on 17 or 18 April, but the father did not return M, and instead applied to the Polish court on 17 April 2019 for an order that M should live with him. The mother travelled to Poland on 1 May to seek M's return to her and she started Hague Convention proceedings in Poland, applying for M's return to England and asserting that the father was retaining him away from his country of habitual residence, namely England. She also cross-applied to the Polish court for a variation to the 2015 contact order seeking permission to relocate to England and to revoke the father's parental authority.

15. The father has explained his reasons for not returning M to his mother's care and allowing his return to England. His case is that he witnessed an incident involving domestic violence between the mother and R in their flat on the eve of his departure with M for Poland. As set out at para. 15 of his first statement, he says that he saw the mother kick R in the head and that later saw the mother lying on her bed with her wrists covered in blood. The father says that over the few days after they travelled to Poland in early April 2019, M revealed to him a history of domestic violence between R and the mother. M had a mobile device which the mother had previously used and which contained records of messaging between the mother and R that painted a picture of a troubled relationship and the mother's unhappiness in England. Translations of those messages appear at [C96] and following pages. They appear to be from 25 October 2018. They include a colourful dismissal of life in England at [C106]. The mother explained to the court that she had severe back pain at the time and was complaining that she could not purchase strong analgesia over the counter as she could in Poland. The messages clearly record a row between the mother and R. It has not been suggested that this was the entirety of the messaging that remained on the mobile device. It is a snapshot.

16. Whilst in Poland, the father also contacted the mother's daughter by telephone and recorded their conversation. The transcript is exhibited to the father's first statement. It must be treated with great caution because he was deliberately setting about obtaining evidence to confirm his view that M was not safe to return to live with R and the mother. The mother's daughter confirmed to the father that R could be unpredictable in his behaviour and that she herself had had arguments with him. She gave the clear impression of not liking R and she thought that he drank too much. She said that her mother had at times talked about ending her life and she confirmed that the mother had packed her bags to leave on occasions after arguments with R. But she reassured the father that R was not a risk to M.

17. The father set about gathering more evidence. There is a transcript of a telephone conversation between the mother and father on 14 April 2019 at [C142] and following pages. The father made this recording – he knew that what he was saying was being recorded and could be used as evidence, the mother did not. Part way through the conversation the father tells the mother that M does not want to return to England. The mother tried to placate the father to persuade him that he should return M to her as agreed. A translated transcript of the conversation cannot relay tone of voice or use of irony. I have read the transcript but for all these reasons I treat the evidence with caution. The father expresses concern about the mother's welfare – he has concerns about her relationship with R, how he treats her, and her own health. He suggests that she and M should "*come to Germany*". The mother seeks to reassure him that she is fine, and that M should return. She says at one point, "*just let me finish, let Michal finish this year … not much left.*" The mother reassures the father that the row he witnessed was due to R consuming too much alcohol, which he was not used to doing, that it was not an incident to cause him concern, and that it will not be repeated.

18. The father also became aware of an incident which led to the police attending the mother and R's home in January 2019. I have read the police disclosure in relation to that incident – the mother denied any violence at the time but accepted they had had a row. The father arranged for M to be seen by a psychologist in Poland and he exhibits a report dated 6 May 2019 which he relies upon to show that M wanted to live with him in Poland. He also arranged for M to go to school which he did for about one week. At [C571] there is a letter from the school saying that M quickly adapted to his new environment. The father says in his second statement at [C511] para. 30,

    "*I was seriously concerned for M's welfare were he to return to England and be exposed to further domestic violence. I was also genuinely concerned for* [the mother] *and wanted to do all I could to help her out of an abusive relationship, which is clear from the transcript of our conversation. M had also made it clear during the course of a number of telephone conversations with* [the mother] *that he did not want to return to England and I have exhibited transcripts below. It was therefore within this context that I told* [her] *that I did not think it was in his best interests to return to England*."

19. On 1 May 2019, the mother regained care of M during a period of contact in Poland agreed between the father and the maternal grandmother. It appears that the father refused to hand over M's passport to the mother. She was able nevertheless to make arrangements and she returned with M to England at the end of the month. During May 2019, before their departure, M and the mother moved around several locations. On 3 June 2019, having returned to England with M, the mother withdrew her Hague

Convention application and on the following day those proceedings were dismissed by the Polish court. The domestic Polish proceedings brought by both parents have continued, with hearings taking place in December 2019 and January and March 2020, and with the family proceedings there now adjourned until further notice.

20. Later in 2019 the father submitted an application to the Polish Central Authority for the summary return of M to Poland pursuant to the 1980 Hague Convention. The evidence suggests that the application was first submitted on 30 July 2019 but the final submission, bearing the father's signature was on 18 September 2019. On 25 October 2019 the C67 application, C1A and accompanying statement were submitted to the Royal Courts of Justice and issued on 29 October 2019.

21. The father's Hague application was determined by Deputy High Court Judge Mr Ekaney QC on 17 January 2020. The mother was unrepresented and some of the documents she presented to the court reflect the fact that English is not her first language. The Judge ordered summary return of M to Poland. The mother sought and obtained permission to appeal and on 13 May 2020 the Court of Appeal allowed the mother's appeal and ordered that if the father wished to continue to pursue his application the case should be remitted to the High Court. The father has chosen to continue with his application and the remitted case has come before me for final determination.

The Father's Case

22. The father's case is that having initially agreed to M having a holiday in England in July 2018, he reluctantly agreed to M having an extended stay until the end of that year. He had then objected to the mother taking M back to England in January 2019 but did not take any formal action to prevent her doing so. Likewise, when the mother told him that she wanted M to finish the school year in England, that is to stay until the summer, he felt he was being strung along but did not take any steps to raise a formal objection or to shorten the stay in England. It was his belief that M was experiencing a very troubled family life in England that caused him to retain care of M in Poland in April 2019.

23. As put by Mr Setright QC and Ms Baker in their skeleton argument, the mother repudiated the agreement to a temporary, time limited stay in England on 10 November 2018 by becoming engaged to R, now her husband:

> "It is (with the greatest of respect) difficult to conceive of a more flagrant repudiation of a left-behind parent's rights of custody than a travelling parent becoming engaged to be married to a person who is a long-term and established resident in this jurisdiction, whilst otherwise pretending that the stay is only temporary."

24. The father further contends that the mother's actions in removing M from Poland in May 2019 were without consent or permission. He says that M remained habitually resident in Poland on 10 November 2018 and at all times until his visit to Poland in

April 2019. Alternatively, if he was habitually resident in England at the beginning of April 2019 his habitual residence changed to Poland soon after arriving there that month. Either way, he was habitually resident in Poland on the mother's removal of him on 30 May 2019. The father neither consented to M's retention or removal, nor did he subsequently acquiesce. He did not know of the repudiation of his rights by reason of the engagement, until months after it had happened. The father also contends that the Article 13 defences of the child's objections and risk of harm or intolerability are not made out.

The Mother's Case

25. The mother's case, as articulated in her Counsels' skeleton argument for this hearing is that:

i) M was habitually resident in England and Wales at the time that the alleged wrongful retention took place; the mother says that the retention was in August 2018 when the mother unilaterally decided to extend the temporary holiday.
ii) More than 12 months passed between the date of the alleged wrongful retention and the father's application being issued, and M is now settled in this jurisdiction.
iii) In any event, the father acquiesced in M remaining in England.
iv) M will be placed at a grave risk of harm or otherwise be placed in an intolerable situation if his return were to be ordered.
v) M objects to a return to Poland, and he is of an age and maturity where the court should give weight to his objection.

However, the mother also invites the court to consider that there has been no wrongful retention by the mother at all. The father, in exercise of his custody rights, agreed to M remaining in England until such time as M was in fact habitually resident in England.

Section 3 – The Legal Framework

The Convention

26. 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 access under the law of one Contracting State are effectively respected in other Contracting States.

27. Baroness Hale, in *Re D (A Child: Abduction Rights and Custody)* [2006] UKHL 51, at para.48, said:

> "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."

28. By Article 3 of the Convention the removal or retention of a child is considered to be wrongful if,

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

29. Article 12 of the Hague Convention provides that:

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding para., shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

30. If M was habitually resident in England and Wales at time of his removal or retention, then the Convention has no further application, and the father's application for return would fall to be dismissed. If, on the other hand, M was habitually resident in Poland at the material time then it is necessary to go on to consider whether the case falls within one of the recognised exceptions under Article 13 which provides so far as is relevant to the present case that:

> "13. Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

> (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."

31. If one or more of the Article 13 exceptions is made out, the court does not have to order return of the child and may exercise its judgment not to do so. This is commonly referred to as the exercise of the court's discretion. Likewise, if settlement under Article 12 is established then the court has a discretion not to order return. It is not the role of this court to determine the longer-term arrangements for this child. The nature of these proceedings does not allow me to conduct a detailed welfare assessment. However, welfare considerations may apply to the exercise of the court's discretion if that arises. The burden of proof in relation to wrongful retention and habitual residence is on the applicant father. The burden of proof on settlement and the Article 13(b) defences is on the respondent mother. The civil standard of proof, on the balance of probabilities, applies.

Retention

32. Retention is a specific event. Lord Brandon of Oakbrook in *Re H (Minors) (Abduction: Custody Rights)* [1991] 2 AC 476, at 78 – 79 held that:

> "…. Once it is accepted that retention is not a continuing state of affairs, but an event occurring on a specific occasion, it necessarily follows that removal and retention are mutually exclusive concepts. 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."

33. In *In the matter of C (Children)* [2018] UKSC 8 Lord Hughes explained the concept of wrongful retention and how it might arise before an agreed return date: [42] to [45]

> [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 to activating it, via articles 3 and 12.

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.

45. It is possible that there might also be other cases of pre-emptive denial of the rights of custody of the left-behind parent, outside simple refusal to recognise the duty to return on the due date. It is not, however, necessary in the present case to attempt to foresee such eventualities, or to consider whether fundamental failures to observe conditions as to the care or upbringing of the child might amount to such pre-emptive denial. It is enough to say that if there is a pre-emptive denial it would be inconsistent with the aim of the Abduction Convention to provide a swift, prompt and summary remedy designed to restore the status quo ante to insist that the left-behind parent wait until the aeroplane lands on the due date, without the child disembarking, before any complaint can be made about such infringement.

34. Mr Devereux alerted the court to the decision of Wall J in *Re S (Child Abduction: Delay)* [1998] 1 FLR 651 and relies on it to contend that if there was a wrongful retention of M in England this was "cured" by his return to Poland in December 2018 and again by his return there in April 2019. I accept the possibility that the history of events in any particular application may give rise to a removal and a retention at different times That might give rise to a risk that either party may choose to rest their case on the date of a retention or removal that best suits their argument. For reasons that shall become apparent later, I do not need to address that particular issue in this judgment.

Habitual Residence

35. The Court of Appeal has most recently considered the concept of habitual residence in *Re M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105 and I have regard in particular to paras. [42] to [64] of the judgment of Lord Justice Moylan in which the significant authorities on the issue are reviewed, and the following principles are extracted:

    a. Habitual residence is an issue of fact. Lady Hale observed in *A v A* [2014] AC 1 at [54] that it is an issue which "s*hould not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.*"

    b. The correct approach to the issue of habitual residence is the same as adopted by the Court of Justice of the European Union. In *A v A* at [48] Lady Hale quoted from the operative part of the CJEU's judgment in *Proceedings brought by A* [2010] Fam 42 at page 69, para. 2:

    > "The concept of habitual residence …. must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration."

    c. The factors listed were taken from para. [39] of the judgment in *Proceedings brought by A*, it being held that they were relevant to the objective and purpose set out in para. [38] of that judgment:

    > " In addition to the physical presence of the child in a member state, other factors must be chosen which are capable of showing that that presence in not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment."

    d. Hence, as summarised by Lord Wilson in *In re LC, (Children) (Reunite International Child Abduction Centre intervening*) [2014] AC 1038 at [1],

> "it is clear that the test for determining whether a child was habitually resident in a place is whether there was some degree of integration by her (or him) in a social and family environment".

e. Integration does not have to be full; it may occur quickly – per Lord Wilson in *In re B (A Child) (Reunite International Child Abduction centre and others intervening)* [2016] Ac 606. The essential question is whether the child has achieved a sufficient degree of integration into a social and family environment in the country in question for their residence to be termed habitual – Lady Hale in *In re LC* at [60].

f. Lord Justice Moylan noted at [49] to [53] that another relevant factor when analysing the nature and quality of the residence is its "stability" as can be seen from *In re R (Children) (Reunite International intervening*) [2016] AC 76 where at [16] Lord Reed held that it was,

> "the stability of the residence that is important, not whether it is of a permanent character … there was no requirement that the child should have been resident in the country for a particular period of time" nor was there any requirement "that there should be an intention on the part of one or both parents to reside there permanently or indefinitely.".

Indeed, Lord Reed held at [23] that following the children's move with their mother, in that case to Scotland,

> "that was where they lived albeit for what was intended to be a period of 12 months. Their life there had the necessary quality of stability. For the time being their home was in Scotland. Their social life was there. Their family life was predominantly there. The longer time went on the more deeply integrated they had become into their environment in Scotland…"

g. Lord Justice Moylan referred to Lord Wilson's see-saw analogy from para. [45] of *In re B,* where he said:

> "I conclude that the modern concept of a child's habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo in which the courts below have placed B. The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new state, up will probably come the child's roots in that of the old state to the point at which he achieves

> the requisite de-integration (or, better, disengagement) from it.".
>
> Moylan LJ warned at [61] and [62]:
>
> "While Lord Wilson's see-saw analogy can assist the court when deciding the question of habitual residence, it does not replace the core guidance given in *A v A* and other cases to the approach which should be taken to the determination of the habitual residence. This requires an analysis of the child's situation in and connections with the state or states in which he or she is said to be habitually resident for the purpose of determining in which state he or she has the requisite degree of integration to mean that their residence there is habitual.
>
> "Further, the analogy needs to be used with caution because if it is applied as though it is the test for habitual residence it can, as in my view is demonstrated by the present case, result in the court's focus being disproportionately on the extent of a child's continuing roots or connections with and/or on an historical analysis of their previous roots or connections rather than focusing, as is required, on the child's current situation (at the relevant date). This is not to say continuing or historical connections are not relevant but they are part of, not the primary focus of, the court's analysis when deciding the critical question which is where is the child habitually resident and not, simply, when was a previous habitual residence lost."

Consent and Acquiescence

36. These are separate concepts. The main principles concerning the defence of consent are set out at para. [48] of the judgment of Ward LJ in *Re P-J (Children) (Abduction: Consent)* [2009] EWCA Civ 588. One of those principles is that consent, or the lack of it, must be viewed in the context of the realities of family life. It is not to be viewed in the context of not governed by the law of contract. In *Re H (Abduction: Acquiescence)* [1998] AC 72, [1997] 1 FLR 872 the House of Lords laid out principles applying to the issue of whether the left behind parent had subsequently acquiesced in the removal or retention of the child: Lord Browne-Wilkinson stated as follows:

> "To bring these strands together, in my view the applicable principles are as follows:
>
> (1) For the purposes of Art 13 of the Convention, the question whether the wronged parent has 'acquiesced' in the removal or retention of the child depends upon his actual state of mind. As Neill LJ said in *Re S (Minors)* 'the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact'.

> (2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.
>
> (3) The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law.
>
> (4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."

Grave Risk of Harm or Intolerability

37. The mother raises the defence under Art 13(b). The principles to be applied in relation to grave risk are well established and were set out in *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, in particular at [31] to [36]. MacDonald J helpfully summarised the applicable principles in *MB v TB* [2019] EWHC 1019 (Fam) at [31] and [32]:

> "i. There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.
>
> ii. The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.
>
> iii. The risk to the child must be 'grave'. It is not enough for the risk to be 'real'. It must have reached such a level of seriousness that it can be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two.
>
> iv. The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'. 'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this

> particular child in these particular circumstances should not be expected to tolerate'.
>
> v. Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child's immediate future 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).
>
> [32] The Supreme Court made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as ground the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest on the evidence available to the court and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm are identified. It follows that if, having considered the risk of harm at its highest on the available evidence, the court considers that it does not meet the imperatives of Art 13(b), the court is not obliged to go on to consider the question of protective measures."

38. At [37] of the same judgment MacDonald J addresses the way in which the court should evaluate evidence:

> "The methodology endorsed by the Supreme Court in *Re E* by which the court assumes the risk relied upon at its highest is not an exercise that is undertaken in the abstract. It must be based on an evaluation of the relevant admissible evidence that is before the court, albeit an evaluation that is undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention. The court does not simply assume, without more, the maximum level of risk contended

> for by the abducting parent. Rather, the court examines the information available to it and, having considered that information, arrives at a reasoned and reasonable assumption as to the maximum level of risk having regard to the available evidence.

39. *In Re D (Abduction: Rights of Custody)* [2006] UKHL 51, Baroness Hale held as follows at [52]:

> “"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 article 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.”

Child’s Objections

40. In relation to children’s objections, I follow the guidance of Black LJ in *Re M (Republic of Ireland) (Child’s Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26 at [69] to [71]:

> “69. In the light of all of this, the position should now be, in my view, that the gateway stage is confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views. Sub-tests and technicality of all sorts should be avoided. In particular, the *Re T* approach to the gateway stage should be abandoned.
>
> 70. I see this as being in line with what Baroness Hale said in *Re M* at §46. She treated as relevant the sort of factors that featured in *Re T* but, as she described the process, they came into the equation at the discretion stage. It also fits in with Wilson LJ's view in *Re W* that the gateway stage represents a fairly low threshold.

> 71. I do not see it as altering the outcome of most cases although it may sometimes make the route to the determination rather less convoluted. In particular, it would not lead to considerations which are undoubtedly relevant being lost, as they will be given full consideration as part of the discretionary stage. It would be unwise of me to attempt to expand or improve upon the list in §46 of *Re M* of the sort of factors that are relevant at that stage, although I would emphasise that I would not view that list as exhaustive because it is difficult to predict what will weigh in the balance in a particular case. The factors do not revolve only around the child's objections, as is apparent. The court has to have regard to other welfare considerations, in so far as it is possible to take a view about them on the limited evidence that will be available as part of the summary proceedings. And importantly, it must give weight to the Hague Convention considerations. It must at all times be borne in mind that the Hague Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned and returned promptly. To reiterate what Baroness Hale said at §42 of *Re M*, "[t]he message must go out to potential abductors that there are no safe havens among contracting states".

41. In *Re F (Child's Objections)* [2015] EWCA Civ 1022, the Court of Appeal confirmed that no gloss should be applied to the word 'objects' in the Convention:

> "35. In her definition of an objection, (counsel) had, in my view, introduced an unwarranted gloss on the simple words of Article 13. It is not necessary to establish that the child has "a wholesale objection" to returning to the country of habitual residence and "cannot think of anything positive to say about that other country". The exception is established if the judge concludes, simply, that the child objects to returning to the country of habitual residence. Mr Williams QC reminded us, rightly, that the Convention is applicable in a large number of countries and that "objects" has an autonomous meaning, but he did not advance a proposed definition in amplification or explanation of the words of the Convention itself. That was prudent, in my view. Whether a child objects is a question of fact, and the word "objects" is sufficient on its own to convey to a judge hearing a Hague Convention case what has to be established; further definition may be more likely to mislead or to generate debate than to assist."

Settlement

42. Authorities including *Cannon v Cannon* [2005] 1 FLR 938, *Re M (Abduction: Rights of Custody)* [2008] 1AC 1288, and *F v M & Anor* [2008] 2 FLR 1270, establish the legal approach that the court should take to the issue of settlement. I am not concerned in this case with the situation when the abducting parent has concealed the whereabouts of the child. In a recent judgment in *AL v SM* [2020] EWHC 2479 para. [49], Lieven J extracted nine principles from the authorities on settlement which I adopt.

Discretion

43. In *Re M* (above), Baroness Hale gave guidance on the exercise of the discretion which applies however the discretion arises under the Convention at [43]:

> "… in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare."

Evaluation of the Evidence

44. I must evaluate the evidence having regard to the summary nature of these proceedings. As well as considering the documentary evidence, I heard oral evidence from the parties restricted to the issue of retention, and from Ms Doyle, Cafcass Family Court Advisor.

45. Ms Doyle gave balanced and considered evidence. She spoke to M in person in January 2020 and remotely in October 2020. She found him to be an engaging boy who spoke freely. He had been living with his mother and having little contact with his father for many months when Ms Doyle first saw him, and that remained the position when she spoke to him again more recently. Nevertheless, he appeared to her to be expressing his own, genuinely held wishes and feelings. He had a maturity that matched his age. She was clear that M is settled in the United Kingdom, sees himself as part of a family here with two step-siblings (as well as his much older half-sister who it appears spends some of her time here and some in Poland) and a second father. He is a proud member of his school, enjoys an after-school activity of fencing, and has a healthy network of friends. His school is happy with his progress and has praised the work he has done during the coronavirus lockdown period. His mother supports him and the school well. M's clearly stated wish is to remain in England and not to return to Poland. He holds that view on the main ground that he does not want to leave his family and school here. He would be very sad were he have to return to Poland. In Ms Doyle's opinion M is physically, psychologically, and emotionally settled in England. When asked about allegations of past domestic abuse by R against the mother, she said that she was aware of them but did not believe there were any

safeguarding issues, no involvement of the local authority, and no complaints by the father to social services. Those allegations and consideration of the fact that face to face contact with the father has been non-existent for about 18 months now, did not lead her to question her conclusion that M is settled in this jurisdiction.

46. In relation to the possible Article 13(b) defence Ms Doyle's evidence was that whilst M would be most upset to have to return to Poland, even if it were for a relatively short period, she could not say that there is a grave risk that his return would expose him to physical or psychological harm or otherwise place him in an intolerable situation. In her oral evidence she said in terms that in her opinion return would not be intolerable for him. Primarily this was because his mother would go with him and she is very able to protect him. She too would be distressed to have to leave her life in England to return to Poland, but she has lived in Poland nearly all her life, she has family and friends there, she has experience of using the court system, and she is very capable of managing a return there in such a way as to protect M.

47. Ms Doyle said that whilst M expressed his wishes and feelings very clearly, and gave reasons for holding them, he is not of an age and maturity to understand the nature of the decision-making process. She told me that M did not understand how his wishes would affect the decision about his return. She wrote at para. 18 of the second report,

> "I remain of the view as set out in my first report that M's levels of maturity appear to be generally consistent with his chronological age and stage of development. He does not fully understand the role of the court in his life, the decisions being made about where he resides or that a return to Poland would be for the purposes of the Polish courts making decisions about his future. Nor would we expect him to at age eight."

48. The other oral evidence received came from M's parents. There is a danger in any case of evidence being tailored to suit the legal tests that both parties know are to be applied. In this case the parties have been involved in these legal proceedings for a long time and have doubtless realised the significance of certain dates and events. Hearing the parties give evidence I was convinced that each of them was offering an interpretation of past events heavily influenced by their current knowledge of the legal issues. This led to failures to give straight answers to pertinent questions, and to inconsistency. Indeed, listening to the parents' evidence it was at times a struggle to find any beacon of truth amidst the fog of evasion and obfuscation.

49. I found the father to be a confident but extremely evasive witness. He was repeatedly asked about his knowledge of the mother and R having a romantic (as opposed to a platonic or business) relationship, and his awareness that the mother, R and M were living as a family unit. The father knew at the time that the mother had stayed with R on a visit to England in May 2018 and then lived with him at this flat continuously from arrival in England in July 2018. The mother disclosed further text messages from the father only on first morning of this hearing, but they show to my satisfaction that he referred to R as the mother's "boyfriend" as early as 27 March 2018. On 27 May 2018 he wrote that M now had two little brothers, clearly referring to R's sons. He accepted that on visiting England in October and November 2018, he spent time overnight at the two-bedroom flat occupied by the mother, R, and M. The father knew

that the mother, R, and M travelled together to and from Poland after Christmas 2018. He visited them again in their home in February and April 2019. It would have taken an extraordinary level of self-deception by him, or deception of him by the mother and R, for the father not to realise that R and mother were in a romantic relationship and living together with M as a family. An important part of his case is that he was deceived: that the first he knew of the engagement, if any, was in May 2019 and that even then he did not know that it had taken place in November 2018 until the mother said so in a statement in these proceedings in late 2019. And yet, at no point in his written evidence does the father say that he was astonished to find that the mother and R had become engaged, as surely he would have been had he not known they were in a relationship. When asked by Mr Devereux QC about his awareness of their relationship between March 2018 and May 2019 he repeatedly answered, "I do not recall". That was obdurate evasion. There were many other examples throughout his oral evidence when the father purported not to be able to recall any details about important events. The father's evasion seemed to me to be tactical.

50. The mother's evidence was also unsatisfactory. Even making full allowance for the difficulties involved in giving evidence remotely and through an interpreter, she seemed at times determined not to answer straightforward questions. She was reluctant to acknowledge manifest inconsistencies in her evidence, such as her account of the messaging at the end of August to which I have already referred. The mother gave evidence under cross-examination that had not previously been given. For example, she volunteered that she and R had discussed as early as in September 2018 the possibility that R would come with her to Poland if she had to go back. At that time her concern was that M might not be given a place at the local school in England. Earlier Mr Devereux on her behalf had questioned Ms Doyle on the basis that a return order would lead to the separation of the mother, and M, from R.

51. I take into account all the evidence, but I give more weight to the contemporaneous evidence than to what the parties now say were their intentions and communications in 2018 and 2019. Mr Setright QC has invited the court to give itself what he calls a full Lucas direction in terms set out by McFarlane LJ in *Re H-C (Children)* [2016] 4 WLR 85 at paras. 97 to 102. I have regard to those paragraphs but need not set them out here. I remind myself that just because a witness has given dishonest evidence does not mean that they have done so to cover up their guilt for something alleged against them, or that they are necessarily to be found to be dishonest about other parts of their evidence. A witness may lie for many reasons including to protect someone else or to prevent harming their relationship with another person.

52. Upon evaluating the evidence in relation to the parties' agreement to M travelling to and remaining in England, I conclude as follows:

    a. The mother brought M to England on or about 6 July 2018. The father agreed to the visit and both parties genuinely expected it to last no longer than to the end of the summer. The mother was travelling to stay with her then boyfriend at his home, as the father I am sure knew, but she had no expectation at that time that she would not be returning with M to Poland at the end of the summer holiday.

b. Towards the end of August 2018 the parties agreed to extend the visit. That agreement was reached very close to the time when they had initially envisaged return, but not after it. This was an agreed extension. The father had some reservations, but only because he was concerned about the mechanics of contact. He did agree to M continuing to stay in England, and he was broadly content with the arrangements. He himself was living and working in Germany and, provided contact arrangements could be made, he was not particularly concerned about where M and the mother were going to live.

c. I have already noted the mother's evidence in her second statement, and during parts of her oral evidence, that the father knew by the end of August that she intended to keep M permanently in England. This evidence was wholly inconsistent with what she told the court in her self-authored position statement in January 2020, and with the contemporaneous messaging. From the beginning of September, the mother chose to pay for the nursery school in Poland to keep M's place open there. Her business in England was in its infancy and might never have become operational. I am quite satisfied that in August the mother did not know how long she would stay in England with M except that it was likely to be for at least a few months. I am sure that the mother had not decided to stay permanently or for a very long time in England by the end of August.

d. I do not accept the father's case that the agreement was for the temporary stay to terminate at the end of 2018. There is an absence of contemporaneous evidence of such an agreement. Further, when the parties, M, and R were in Poland at the end of 2018, there is no evidence from that time of any discussion about M returning to England, let alone any evidence of the father objecting to his return. Had the mother been about to breach an agreement to return at the end of 2018 I have no doubt that the father would have objected strongly and taken steps to prevent M leaving Poland, as he promptly and robustly did a few months later.

e. The position reached at the end of August was therefore an agreement between the parents that M would stay in England with the mother for a few months longer, with no agreed end date, but with the expectation that at some point he and the mother would return to live in Poland.

f. The father knew about M starting at school in the autumn of 2018 and was content that he did so. The father visited England in October and November 2018. During his visit he stayed with the mother, M, and R at their flat. He spent time with M and then returned to Germany where he was living at the time. There is no evidence at all that he was unhappy about M being in England. I am quite satisfied that he knew at the time of his visit in October 2018 that the mother and R were in a relationship, were co-habiting as partners, and were forming a family unit with M in England. He was content with the arrangements and voiced no objection. It suited him given his own circumstances at the time – he too was in a relationship, and he was living in Germany.

g. The father continued to agree to M remaining in England beyond the end of 2018. As I have already noted, there is no evidence of him objecting to M returning with his mother and R to England in January 2019. He knew that M was returning to school to begin his second term. He arranged to visit M in England at half term in February 2019. He messaged the mother on 15 February 2019 saying, "you are a family now". He visited that family in February 2019, bringing a toy belonging to M from Poland to England with him. He accepted in his oral evidence that the tone of communications between him and the mother in January to March 2019 was friendly. This is not the behaviour of a man who was objecting to M being in England, nor of someone who was anxiously pressing for M's imminent return to Poland. There were no signs that the mother was going to take M back to Poland in the early part of 2019.The father was in fact still living and working in Germany until April 2019, as he told me in oral evidence. The parties agreed that during the Easter holiday M would travel with his father to Poland to spend ten days there, before returning to England. The mother had no reason to believe that the father would not return M to England at the end of that visit. I am satisfied that by 7 April 2019 the father knew that the mother was in a long term relationship with R, and that M was part of a new family unit in England. I am satisfied that until M was in Poland with his father from 8 April 2019, both parties were in full agreement that M should continue to live in England after the end of his holiday in Poland on 17 or 18 April 2019.

h. The father's agreement to M remaining in England changed abruptly after M arrived in Poland on or about 8 April 2019. It is abundantly clear that the reason for the father's change of view was his perception that the mother's relationship with R was dysfunctional and that he needed to protect M from it. I have referred already to what the father says he witnessed on 7 April at the flat in England and the steps he took to gather evidence to confirm his belief that M would be harmed were he to return to live with the mother and R. This coincided with the father's work in Germany ending, and his returning to live in Poland. I have paid careful attention to all the evidence that the father gathered at this time. It shows that the mother and R had previously exchanged frank messages, that their relationship could be fiery, and that on occasion the mother had said that she wanted to leave England and return to Poland. The father's view that it showed a history of domestic abuse adversely affecting M is not sustainable in my judgement. As it happens, the father has not raised concerns about M's safety or welfare with social services in England even though M has been living here with his mother and R for 18 months since he returned in May 2019.

i. I note that in his applications to the courts in Poland, the father's complaint was of the mother's wrongful removal of M in May 2019, rather than her wrongful retention before then. This tends to confirm my finding that prior to 7 April 2019 the father had agreed to M remaining in England beyond April 2019.

53. The father's Counsel place considerable emphasis on the mother's engagement on 10 November 2018, asserting that the father did not know about it until much later. The

submission is that the engagement was an act of pre-emption of the father's custody rights and that even if the parties had ostensibly agreed to M staying in England beyond April 2019, as I have found, the engagement was an act of repudiatory retention which only came to light nearly a year later when the mother told the court in late 2019 that the engagement had been in November 2018. My conclusions regarding the engagement, and the mother's relationship with R, are as follows:

a. The only evidence I have of the date of this engagement is from the mother and curiously it is the father who has said he does not believe her – his first statement at para. 43, page [C81]. There is no evidence of an engagement on 10 November 2018 other than the mother's say-so and one might reasonably ask why R would have posted news of the engagement on social media at the end of May 2019 if it had happened in November 2018. However, having heard her give evidence, on balance I am satisfied that she and R did become engaged on that date. She gave spontaneous evidence about the day of the engagement when she was bought flowers and a ring and was given breakfast in bed. It might have been more helpful to her case if the mother had agreed with the father that the engagement did not happen in November 2018, but she was adamant and convincing in her evidence that it did. I accept her evidence.

b. The mother told the court that in fact R would contemplate going to Poland with her if she had to return with M, and that they had talked about that in September 2018 when she was concerned that M might to secure a school place in England. Although this was new evidence, not alluded to in her statements, and therefore must be treated with caution, I considered it to be authentic. R is Polish. In the autumn of 2018 he was clearly in love with the mother, hence his proposal on 10 November 2018. It would be surprising if he would not at least contemplate moving to Poland, even if just for a temporary period, with the mother and M if that were necessary to keep them together.

c. The contemporaneous evidence shows that the mother's relationship with R could be fiery at times, and that the mother did have doubts about it, and about remaining in England. However, I do not accept the father's suggestion that the relationship was deeply dysfunctional. He had not noticed anything awry on his visits in October or November, he had no concerns whatsoever about M's welfare within the family unit, as it obviously was, until April 2019. If the relationship was as unstable as he says, it would have been obvious to him on his visits and communications with M and the mother that all was not well. The very fact that R and the mother became engaged in November 2018 is good evidence that they were in love even if they did sometimes argue. The mother showed her fiery side at times when giving evidence, and it is clear from the evidence that the father gathered and presented to the court that she and R could sometimes row and use choice language when doing so, but that does not mean that they did not love one another or that their relationship was an unhappy or very unstable one.

d. Mr Setright QC seized upon the mother's evidence that the engagement had been a surprise. He sought to portray R's proposal as a bolt from the blue, but that is not how I understood the mother's evidence at all. It was obvious that by 10 November 2018 the mother and R had formed a romantic relationship

and that they were co-habiting as a couple. The relationship clearly developed between July and November 2018 and continued to do so thereafter. It would not have been easy for the mother to settle into a new relationship given that she was living with her son in a new country, and her relationship with R did not always run smoothly. The father's own investigations in April 2019, as set out above, show that the mother and R had arguments, and that shortly before the engagement, at the end of October 2018, the mother was uncertain about staying in England. R's proposal was therefore a surprise to her and although she agreed to becoming engaged, she clearly had doubts about whether the relationship would endure. Although the relationship became stronger as time went on, and the mother and R married late in 2019, she was unsure what would happen to the relationship at the time when the couple became engaged. When seen in context, the engagement was one part of a developing process with an uncertain outcome, rather than a sudden step-change and a manifestation of a decision made to stay permanently in England.

e. I accept the father's evidence that he did not know about the November engagement until later. The mother said that she was given an engagement ring and would have been wearing it when the father visited later in November. It is conceivable that he did not notice. It is equally possible that the mother withheld the information from the father. This does not cause me to doubt that the engagement had occurred: the parties had only a brief relationship and the parties generally had little interest in each other's relationships – this is not a case in which ongoing jealousy plays a part. The father himself was in a relationship at this time. The mother told me that she felt judged by the father and she may well have withheld news of the engagement from him until she was more confident that the relationship would be long-lasting. The parties agree that the engagement was not discussed at all in November 2018.

f. The mother does say that she told the father of the engagement during the visit to Poland at the end of 2018 but he denies that, maintaining that the first he knew of the engagement was in May 2019. I note again his description on 15 February 2019 of the mother now being "a family" [C280]. The father characterised that as a sarcastic remark, but even if it was, it reflected what he knew to be the truth. He knew then that the mother and R were in a long-term relationship. In April 2019 he was trying to persuade the mother to break up the relationship and none of his recorded conversations suggest that the father had only recently discovered that the relationship existed. However, there is no contemporaneous evidence to show that he knew that the mother and R were engaged.

g. In her first statement the mother set out a chronology showing that she told the father of the engagement on 28 December 2018. In oral evidence she said that she had done so on 1 January 2019. The father responded at para. 43 of his first witness statement at [C81] exhibiting the social media announcement of the engagement, dated 28 May (2019) at C158. However, he made nothing of this "discovery" when initially making the application for a return order. The engagement was not mentioned in his solicitor's statement of October 2019 even though the father then knew about it. The father considers that the

engagement announcement was faked in an attempt to assist the mother in her applications then before the Polish court. M was still in Poland as of 28 May 2019.

h. The mother told me, and I accept, that on the visit to Poland after Christmas 2018, she and R told her whole family of their engagement. I accept that she told the father of the engagement on 1 January 2019. R may well have posted about the engagement on social media to help the mother's court application in Poland at that time, but I am satisfied that the father knew about the engagement as early as 1 January 2019. However, of more importance is the fact that whether engaged or not, the father knew from the time of his visit to England in October 2018 at the latest, that the mother and R had formed a new family with M. The fact that the mother, R and M travelled to Poland together, and returned to England together after Christmas 2018 will only have confirmed the fact that they were a family unit. The mother and R were plainly cohabiting as a couple and living as a family with M in England. Until 7 April 2019 the father was content with that arrangement and his acceptance of it would have been the same whether or not he knew they were engaged.

54. Having regard to the legal framework and my evaluation of the evidence I shall now address the issues for me to determine.

Retention and Removal

55. I am satisfied that in late August the parties agreed to extend for an undefined number of months what was initially expected to be a long summer holiday in England for the mother and M. They continued to agree to M's continued stay even until the beginning of April 2019 when both agreed that M would continue to live in England after returning from holiday in Poland on 17 or 18 April 2019. There was no agreement that the stay in England would be permanent but both understood that the stay was for a substantial albeit undefined period. In so agreeing the father was exercising his custody rights. I can find no contemporary evidence to support the father's suggestion that he objected to M's continued stay in England until his significant change of mind in April 2019. Not only did he not object, but he visited M in England in October and November 2018 and again in February 2019, returning to his own home which was then in Germany, without a hint that he did not agree to leaving M behind in England on his departure. He fully accepted that M would continue to stay in England throughout that period.

56. It is one strand of the mother's case that she retained M in England in breach of the father's custody rights as early as August 2018. It is clear why this submission has been made: if wrongful retention were as early as August 2018, then the father's application herein is more than 12 months after that retention, and the court would then have to consider whether M was settled in England at the date of issue of this application. The evidence is strongly in favour of a finding that M was then settled in this jurisdiction. Accordingly, having previously accepted that she had not decided to stay permanently as early as August 2018, the mother now says that she had. It is to her discredit that she does so. As already noted, her evidence that she had decided permanently to stay, or to stay in the long term, is wholly at odds with the

contemporaneous evidence, and her own previous evidence. I reject it. She did nothing in August that would constitute a retention contrary to the agreement reached with the father.

57. The father asserts that, without his knowledge, the mother had pre-empted his rights and repudiated the temporary nature of the stay. Borrowing the words of Lord Hughes in *C (Children)* [above] she set about making the stay in England indefinite, putting down the child's roots in the destination state with a view to making it impossible for him to move home. I accept that repudiation might occur in that manner (or in other ways), but I am not persuaded that the mother repudiated the father's rights as alleged or at all. Although the father's case on repudiatory retention rests on the engagement on 10 November 2018, it is important to put the engagement in context, the better to understand its significance.

58. Prior to the engagement, the father knew that the mother was living in England with her partner or "boyfriend" as he had described him. He knew, and seemed content with, the fact that M was living with the mother and R as a family unit. He was agreeable to M starting school here. It is not surprising that the mother registered M with a general practitioner and took steps to find work for herself. She had plans for a business which got underway in August, but those plans were not particularly advanced. She obtained temporary work. Those steps were not of a kind to repudiate the temporary nature of the stay which, by the end of August, had been agreed to be for some months. The father saw for himself during his visit in October 2018 that M was living with R and the mother in a family unit and, I am sure, was fully aware that the mother and R were in a serious relationship and were co-habiting. The father agreed to M staying in England under those arrangements. They did not amount to a repudiation of his rights.

59. Did the engagement constitute a repudiatory retention either by itself or in combination with other factors? I have referred earlier to the submission on behalf of the father that it is difficult to conceive of a more flagrant repudiation of a left-behind parent's rights of custody. R had lived in England for over a decade. He had two sons who were at school here and who, when not staying with R, lived with their mother here. They were not going to leave this jurisdiction and so, arguably, neither was R. The engagement is therefore said to manifest the mother's decision not to honour the temporary nature of M's stay in England.

60. I do not agree that the engagement in this case carries the weight that Mr Setright QC and Ms Baker place upon it. The father himself was almost dismissive of the engagement, saying that he believed it to be a fake. His evidence has been directed at portraying the relationship between the mother and R as unstable, unhappy, and dysfunctional. That view is difficult to reconcile with the case put forward on his behalf, that as of 10 November 2018 the mother was committed to staying in England in the long term.

61. It would be glib to describe the engagement as a trivial matter, but seen in context it was not a marked change in circumstances. Firstly, although the agreement was for a temporary stay, there was no defined end date. I do not accept the father's case that the agreement was for M to be returned to Poland at the end of 2018. Secondly, the father had already agreed to M staying in England for several months, starting school

here and living in a family unit with R and the mother. The engagement did not make a material change to the arrangements, so knowledge of the engagement would not have been likely to lead the father to withdraw his consent to the agreement reached. Thirdly, it was possible that the relationship between the mother and R might not endure – I am sure that the mother realised this even on the date of the engagement. Fourthly, it was possible that the mother and M might return to Poland with R, either temporarily or on a longer-term basis. Fifthly, when the father was told of the engagement on 1 January he did not oppose M being returned from his holiday in Poland back to the family home in England, and he continued to agree to M remaining there in the following months until the events in April 2019. Finally, the engagement meant no more or less than that the parties intended to marry. Some engagements last for months, some for years, others are broken and there is never a marriage. Looked at in context, this engagement did not change the nature of M's stay in England. It did not pre-empt the father's custody rights. It did not make it impossible for M to return to Poland in 2019 or at all.

62. It was the father who then retained M in Poland in April 2019. Although not a matter for me to decide, his retention was clearly without the consent of the mother, and, for the reasons given below, M was habitually resident in England at the time of his retention by the father. The mother applied for M's return under the Hague Convention but that application, in Poland, became otiose when she managed to regain care of M on 1 May 2019 during a visit by M to his grandmother, and to return to England on 30 May 2019. She did so without seeking permission of the courts in Poland, before which there were ongoing applications, and without the consent of the father.

Habitual Residence

63. On my findings on retention, there is no date of retention on which to consider whether M was habitually resident in Poland, but there was a removal by the mother on 30 May 2019. I shall consider M's habitual residence at that date. However, in case I am wrong to reject the father's case as to repudiatory retention on 10 November 2018, I shall also consider habitual residence as of that date.

64. I consider that M was habitually resident in England on 30 May 2019. Prior to the father taking M to Poland on 8 April 2019, M had lived in England since early July 2018, a period of nine months. He had lived in one place – R's two-bedroom flat. He had started school for the first time and, by 8 April 2019 had spent two terms at school. He was registered with a general practitioner. He had a great deal of contact with R's two sons – photographs show that he had many enjoyable times with them. He had made friends at school and had enjoyed several parties and other social occasions with those friends. His English was improving. His father had visited him in England three times, returning to the continent after each visit. He himself had visited Poland for a holiday and then returned to England in time for the new school term. From July 2018 to the beginning of April 2019 M's father was living and working in Germany, not in Poland. M had lived all his life in Poland prior to July 2018, but he had then swiftly become part of a family unit in England, integrated into society here, and had certainly acquired habitual residence by April 2019.

65. On my evaluation of the evidence, the mother was unsure about how long she would stay in England from the time of her arrival in July 2018 until April 2019. However, whatever his mother's doubts about how long she would stay, there is no evidence that she shared those doubts with M. From his perspective he had a new home, new family life, new school, and new social life in England, and these were now part of his normal, daily life. His life was stable and he was deeply integrated in family and social life in England by April 2019.

66. A more difficult question is whether M was habitually resident in England or Poland as of 10 November 2018. He had lived all his life in Poland until July 2018. His extended family on both the father's and the mother's sides lived in Poland. By 10 November 2018 he had been in England for about four months but for the initial few weeks he would not have expected to have stayed beyond the end of the summer – the visit had been intended as a holiday. However, from the end of August 2018 M will have known that he was staying in England for the time being. From September 2018, he was becoming settled at his new home, with his mother's partner, R, and R's own children who would stay overnight on a regular basis. M would have been looking forward to starting school in England and from on or about 15 October 2018 he was at his new school. This was a very significant step for M – it was his first school. He knew other pupils there including R's children. He appears to have settled in well at the school, but he had been there only for about four weeks by 10 November 2018. It is of some significance that his father had visited him in England in October and then returned to work in Germany. There is no evidence at all that the father talked to M about returning to Poland at the end of the year or at all. After all, the father was not even living there. To this child therefore there would have seemed to be some stability in the arrangements under which he was living. The fact that his parents may both have expected the stay in England to be temporary, for a "few months", does not detract from the fact that, to M, his life here would have felt stable. M appears to have been picking up the English language and was able to manage at school even though his first language was Polish. He made friends there. He engaged in activities outside school. He had a new home and a new family unit. He was not as fully integrated into the social environment here as he was by April 2019 but he was, in my judgment sufficiently integrated in family and social life, and his life here had sufficient stability, for me to conclude that he was habitually resident in this jurisdiction as at 10 November 2018. He was not, by then, habitually resident in Poland.

67. On visiting Poland on 8 April 2019, and by the time the mother removed him back to England on 30 May 2019, did M become habitually resident in Poland? In my judgment he did not. On arrival in Poland he was expecting to have a holiday of about 10 days before returning to England in time for the summer term at school. His father took it upon himself without the mother's consent and with no pre-planning, not to return M to England and to his mother's care. He spent just one week in school in Poland without his mother's agreement. He saw a psychologist there solely at the instigation of his father who may well have made that arrangement as part of his evidence gathering exercise. By 1 May 2019 M was back in the care of his mother. M then spent one month moving around different locations whilst his mother sought documentation allowing her to take M back to England. He was, as it were, in the departure lounge for much of May 2019. Even allowing for the fact that M spoke Polish, was brought up in Poland until July 2018, and many members of his extended family lived there, he did not re-integrate into society or family life in Poland during

these few weeks in April and May 2019. To him this was certainly a temporary visit, followed by an unsettling week or so when he expected to be with his mother, but instead was being kept in Poland by his father and sent to a school there. This was followed in turn by a month where he moved around Poland with his mother waiting to return to England when they were able to secure the necessary documentation. There was no stability whatsoever in Poland during that period. He was due to return to school in England which he had been attending for six months, he was registered with a GP there, his mother was receiving child benefit there, his home was there, R's sons were there, his other friends were there. He remained integrated in the family and social environment in England throughout his time in Poland in April and May 2019.

68. It follows that M was habitually resident in England at the date of his removal by the mother from Poland on 30 May 2019, hence the Hague Convention has no application and the father's application should be dismissed. Even if I am wrong about the alleged repudiatory retention by reason of the engagement on 10 November 2018, I am satisfied that M was habitually resident in England at that date. Again, the Hague Convention would have no application and the father's application for return would be dismissed.

Acquiescence

69. Consent to removal does not seem to me to arise as a defence or exception in this case. Acquiescence does require consideration. I have found that the father was informed of the engagement on 1 January 2019. He was then aware of the facts and matters that are said to constitute a repudiatory retention by the mother on 10 November 2018. I have found that there was no repudiatory retention, and that M was in any event habitually resident in England as of 10 November 2018. If I am wrong, the father clearly acquiesced in M's continued retention in England after 1 January 2019. I do not accept his suggestion that he objected to M's return to England in early January 2019 – there is no contemporary evidence that he did. He even made arrangements to visit M in England the following month, with no evidence in the messaging about that visit to suggest that he was objecting to M being in England. The contemporaneous evidence shows that even when the father knew of the engagement, he acquiesced in fact in M's continued retention in England.

70. If the mother had to rely on the defence of subsequent acquiescence under Article 13(a), then I am satisfied that the father did acquiesce in M's continued retention after 10 November 2018, when he knew about the engagement having been informed of it on 1 January 2019. Accordingly, I would have a discretion whether to order return. I shall address the question of discretion below.

Article 13(b)

71. Had this been what is sometimes called a "hot pursuit" case, and M had more recently left Poland, there would be no merit at all in an argument that the Article 13(b)

defence applied. He and his mother had lived in Poland since his birth. There would be no language difficulties. He has extended family in Poland on both his mother's and father's sides. Ms Doyle addressed the issue directly and advised that in her opinion there would not be a grave risk that return to Poland would expose M to a physical or psychological harm or otherwise place him in an intolerable situation. The Court of Appeal did not include Article 13(b) in the list of issues for this court to determine on the case being remitted to it. Nevertheless, the mother does argue this defence. Mr Devereux referred the court to *KS v RS (Abduction: Habitual Residence)* [2009] EWHC 1494 (Fam), [2009] 2 FLR 1231 in which Macur J found that undue delay and settlement constituted the basis of an argument that a child would be exposed to an intolerable situation if summarily returned to their country of habitual residence prior to removal. There might be many different reasons, including uprooting a sensitive child from settled life in the new country, that might cause an intolerable situation for them on return, but I am not persuaded that the Article 13(b) exception is made out on the facts of this case. M would be very sad to have to return and I am sure that return would be detrimental to his welfare, but I see no evidence that he is a particularly sensitive or vulnerable child, he would have the full support of his mother, he would be returning to an environment where he could speak the language and adapt to a new school, and he would have wider family support. The circumstances do not demonstrate that there would be a grave risk that return would expose M to harm or otherwise place him in an intolerable situation.

Child's Objections

72. Ms Doyle's evidence was very helpful to the court in relation to this issue. Through her I heard M's voice very clearly – he objects to a return to Poland. This is not a case in which he confused a return with being separated from his mother. His reasons for objecting to a return to Poland were that his family and friends were here in England – [F32-33]. Ms Doyle's evidence, which I accept, is that M is of a maturity consistent with his chronological age, which is now 8. He may not have a full understanding of how the decision about return is to be made, or the ramifications of stating his objections, but I am satisfied that he spoke freely, that he called on his experience of Poland and England (albeit his memories of living in Poland are not very strong), that his reasons for objecting to return were not fanciful but were grounded in reality, and that the objections he raised were his own – he was not unduly influenced by his mother. It can be said that he has been influenced by the circumstances his mother has created by wrongful removal or retention (if that were the case) but I am satisfied on all the evidence that he objects to return to Poland and I should taken into account his views. He is only eight years old but the courts have taken into account the views of children of that age or younger in other cases – for example *Re W (Abduction: Child's Objections)* [2010] EWCA Civ 520, [2010] 2 FLR 1165.

Settlement

73. Given my findings on retention and habitual residence, the question of settlement under Article 12 does not arise. I do not think it would be helpful to burden this already long judgment with a detailed determination of the issue of settlement. If, however, the wrongful retention had been more than 12 months prior to the issue of the application herein which was on 29 October 2019, I would have had no hesitation

in finding that at that date M was physically, psychologically, and emotionally settled in England.

Discretion

74. If, contrary to my findings regarding wrongful retention, removal, and habitual residence, the Hague Convention applies; and if subsequent acquiescence and/or the "low threshold" of the child's objections are met, as I have found, then the court has a discretion not to order M's return to Poland. In exercising the discretion I follow the guidance of Baroness Hale in *Re M* (above). I take into account the reasons why the discretion arises, namely the father's acquiescence and the child's objections, the objects of the Convention, and welfare considerations. Acquiescence to (an alleged) repudiatory retention, would be of considerable significance when exercising the discretion. M's objections to return are clear, but they do not attract quite as much weight, in relation to the exercise of discretion, as they would were he older and able to demonstrate greater depth of understanding and reasoning. Nevertheless, his objections are strong ones. The object of the Convention to effect prompt return to the country of habitual residence cannot be achieved in this case because it is already so long since M was retained in England and away from Poland. This case is far removed from one of a blatant overnight abduction followed by a "hot chase". The welfare of the child is said to be woven into the Convention but in this case there would be a danger that over-emphasis on promoting certain objects of the Convention would cause harm to the child. It appears to me to be incontrovertible that removing M from England now, from his home, his school and his friends, and returning him to Poland against his wishes and those of his main carer, would be detrimental to his welfare. The higher threshold under Article 13(b) is not crossed, but welfare considerations point clearly against return. The father was able to travel to and from England for contact in 2018 and early 2019. Whilst damage has been done to his relationship with the mother by reason of events in April and May 2019 and these proceedings, I am confident that the mother will support contact between M and his father in the future, as being in M's best interests.

75. Weighing all the evidence and factors I am satisfied that I should exercise my discretion not to order M's return to Poland. In would come to that conclusion whether the exercise of the discretion arose solely because of acquiescence, solely because of child's objections, or arose because of both.

Conclusion

76. The parties and the court have been fortunate to have two very experienced Leading Counsel, ably supported by Junior Counsel, acting in this case. Their knowledge of the issues and authorities in Hague Convention cases, of which there are many, is impressive. I thank them for their assistance. I also thank the solicitors for the parties for their able preparation of the evidence and the hearing bundle.

77. There being no order for M to return to Poland, it is now important that the parties put this long-running and bruising case behind them and, for M's benefit, learn to collaborate to ensure that he grows up having a strong relationship with both parents and their respective families.

78. The answers to the questions identified at the outset of his judgment are as follows:

    (i) On what date, if at all, was M retained in the jurisdiction of England and Wales? *He was not retained in England in breach of the father's custody rights. He was removed from Poland on 30 May 2019 without the consent of the father.*
    (ii) At that date where was M habitually resident? *In the jurisdiction of England and Wales. Even on the father's case that there was a repudiatory retention on 10 November 2018, M was habitually resident in England at that date.*
    (iii) If M was habitually resident in Poland at that date did the father subsequently acquiesce to the retention? *This issue does not arise. In the alternative, if there had been a repudiatory retention on 10 November 2018, and if M was habitually resident in Poland at that date, the father subsequently acquiesced in his retention in England.*
    (iv) If acquiescence is established should the child nevertheless be returned to Poland? *The court would not order return in those circumstances.*
    (v) If the retention took place more than one year before the issue of proceedings on 29 October 2019 is the child now settled in his new environment? *This issue does not arise. There was no relevant retention. The mother's removal was on 30 May 2019, less than 12 months prior to the issue of proceedings. Alternatively, on the father's case the repudiatory retention was on 10 November 2018, less than 12 months prior to the issue of proceedings.*
    (vi) Is the article 13(b) defence of grave risk of harm or intolerability established? *No, even if it were applicable.*
    (vii) If the test under Art 13(b) is met, should the court exercise its discretion not to order M's return to Poland? *Not applicable.*
    (viii) Does M object to return to Poland and is he of an age and maturity that his objections should be taken into account? *If this needed to be considered, yes.*
    (ix) If so, should the court exercise its discretion not to order M's return to Poland? *Yes.*

79. I find that the parties agreed to M travelling to England in July 2018 and then to remaining here with his mother until April 2019 when the father unilaterally decided to retain M in Poland following an agreed holiday there. On 30 May 2019 the mother removed M back to England without the father's consent. Up to that point there had been no wrongful removal or retention of M by the mother. I find that on 30 May 2019 M was habitually resident in England and therefore the Hague Convention has no application. If I am wrong then the exception of the child's objections under Article 13 of the Convention has been established and I would exercise my discretion to refuse the application for return. Accordingly, the father's application is dismissed.