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Case No: FD21P00108

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/06/2021

Before:

THE HONOURABLE MR JUSTICE MACDONALD

Between :

K
- and -
T

Applicant

Respondent

Ms Clare Renton (instructed by **Birmingham Legal Ltd**) for the **Applicant**
Ms Rebekah Wilson (instructed by **Sternberg Reed Solicitors**) for the **Respondent**

Hearing dates: 26 May 2021

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic. Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 10.30am on 11 June 2021.

THE HONOURABLE MR JUSTICE MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

INTRODUCTION

1. In this matter I am concerned with an application under the Child Abduction and Custody Act 1985 for an order pursuant to Art 12 of the Hague Convention on the Civil Aspects of International Child Abduction (hereafter the 1980 Convention) directing the summary return of R, a girl born in 2012 and now aged 9 and H, a girl born in 2019 and now aged 2, to the jurisdiction of Austria upon the application of their father, K. That application is defended by the children’s mother, T. The mother relies on the following grounds:
 - i) Neither child was habitually resident in the jurisdiction of Austria for the purposes of Art 3 of the 1980 Convention at the time the mother retained the children in the United Kingdom (this ground was expressed in the Skeleton Argument on behalf of the mother as “settlement” but that concept has a specific meaning within the context of the 1980 Convention and is an inapt description of the case that the mother advances having regard to the date of issue of these proceedings);
 - ii) If the children were habitually resident in the jurisdiction of Austria at the time the mother retained the children, the father had consented to that retention for the purposes of Art 13(a) of the 1980 Convention.
 - iii) If the children were habitually resident in the jurisdiction of Austria at the time the mother retained the children, to order the return of the children to that jurisdiction would result in a grave risk that each of the children would be exposed to physical or psychological harm or would otherwise place them in an intolerable situation for the purposes of Art 13(b) of the 1980 Convention.
 - iv) If the children were habitually resident in the jurisdiction of Austria at the time the mother retained the children, R now objects to returning to the jurisdiction of Austria for the purposes of Art 13 of the 1980 Convention.
2. In determining the issues in this matter, I have had the benefit of reading in full the trial bundle lodged in this case, which bundle includes the statements from the applicant father and from the respondent mother. I have also had the benefit of a report from the Cafcass Family Court Adviser, Ms Demery, the contents of which report were not disputed by either parent. I have also had the considerable assistance of the written and oral submissions of Ms Clare Renton on behalf of the father and Ms Rebekah Wilson on behalf of the mother.

BACKGROUND

3. The mother was born in Turkey in December 1985 and is now aged 35. She moved to the United Kingdom when she was 12 and is a British Citizen. The father was born in Turkey in August 1986 and is now aged 34. The parents were married in Turkey on 27 July 2009 and remain married. The father came to the United Kingdom on a spousal visa in August 2010. The father now also has British Citizenship. Both children were born in the United Kingdom, R in 2012 and H in 2019. Both children are British Citizens and hold UK passports.

4. R lived in this jurisdiction for 7 years and attended school here prior to the departure of the mother and the children for Vienna in July 2019 and was registered with a GP practice. It is clear from the evidence that R had friends in school in England that she had known since nursery and was close to, and that she also had maternal family members in the United Kingdom. Within this context, I note that when spoken to by a social worker on 18 February 2021, in circumstances that I will come to, R stated she missed her friends at school during lockdown. R's attendance when in school in England had been 90%. Further, within the foregoing context, R has also made clear to Ms Demery that she was born in London and that London is her home.
5. The mother asserts that the father was controlling and violent during their marriage, questioning her every move and demeaning her friends. The mother further asserts that the father forced her to drink and then performed sexual acts on her. She has also made two allegations of rape against the father that I will come to.
6. Dealing with these matters in a little more detail, on 6 May 2017 the mother attended the Emergency Department and alleged that she had been pushed by the father and sustained bruising as a result. This incident resulted in a referral to social services. The social services documentation records that the mother conceded she had been drinking and that during the incident she had tried to scratch the father's face. She stated that this was the first incident of domestic violence in the marriage. The report that relates to this incident in May 2017 states that:

“She presented today with bruising to her hip and thigh which she alleges was caused by her husband pushing her during an argument – the push caused her to fall. She recounted that their child (only child) was asleep at the time and did not witness the argument which happened two days prior to her presenting at [the hospital]. [The mother] told the referrer that the police had been called by neighbours and they took her husband away but he returned later. [The mother] put forward the view that the incident was ‘her fault as she wound him up’.”
7. On 18 December 2018 the mother reported that her sister had attempted to assault her by hitting her in the stomach when she was five months pregnant with H. I pause to note that in seeking to justify his abduction of the children in February 2021, to which incident I shall come to in detail below, and his case as to the children's welfare more generally, the father now relies on transcripts of recordings purportedly made by the mother's sister that are said to demonstrate that the mother has physically abused both of the children.
8. In March 2019, the father alleged that he had been attacked by the mother with a knife, suffering cuts to his forearm and abdomen. The mother alleges that two months later, on 20 May 2019, the father assaulted her and raped her 9 days after H was born, the mother alleging that the father said was entitled to act in that manner as she was his wife. The mother gave a detailed account of the alleged rape to the Police on 3 July 2020, which account is set out in the police disclosure provided to this court. In February 2021 the mother gave the following further account during a child protection medical following the father attempting to remove the children from the mother's care:

“Mother said that after she became pregnant with H, their relationship deteriorated. Nine days after H was born, mother alleges that father raped and

tortured her. Mother said this incident occurred in Istanbul. Mother said that following this event she developed a tremor and hyperactivity.”

9. Within this context, there is some support for the mother’s allegation of rape by the father, as recorded the police disclosure and in the history given by the mother to the hospital, in a subsequent text exchange between the parents:

Mother: After I gave birth to H, you raped me when I learned you cheated on me.

Mother: My bottom was injured, I was injured.

Mother: Then you told me “if I try to push my head into it, even it will enter”.

Father: *You also wanted that.*

Mother: No Ahmet.

Mother: I gave birth 9 days ago. I was injured.

Mother: You hurt me so much.

Mother: But I still went into your bed.

10. The mother alleged to the police that the father raped her again in December 2019. These allegations of rape are denied by the father.

11. Within the foregoing context, I note that the police disclosure summarising the father’s interview in respect of the allegation of rape the father conceded that he had had sex with the mother two weeks after the birth of H but stated that this was not against her will. Further, and in the context of the allegations of physical abuse made by the mother against the father, I note that the summary of his police interview includes a statement by the father that:

“He does not accept the allegation, he said had she said we had an argument and he hit her then would agree but not rape.”

12. In addition to the allegations of domestic abuse made by the mother, she further alleges that the father physically abused R when she was a baby in 2012. In a DASH form completed in February 2021 the mother alleged father would punch R to the head when she was naughty and that in 2019, after H was born, the father punched R for acting out by reason of her being jealous of the new baby. As I will come to, R has never made allegations of physical abuse against either her mother or her father.

13. The applicant father bought a business in Austria in March 2018. The father contends that at first he managed the business from the United Kingdom without moving the family to Austria. He further contends that following the birth of H in May 2019, the family moved permanently to Austria. As I have noted, the mother travelled from the United Kingdom to Austria with the children in July 2019. The mother concedes in her statement that all of the father’s family reside in Austria and that the father had “always wished to relocate there to be close with his family and to start a business” and that

after the birth of H the father “asked me again if I would now consider moving to Vienna with him and the children”.

14. The mother alleges that her move to Austria from the United Kingdom was always agreed with the father to be for a *trial* period, with the mother and the children being able to return to the United Kingdom at any point if the trial did not work out. Within this context, the mother contends that she maintained the family home in England, a tenancy in the name of her father. The mother contends that the father agreed to this arrangement in circumstances where she was concerned that she would be isolated in Austria and did not speak German. The mother further contends that her agreement to this arrangement was forthcoming in an attempt to save the marriage following the father engaging in numerous infidelities, which the mother contends the father promised to cease if she moved to Austria. The father says in his statement that the move to Austria was in order to “overcome the problems we were experiencing during the pregnancy and post-birth periods and to create a new life”.
15. The father further asserts that the family took their personal belongings to Austria and arrived at their new property on 12 July 2019. The English translation of a report by the Austrian social services dated 28 November 2019 describes the position as follows:

“The parents lived with their children in London until June 2019, the father had been commuting between London and Vienna for 2 years because he had business in Vienna.”

And

“The family lives in a newly renovated, spacious, clean and modern three-room apartment. The children have their own room... the father sleeps in the living room.”

And, with respect to R:

“She seems unhappy with the situation and does not seem to be enjoying her new life in Austria yet”

16. When the mother made her complaint of rape to the police on 3 July 2020, *prior* to the father issuing proceedings under the 1980 Convention, the mother described the move to Vienna thus:

“This [the rape] happened in May and then he went to Austria ? he came back a bit later, we tried to be a family and went to Vienna together I said I would try but wouldn’t promise because he hadn’t been good to me.”

17. When the mother spoke to Children’s Services in this jurisdiction in February 2021, she described the position with respect to the move to Vienna as follows:

“[The mother] stated that they moved because [the father] had been caught cheating on [the mother] whilst she was pregnant and they were going to try and start a new life in Austria as a family. [The mother] was quite keen on this idea to start with but soon realised when they arrived in Austria in August 2019 that she was more isolated from friends and family.”

18. In a statement provided to the police by the mother on 9 February 2021, the mother described the move to Vienna as follows:

“In 2019 I went to Vienna for 3 months but I had always intended to return to the UK. I still had my property here.”

19. Upon arrival in Austria, it is not disputed that the children were registered by the parents as residents of Austria and R was enrolled in school after taking a placement test with respect to the 2nd Grade in Austria. R commenced school on 4 September 2019. R told the Cafcass Family Court Adviser that she enjoyed attending school in Austria with her cousin who is the same age, she having cousins aged 8 and 4 in Vienna. I note however, that in the papers is a document indicating that the father was fined €110 by reason of R being absent from school from September 2019 to June 2020. A reply to the father’s solicitors from the school dated 1 March 2021 indicate that whilst R was enrolled as an “extraordinary student” from September 2019 to September 15 2020, she had attended classes *very* irregularly. The English translation of the report of Austrian social services dated 28 November 2019 records that “Since the start of school, R has only attended classes very irregularly and often without excuse. Her fine and gross motor skills are not developed in accordance with her age and require logopaedic care.” There is no evidence before the court of the extent to which R began to learn German whilst in Vienna, if at all.

20. The mother alleges that domestic abuse by the father continued in Austria and that the relationship between them was fractious and unstable. In the DASH form completed in February 2021, the mother alleged that whilst in Vienna the father would threaten to throw the mother over a balcony. At the end of 2019 the mother alleges the father assaulted her when in drink and pulled her hair in an incident witnessed by the children. Within this context, I note that R was clear when speaking to the Cafcass Family Court Adviser that her father had been domestically abusive to her mother when they were in Vienna:

“[28] R told me that her parents used to get on well but do not now. She described her father pulling her mother’s hair out and punching her and kicking her out of the house. She said that is why her mother decided to move back to London. R was scared in Austria as the violence happened a great deal, she thought it was about every month. She added, ‘He can’t do nothing now we are in London’”.

21. The father alleged to the Austrian courts in November 2019 that in August 2019 the mother inflicted bruising to R’s legs. The Austrian court recorded that photographs were submitted to the court on 12 November 2019 that showed bruising to R’s legs. The provenance of these photographs is unclear and the mother asserts they simply show ordinary playground injuries. Again, as I will come to, R has never made allegations of physical abuse against either her mother or her father.
22. The mother contends that she suffered depression and anxiety in Austria by reason of feeling isolated from her family and friends in a country in which she did not speak the native language. The mother further contends that the father continued to have affairs, an allegation strenuously denied by the father. On 21 October 2019 the mother travelled to the United Kingdom with the children. The father contends that this was without his consent and that he caused a letter to be sent to the mother from his lawyers in Vienna

and that, after negotiations, the mother agreed to return to Austria. The mother arrived back in Austria on 3 November 2019. The papers associated with subsequent injunction proceedings in Austria make clear however, that it was the father's understanding that the mother had originally intended to remain in England permanently at this time.

23. The father alleges that upon the return of the mother and children to Austria the mother continued to have difficulties with the use of alcohol and cannabis. It is accepted by both parties that on 6 November 2019, only three days after the mother and children arrived back in Vienna, a further incident of domestic abuse occurred at the family home. The father alleges that the mother drank to excess in the presence of the children, that the glass of the apartment door was broken and that the mother scratched and injured the father, assaulting him in the kitchen whilst holding a knife. The mother alleges that the father supplied her with both alcohol and cannabis in order to stop her feeling down and he then told the mother he was having an affair, provoking her to violence. The mother concedes that at this point she tried to hit the father. The mother however alleges that the father also hurt her during the incident, leaving her with bruises. The father asserts that locked the mother in the kitchen and that he left the apartment with the children.
24. The Austrian police report dated 7 November 2019 contains the following account of the incident on 6 November 2019:

“When we arrived at the scene, the apartment door was opened for us by [the mother] (personal information on file). She was very drunk, but calm and co-operative. As soon as the apartment door was opened, [the mother] fell over due to being drunk. In the apartment we could see that the glass panel of the inside door to the kitchen was damaged and [the mother] had a small cut on her right wrist. When asked about the circumstances, [the mother] stated as follows:

“I had an argument with my husband today. We have been arguing a lot lately because we have a lot of relationship problems and he cheated on me. As I got very angry over time, I wanted to go to the kitchen for a smoke. I wanted to slam the kitchen door, but I drank too much and fell with my right hand against the door. I injured my wrist. I do not need the ambulance because the wound is not bad and is also no longer bleeding. My husband then left the apartment with our two children and went to his brother's. That's all I can say about this incident”.

During her Austrian police interview on 12 November 2019, the mother gave the following account:

“My husband and I had an argument that evening. The reason for this was that he cheated on me and also hit me. The last time in early October 2019, he hit me so that I passed out. I never filed a complaint against my husband. I was afraid that if I reported him that my children would be taken away and my husband would get into trouble. I have never seen a doctor and I haven't been to the hospital either. Since the incident on 06.11.2019, my brother has also travelled from London to support me. I live in a foreign country and all of my husband's relatives live here. We argued on 06.11.2019 about the whole past. About the beatings and about my husband cheating on me. There

were fights again. We scratched and hit each other. I didn't go to the doctor or to a hospital. My neck was scratched and my upper arm was bruised. I admit I hit my husband and scratched his neck.”

In his Austrian police interview on 15 November 2019 the father gave the following account:

“I can state that she drank alcohol again that afternoon. I am strictly against it because we have two young children. She drinks so much that she almost passes out and I have to drive home from the [business] every time and take care of the children. These are 7 years old and 6 months old. As said, that day it was also like that and she was heavily drunk. Then I went home from the [business]. She spoke to me on the phone before and then I noticed that she was drinking again. That's why I drove home quickly. A verbal argument ensued. My wife scratched my neck and hand. Then she went to the kitchen. I closed the door and called my brother. I locked the door because my wife had attacked me with a knife in the past. That was in London in 2018. My brother came and picked up the children. I did this because I didn't want my children to see how their mother was feeling. When we were alone in the apartment, she hit the glass of the kitchen door and injured her hand in the process. I wanted to give first aid. She didn't let that happen. I gave her a kitchen roll so she could take care of the wound. I left the apartment and went to my brother.”

25. Following the incident on 6 November 2019, the father obtained a provisional injunction against the mother in the Austrian court. A translation of that injunction is before this court and excluded the mother from the family home and prohibited the mother from having contact with the children save as ordered by the Austrian court. Within the injunction proceedings in Austria the father alleged that he had been the victim of domestic abuse at the hands of the mother, having been physically attacked by her when she was in drink over a period of some three years prior to November 2019. Within this context, the mother was prevented from residing in the family home and went to Turkey for some six weeks. Thereafter, the mother raised an objection to the provisional injunction and, ultimately, a negotiated settlement was reached between the parties by which the mother would have contact with the children and the father applied for the provisional injunction to be discharged. The parents reconciled in December 2019, the mother asserting that this reconciliation was the result of family pressure borne of culture and religion.
26. During this period, Austrian social services were involved in the welfare of the children. As a result of the incident on 6 November 2019 the social services authorities in Austria completed a risk assessment. The documentation provided to this court indicates that Austrian social services found the mother's account of the incident to appear credible, that the father was not keeping appointments and could not be reached by social services or the school, that R was exhibiting poor school attendance and giving the impression of “suffering under the circumstances”. However, the case was closed on the basis that the children appeared well cared for by the father.
27. Following the parents' reconciliation, the mother alleges that domestic abuse continued. The mother alleges that on 15 February 2020 the father assaulted her when she questioned why he had stayed out the night before. The mother further alleged that the

father began an incestuous affair with his aunt, causing an uncle to injure him with a knife. The father concedes in his evidence that the mother's allegation of incest caused him to be attacked by an uncle, who stabbed him with a knife to the leg whilst he was in the family home.

28. The mother returned to the United Kingdom with the children in February 2020. As I have noted, the mother contends that the father knew of her intention to return to England with the children and that he agreed to her departure. The mother alleges that this was in order to conceal the fact that he was having an affair with his aunt, the father offering to consent to the mother's departure in return for the mother not revealing the alleged incestuous affair. The father accepts he consented to the mother's departure but contends that this was on the basis that what was intended was a weekend break in the United Kingdom, the father asserting that he did not agree to any more than a weekend away. In this regard, the father prays in aid the fact that the school were not told of the departure and that he continued to pay R's school fees.
29. Following her return to the United Kingdom in February 2020, on 3 July 2020 the mother reported to the police that the father was making threats to kill her. The mother also reported that the father had domestically abused her and, as I have recounted above, made a complaint of rape against the father. In mid-July 2020 the father came to this jurisdiction but asserts that the mother refused the father any contact with the children. The father made an application under the 1980 Convention to the Austrian Central Authority on 24 August 2020.
30. The father again returned to the United Kingdom on 9 February 2021. The father asserts that this was because he had been informed by the mother's sister that the mother was physically abusing the children. As I have noted, exhibited to the father's statement are what purport to be translations of extracts recordings allegedly made by the mother's sister. It is entirely unclear who translated the alleged recordings and there is no way for the court to gauge the accuracy of the translations. The father asserts that the transcripts show that the mother was physically abusing both children. However, as I deal with below, this is inconsistent with what R has said about her life at home with her mother. Neither the father nor the mother's sister appear to have raised child protection concerns with the police or children's services at the time of these alleged recordings, despite one of the translations asserting that H was about to pass out due to violence from the mother.
31. Within this context, on 9 February 2021 the father attended the family home in England, broke down the front door and abducted the children after they had been left alone by the mother whilst she went to the shop. The police managed to locate and pursue the father and recovered the children. The police thereafter exercised the police protection powers conferred by the Children Act 1989 and arrested the father on suspicion of burglary and child abduction. The father was remanded in custody. In the papers it is recorded that prior to this abduction the father had driven from Vienna in the previous 24 hours.
32. R has given a number of accounts of the father's abduction of her and H on 9 February 2021. During the course of her ABE interview on 10 February 2021, R gave the following account of the father's abduction of the children to the police, also telling the police at one point that her father had broken the front door down and that she shakes when thinking about the incident:

“Q. Yeah.

A. And then my things, like, literally freeze. When my dad knocked the door he said: “R, it’s me, your father”, um, and then I said: “Go away”, and then he -- and then he said, um, “Nonsense, I will break the door and get you two”, and my sister and me, my little sister, that’s the one, one and a half years old name [name given] – [name given], I mean. And then he broke the door and said that: “Where’s your thing” -- I don’t know the English type, but it’s like, um, it’s a card that tells your name, your date of birth and stuff.

Q. Mm-hm.

A. And do you know them? Do you have them?

Q. What do you use it for?

A. Um, you use it for going to planes and stuff, to go to another country, you use it.

Q. Okay, you use it to go to another country. Do you know what colour it is?

A. Yeah. It’s kind of brownish/reddish.

Q. Okay.

A. Do you know it?

Q. Yeah.

A. Do you have it?

Q. It sounds -- it sounds like a passport.

A. Yeah, it is a passport.

Q. Okay.

A. Um, then, um, he said that “Where’s your passport?” and I said: “Why do you mind?” Then I said: “Why do you mind?” and then he said that “We’re going to Vienna, like, to another country” and then I said: “I don’t want to go with you. I want to stay here in England”, and then he said: “No, we’re going” and then he said: “R, do you want to stay here or should I get your sister?” he said, and then I just didn’t want my sister to go, um, so I said: “Leave the two of us and you go”, I said. Um, without clothes, not even shoes, not even socks, not even -- not even tops, he just, um, got me on his um, he just got me and then -- and I was freezing cold. He was in a hurry, and then he got me, he ran downstairs. I was scared that I was going to fall. After, he bring me in the car.

Q. Okay.

A. And then we come to the police station and then -- and then I ate some snacks and stuff.”

I pause to note that during his police interview under caution on 11 February 2021 the father gave an account of R’s reaction to him forcing his way into the family home that is almost diametrically opposed to that given by R herself, the father asserting that the children were pleased to see him and went with him willingly.

33. R gave a further account of the actions of the father to doctor at child protection medical on 16 February 2021, which is recorded in disclosure provided by the local authority:

“R told us that she was worried that her father will come back. R said that she would like to see both her mother and father but wants to live with her mother. R told us that when she talks about what happened, she becomes shaky. R said that since the incident she has had difficulty sleeping. She described sleeping on a sofa and getting up in the night.”

34. R also gave an account of the father’s abduction of the children to a social worker on 18 February 2021, stating that the incident had been scary and she was glad to be at home with her mother:

“R spoke openly about the experience of the previous week. She stated that her mother had gone out very briefly to the shops and her neighbour (who she calls auntie) was coming downstairs to speak to her. She said that there was a knock at the door and she went to the door. It was her father’s voice and he said: “let me in or I will kick down the door”. R was scared, so she grabbed her sister and hid in their bedroom. Her father then kicked down the door and grabbed her and her sister and took them downstairs. He was also asking about where the passports and the birth certificates were but R said that she would not tell him, she he started going through drawers. Her father and his friend picked up her and her sister and took them downstairs. At this point, the neighbour from upstairs came out and shouted for them and she shouted back, but they were already out onto the street. R said that the worst thing was that they had very few clothes on and it was freezing outside.

R said that her father and his friend drove in a grey Range Rover. R said it was a bit scary but it was also like a fun adventure. She was happy to see her dad but it was also scary because they were driving fast, and she did not know where they were going. She was also worried because she thought she might be taken away from her mother and she did not want to go to Vienna. She was relieved when the police arrived, and she thought some of the police officers were friendly and funny.

R asked if her dad was in prison and I stated that he was at the moment. I reminded R that what her daddy had done was very wrong and dangerous. R stated that she understood this and that she had been most upset about how it made her mum feel. R stated that she would not mind seeing her dad again but would prefer to live with her mum. I said that would be fine. R said that she did not want to go back to Vienna with her father and she wants to stay in her current home. I stated that would also be fine. R said that she feels

happy and safe with her mother, she has never disclosed any form of physical abuse at the hands of either parent.”

35. Finally with respect to the abduction on 9 February 2021, R also spoke about the incident to Ms Demery. Ms Demery records the following statements made by R:

“[26] R said she does not feel safe when she is with her father. In a matter of fact tone she said her father kidnapped her and her sister. She told me their mother had gone to buy food as they had nothing to eat, and an adult friend in the same block of flats was going to look after her and H. However, their father came to their home before the friend arrived. He knocked on their door and identified himself. She would not let him in, but he broke the door. He was asking for their passports, but he could not find them. She had hidden them. He put them in a car, and he was driving them to relatives. However, the “cops pulled him over”. The ‘cops’ took her and H to the police station and they called her mother. She was scared but at the same time it was an adventure. She said their dad kidnapped them quickly and she felt that he must have been hiding in the block of flats. She said her sister “didn’t even care. I didn’t cry because I knew my mum was going to save us”.

36. Given the father’s abduction of the children on 9 February 2021, and in circumstances where the mother had left the children at home alone, at a strategy meeting held on 10 February 2021 a decision was made by the local authority to proceed to a Section 47 investigation. The outcome of the investigation was that the mother’s care of the children was assessed to be good, and it was considered by the local authority to be unlikely that the mother would leave the children home alone again. The local authority identified no concerns regarding the mother’s overall care of the children. The police took the decision not to prosecute the mother for child cruelty in circumstances where the mother was cooperating with children’s services. Following the file being passed by police to the Crown Prosecution Service, the CPS have now discontinued criminal proceedings due to lack of evidence.

37. Following the abduction on 9 February 2021, a high risk domestic violence MARAC was held on 9 March 2021. As a result of that MARAC a multi-agency safeguarding plan was agreed between police, social care, housing and the domestic violence service. The mother alleges that the father has continued to abuse her verbally by text and voicemail messages since her return to England. Whilst the father denies having made threats to kill the mother, the following messages from the father to the mother are contained in the bundle:

“Let me say this. You are done. If anything happens to my mother or father. I will not let you live. It is your turn to feel scared. I will event take the children from you”

And:

“You cannot answer the call. I will kick your brains out. Go out on the street with fear from now on.”

And on 12 May 2021:

“What happened? You don’t have the courage to confront me. Ask [name given] what kind of a misdeed I have done to him so he did this to me? I have only done good. You messed my life up. And, with a lot of other people. Now I will fuck you alive or dead. Now it is my turn.”

38. As I have noted, central to the father’s defence of his actions on 9 February 2021 is the assertion that he had been informed by the mother’s sister that the mother was physically abusing the children. During his police interview, the father also alleged that he had directly witnessed such conduct by the mother. As I have also recounted, the father alleged to the Austrian courts in November 2019 that in August 2019 the mother inflicted bruising to R’s legs. However, the following evidence appears to undermine these assertions.

39. In March 2019 Children’s Services in this jurisdiction undertook a Child and Family Assessment. During the course of that assessment R was spoken to and made clear that she would prefer to live with her mother and did not want to go back to Vienna with her father. Within this context, I note the following statement made by R during her ABE interview following the father’s abduction of the children on 9 February 2021 and after telling the interview officer that her father had lied by telling her that her mother was coming too:

“Um, I knew that all of the things that he said was a lie and then he -- and then he asked me some few questions and then he recorded it. He said that “Does Mum hit you?” and I said: “No”. She never, ever, ever hit me, because she never does that, she is so kind. And then -- and then -- and then he says that “You’re lying” and stuff, because he’s trying to make himself saying the truth but actually he’s the one that’s saying the lie stuff.”

40. Finally, both parents make allegations regarding the state of the mental health of the other. The mother contends that a psychologists report prepared for the proceedings in Austria demonstrated that the father suffers from bi-polar affective disorder and a narcissistic personality disorder. That report is not before the court. The father contends that the mother is a schizophrenic but there is no evidence before the court to support that assertion. In the absence of any medical evidence, I have placed no weight on these respective assertions.

41. These proceedings were issued on an urgent basis on 18 February 2021. The mother has also issued proceedings under Part II of the Children Act 1989, which proceedings have been stayed pending the outcome of this application. As I have noted, following the issue of these proceedings, Cafcass was directed to prepare a report dealing with R’s wishes and feelings. In this regard, Ms Demery records R’s views as follows:

“[31] R said “I don’t want to go back to Austria- I would not want to put my finger on it (apparently this is a direct translation of a Turkish saying)- I don’t like that country and I don’t want to live there, I hate everything about the country-not the people. She could not think of anything nice about Austria, adding “My mum hates Austria too”.

Asked what she would like to say to the judge, R repeated that she does not want to go to Austria because she does not like that country, that she wants to live with her mother and that she wants to stay in London.

42. Within the foregoing context, Ms Demery draws the following conclusions in her report regarding R's views, wishes and feelings with respect to returning to Austria:

[36] R has expressed a strong wish to remain in the United Kingdom in her mother's care. This is perhaps unsurprising given that she has lived for the majority of her life in London, and she views London as home. The time that she lived in Austria, was by either parents' account at a particularly problematic time in their relationship. It is perhaps to be expected that she could find little that was positive to say about Austria. She stated that she hated the country. However, she acknowledged that she enjoyed school there. Her negative views of Austria appear to correlate with her mother's.

“[37] R at age nine, is poised for major transition as she stands on the cusp of adolescence. Children of this age are usually becoming independent from their family and friendships become increasingly important. She presents as a child who is older than her chronological years, which may be indicative of her recent adverse life experiences.”

43. With respect to the question of protective measures for the purpose of evaluating the mother's case with respect to Art 13(b) of the 1980 Convention, in his first statement the father says he “will consider any requests for protective measures that are made by the mother”. The father's second statement provides the following detailed proposals:
- i) The father will make available to the mother and the children a spare property for her immediate and exclusive occupation for a period of three months.
 - ii) The father will pay all associated housing costs.
 - iii) The father will not remove the children from the care and control of the mother save for the purposes of agreed contact.
 - iv) The father will not seek to contact the mother save through his lawyers.
 - v) The father undertakes not to use of threaten violence against the mother or to intimidate, harass, threaten or pester the mother, or to instruct or encourage any other person to do so.
 - vi) The father will not enter the property of come within 250 metres of it save by prior agreement in writing for the purposes of contact with the children.
 - vii) The father will pay child maintenance of €160 per calendar month until the Austrian court has made a decision in respect of maintenance.
 - viii) The father will pay the costs of travel for the return of the mother and children to the jurisdiction of Austria.

- ix) The father undertakes not to institute or voluntarily support criminal or civil proceedings arising out of the children's removal from the jurisdiction of Austria.

LAW

44. The law governing each of the exceptions relied on by the mother in this case is well settled and can be summarised as follows.

Habitual Residence

45. For habitual residence to be established the residence of the child must reflect some degree of integration in a social and family environment (*Area of Freedom, Security and Justice*) (C-532/01) [2009] 2 FLR 1 and *Re A (Jurisdiction: Return of Child)* [2014] 1 AC 1). Whether there is some degree of integration by the child in a social and family environment is a question of fact to be determined by the national court, taking into account all the circumstances specific to the individual case. Habitual residence must be established on the basis of all the circumstances specific to the individual case (*Case C-523/07* [2010] Fam 42). With respect to those circumstances, in *Re A (Area of Freedom, Security and Justice)* and *Mercredi v Chaffe* [2011] 2 FLR 515, the Court of Justice of the European Union identified the following, non-exhaustive, list of circumstances that might be relevant in a given case:
 - i) Duration, regularity and conditions for the stay in the country in question.
 - ii) Reasons for the parents move to and the stay in the jurisdiction in question.
 - iii) The child's nationality.
 - iv) The place and conditions of attendance at school.
 - v) The child's linguistic knowledge.
 - vi) The family and social relationships the child has.
 - vii) Whether possessions were brought, whether there is a right of abode and whether there are durable ties with the country of residence or intended residence.
46. In a series of decisions, namely *Re KL (A Child)* [2014] 1 FLR 772, *Re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2014] 1 FLR 772, *Re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] 1 FLR 1486, *Re R (Children) (Reunite International Child Abduction Centre and others intervening)* [2015] 2 FLR 503 and *Re B (A child) (Habitual Residence: Inherent Jurisdiction)* [2016] 1 FLR 561 the Supreme Court has articulated the following principles of general application with respect to the question of habitual residence:
 - i) It is the child's habitual residence which is in question and hence the child's level of integration in a social and family environment which is under consideration by the court determining the question of habitual residence.

- ii) In common with the other rules of jurisdiction, the meaning of habitual residence is shaped in the light of the best interests of the child, in particular on the criterion of proximity. Proximity in this context means the practical connection between the child and the country concerned.
- iii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must also weigh up the degree of connection which the child had with the state in which he resided before the move.
- iv) The relevant question is whether a child has achieved some degree of integration in social and family environment. It is not necessary for a child to be fully integrated before becoming habitually resident.
- v) It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there.
- vi) In circumstances where the social and family environment of an infant or young child is shared with those on whom she is dependent, it is necessary to assess the integration of that person or persons (usually the parent or parents) in the social and family environment of the country concerned.
- vii) In respect of a pre-school child, the circumstances to be considered will include the geographic and family origins of the parents who effected the move.
- viii) The requisite degree of integration can, in certain circumstances, develop quite quickly. It is possible to acquire a new habitual residence in a single day. There is no requirement that the child should have been resident in the country in question for a particular period of time. The deeper the child's integration in the old state, probably the less fast his or her achievement of the requisite degree of integration in the new state. Likewise, the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his or her achievement of that requisite degree. In circumstances where all of the central members of the child's life in the old state to have moved with him or her, probably the faster his or her achievement of habitual residence. Conversely, were any of the central family members have remained behind and thus represent for the child a continuing link with the old state, probably the less fast his or her achievement of habitual residence.
- ix) A child will usually, but not necessarily, have the same habitual residence as the parent(s) who care for her. The younger the child the more likely that proposition but this is not to eclipse the fact that the investigation is child focused.
- x) Parental intention is relevant to the assessment, but not determinative. There is no requirement that there be an intention on the part of one or both parents to reside in the country in question permanently or indefinitely. Parental intent is only one factor, along with all other relevant factors, that must be taken into account when determining the issue of habitual residence.

47. In considering the question of habitual residence, it is not necessary for the court to make a searching and microscopic enquiry (*Re B (Minors)(Abduction)(No 1)* [1993] 1 FLR 988).

Consent and Acquiescence

48. In *Re P-J (Abduction: Habitual Residence: Consent)* [2009] 2 FLR 1051, [2009] EWCA Civ 588 the Court of Appeal made clear that consent to the removal of the child must be given in clear and unequivocal terms. Further, consent can be given to the remove at some future of unspecified time, or upon the happening of some future event, but such advance consent must still be operative and in force at the time of the actual removal. Further, in respect of the latter, the happening of the future event must be reasonably capable of ascertainment. The condition must not have been expressed in terms which are too vague or uncertain for both parties to know whether the condition will be fulfilled. Fulfilment of the condition must not depend on the subjective determination of one party.
49. Within this context, the Court of Appeal made clear in *Re P-J* that consent, or the lack of it, must be viewed in the context of the realities of family life, or more precisely, in the context of the realities of the disintegration of family life. It is not to be viewed in the context of nor governed by the law of contract. Within this context, consent can be withdrawn at any time before actual removal. If it is, the proper course is for any dispute about removal to be resolved by the courts of the country of habitual residence before the child is removed. The burden of proving the consent rests on him or her who asserts it and, in this respect, the inquiry is inevitably fact specific and the facts and circumstances will vary infinitely from case to case. The ultimate question is a simple one even if a multitude of facts bear upon the answer. It is simply this: had the other parent clearly and unequivocally consented to the removal? Within this context, at [57] Lord Wilson held that:

“[57] It seems to me that the most obvious (albeit not always decisive) indication of whether in reality an advance consent subsisted at the time of removal is whether the removal was clandestine. I accept that a consent to the removal of children within Art 13 does not have to include a consent to their removal on the particular day, or by the particular means or more generally in the particular circumstances, on, by or in which the other parent elects to remove them. Nevertheless a clandestine removal will usually be indicative of the absence in reality of subsistence of the consent; see, for example, the judgment of my Lord in this court in *P v P (Abduction: Acquiescence)* [1998] 2 FLR 835 at 836H–837A.”

50. With respect to acquiescence, in *Re H (Minors) (Abduction: Acquiescence)* [1998] AC 72 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.”

51. In the circumstances, the court is required to ask itself whether, in all the circumstances of the case, the subjective intention of the father was that the children should remain in the jurisdiction of England and Wales following their abduction. This is a question of fact to be determined on the evidence before the court, including the contemporaneous words and actions of the father. Unless the mother is able, in this manner, to prove as a matter of fact that the father acquiesced, the defence of acquiescence cannot succeed. The only exception to this is if the case is one that falls within the ‘exceptional’ category. The case will fall into this category only where, although the father has not in fact acquiesced, the words and actions of the father clearly and unequivocally show, and have led the mother to believe, that the father was not asserting, or going to assert, his right to summary return of the children and were inconsistent with such a return, such that justice requires that the father be held to have acquiesced to the children remaining in the jurisdiction of England and Wales.
52. A parent cannot be said to have acquiesced in the unlawful removal or retention of a child unless he or she is aware of the act of removal or retention, is aware that it is unlawful and is aware, at least in general terms, of his or her rights against the other parent (see *Re A (Minors) (Abduction: Custody Rights)* [1992] Fam 106, sub-nom *Re A (Minors) (Abduction: Acquiescence)* [1992] 2 FLR 14). It is not a prerequisite for the establishment of the defence of acquiescence that a parent has correct advice or detailed knowledge of his or her Convention rights provided it is shown that he or she knew in general terms that he or she could bring proceedings (see *D v S* [2008] 2 FLR 293).
53. It is clearly established that when considering written evidence of the parties' intentions, the written statements in question must be in clear and unambiguous terms in order to establish acquiescence (see *Re S (Child Abduction and Acquiescence)* [1998] 2 FLR 893).
54. It is important to note that merely seeking to compromise matters by permitting the abducting parent to remain in the country to which he or she has taken the children provided that the wronged parent is satisfied as to other matters and issues between them has not been regarded as acquiescence for the purposes of the 1980 Hague

Convention (see *P v P (Abduction: Acquiescence)* [1998] 2 FLR 835). Similarly, a parent who enters into a conditional agreement that the children remain in the jurisdiction whilst discussions continue may not be held to have acquiesced for the purposes of a Convention (see *Re W (Acquiescence: Children's Objections)* [2010] 2 FLR 1150). In *P v P (Abduction: Acquiescence)* Ward LJ agreed with the observation of Hale J (as she then was) at first instance that:

“...it would be most unfortunate if parents were deterred from seeking to make sensible arrangements, in consequence of what is usually an acknowledged breakdown in the relationship between them, for fear that the mere fact that they are able to contemplate that the child should remain where he has been taken will count against them in these proceedings. Such negotiations are, if anything, to be encouraged”.

55. Within this context, in *Re H (Minors) (Abduction: Acquiescence)* Lord Browne-Wilkinson noted that the Convention itself, by Arts 7(c) and 10, places weight on the desirability of a negotiated or voluntary return or the amicable resolution of the issues.
56. Delay, and in particular unexplained delay, in taking action can be indicative of acquiescence (see *W v W (Child Abduction: Acquiescence)* [1993] 2 FLR 211 and *Re D (Abduction: Acquiescence)* [1999] 1 FLR 36). The fact that an applicant has applied for custody in the child's State of habitual residence may, however, be strong evidence of a lack of acquiescence (see *Re A (Minors)* [1991] 2 FLR 241). A parent who allows substantial delay to accrue as a result of erroneous legal advice before issuing proceedings may not be said, depending on the facts of the case, to have acquiesced in a wrongful removal (see *Re S (Minors) (Abduction)* [1994] 1 FLR 819).

Harm

57. Art 13 of the 1980 Hague Convention provides as follows with respect to the exception relied on by the mother:

“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. In considering the circumstances referred to in this Article, the judicial

and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.”

58. The law in respect of the defence of harm or intolerability under Art 13(b) was examined and clarified by the Supreme Court in *Re E (Children)(Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144. The applicable principles may be summarised as follows:
- i) There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.
 - ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.
 - iii) The risk to the child must be ‘grave’. It is not enough for the risk to be ‘real’. It must have reached such a level of seriousness that it can be characterised as ‘grave’. Although ‘grave’ characterises the risk rather than the harm, there is in ordinary language a link between the two.
 - iv) The words ‘physical or psychological harm’ are not qualified but do gain colour from the alternative ‘or otherwise’ placed ‘in an intolerable situation’. ‘Intolerable’ is a strong word, but when applied to a child must mean ‘a situation which this particular child in these particular circumstances should not be expected to tolerate’.
 - v) Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child’s immediate future 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, in principle, such anxieties can found the defence under Art 13(b).
59. In *Re E*, the Supreme Court made clear that in examining whether the exception in Art 13(b) has been made out, the court is required to evaluate the evidence against the civil standard of proof, namely the ordinary balance of probabilities whilst being mindful of the limitations involved in the summary nature of the Convention process (which include the fact that it will rarely be the case that the court will hear oral evidence and, accordingly, rare that the allegations or their rebuttal will be tested in cross

examination). Within the context of this tension between the need to evaluate the evidence against the civil standard of proof and the summary nature of the proceedings, the Supreme Court further 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 grounding the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest and then, *if* that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm can be identified.

60. As I have observed in a number of cases, the methodology articulated in *Re E* forms part of the court's general process of reasoning in its appraisal of the exception under Art 13(b) (see *Re S (A Child)(Abduction: Rights of Custody)* [2012] 2 WLR 721), which process will include evaluation of the evidence before the court in a manner commensurate with the summary nature of the proceedings. Within this context, the assumptions made with respect to the maximum level of risk must be reasoned and reasonable assumptions based on an evaluation that includes consideration 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.
61. In determining whether protective measures can meet the level of risk reasonably assumed to exist on the evidence, the following principles can be drawn from the recent Court of Appeal decisions concerning protective measures in *Re P (A Child) (Abduction: Consideration of Evidence)* [2018] 4 WLR 16, *Re C (Children) (Abduction: Article 13(b))* [2019] 1 FLR 1045 and *Re S (A Child) (Hague Convention 1980: Return to Third State)* [2019] 2 FLR 194:
- i) The court must examine in concrete terms the situation that would face a child on a return being ordered. If the court considers that it has insufficient information to answer these questions, it should adjourn the hearing to enable more detailed evidence to be obtained.
 - ii) In deciding what weight can be placed on undertakings as a protective measure, the court has to take into account the extent to which they are likely to be effective both in terms of compliance and in terms of the consequences, including remedies, in the absence of compliance.
 - iii) The issue is the effectiveness of the undertaking in question as a protective measure, which issue is not confined solely to the enforceability of the undertaking.
 - iv) There is a need for caution when relying on undertakings as a protective measure and there should not be a too ready acceptance of undertakings which are not enforceable in the courts of the requesting State.
 - v) There is a distinction to be drawn between the practical arrangements for the child's return and measures designed or relied on to protect the children from an Art 13(b) risk. The efficacy of the latter will need to be addressed with care.

- vi) The more weight placed by the court on the protective nature of the measures in question when determining the application, the greater the scrutiny required in respect of their efficacy.
62. With respect to undertakings, what is therefore required is not simply an indication of what undertakings are offered by the left behind parent as protective measures, but sufficient evidence as to extent to which those undertakings *will* be effective in providing the protection they are offered up to provide.

Child's Objections

63. The law on the 'child's objection' exception under Art 13 of the Convention is comprehensively set out in the judgment of Black LJ in *Re M (Republic of Ireland)(Child's Objections)(Joinder of Children as Parties to Appeal)* [2015] 2 FLR 1074 (and endorsed by the Court of Appeal in *Re F (Child's Objections)* [2015] EWCA Civ 1022). In summary, the position is as follows:
- i) The gateway stage should be confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.
 - ii) Whether a child objects is a question of fact. The child's views have to amount to an objection before Art 13 will be satisfied. An objection in this context is to be contrasted with a preference or wish.
 - iii) The objections of the child are not determinative of the outcome but rather give rise to a discretion. Once that discretion arises, the discretion is at large. The child's views are one factor to take into account at the discretion stage.
 - iv) There is a relatively low threshold requirement in relation to the objections defence, the obligation on the court is to 'take account' of the child's views, nothing more.
 - v) At the discretion stage there is no exhaustive list of factors to be considered. The court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available. The court must give weight to Convention considerations and at all times bear in mind that the Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly.
64. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are authentically the child's own or the product of the influence of the abducting parent, the extent to which they coincide or at odds with other considerations which are relevant to the child's welfare, as well as the general Convention.

DISCUSSION

65. Having considered the evidence in this case with care and having had regard to the helpful submissions made by Ms Renton on behalf of the father and Ms Wilson on behalf of the mother, I am satisfied that at the time the mother retained the children in England in February 2020 both of the children remained habitually resident in *this* jurisdiction and that, accordingly, the father's application under the 1980 Convention must be dismissed. My reasons for so deciding are as follows.
66. For habitual residence to be established, the position of each of the children must reflect some degree of integration in a social and family environment. It is not disputed that, prior to their departure to Austria in July 2019, both children were habitually resident in England and Wales. Can it be said that, following their arrival in Vienna, R and H achieved a degree of integration in a social and family environment such that their habitual residence moved from England and Wales to Austria? In my judgment, having regard to all the circumstances of this particular case, it cannot.
67. In considering the question of the children's habitual residence, the court must weigh up the degree of connection which the child had with the state in which he or she was resided before the move. In this case, R had resided in this jurisdiction since birth and for a period of 7 years. As I have noted, she attended school in this jurisdiction and had friends at school who she had known since nursery. R was born in this jurisdiction and is a British Citizen with a UK passport. Within this context, I am satisfied that as of July 2019 R had a deep connection with the United Kingdom established over a number of years since her birth. Whilst H is much younger than R and resided in this jurisdiction for only a number of months before travelling to Austria, in circumstances where the social and family environment of H is shared with those on whom she is dependent, I bear in mind that both her parents are British citizens, that H too was born in the United Kingdom and is a British Citizen with a UK passport. Within this context, I am satisfied that H too had a strong connection to this jurisdiction as of July 2019, albeit less so than R. As I have noted, it is not disputed that, prior to their departure to Austria in July 2019, both children were habitually resident in England and Wales.
68. In determining the question of each child's habitual residence, parental intention is relevant to the assessment, although not determinative. There is no requirement that there be an intention on the part of one or both parents to reside in the country in question permanently or indefinitely. Within this context, parental intent is only one factor, along with all other relevant factors, that must be taken into account when determining the issue of habitual residence.
69. In this case, with respect to parental intention I am satisfied on the balance of probabilities that at the time the mother and the children travelled to Vienna in July 2019 it *was* the intention of the mother that that be for a *trial* period. Whilst I accept that the father viewed the move as more permanent in nature, I am satisfied he was aware that the mother considered it to be a trial period. I am satisfied that this was the position having regard to the following matters.
 - i) The statement of the mother made to the police on 3 July 2020 *prior* to the father issuing proceedings under the 1980 Convention that "we tried to be a family and went to Vienna together I said I would try but wouldn't promise because he hadn't been good to me", which statement is consistent with statements after

issue of proceedings and to the police on 9 February 2021 with respect to the parents trying to save their relationship.

- ii) A trial period was entirely consistent with the highly unstable and volatile nature of the parents' relationship up to that date.
- iii) A trial period was further consistent with the mother having retained a home in the United Kingdom, there being no evidence that the tenancy she occupied, and which was held in the name of her father, was let out.

70. I accept that upon arrival in Austria the children were registered as residents and accordingly had a right of abode in that jurisdiction. However, a legal right of abode is but one factor for the court to consider. As the authorities make clear, it is the *stability* of a child's residence that is also relevant. Within this context, and on the particular facts of this case, I am satisfied that, whilst lawfully resident in Austria, the family and social lives of R and H were highly unstable and disrupted, militating against them achieving the requisite degree of integration in Austria required to bring to end their habitual residence in the England and Wales and establish their habitual residence in Austria
71. First, whilst I accept that R was enrolled in school in Austria, it is plain on the evidence before the court that here attendance at school was *very* irregular, to extent that the father was fined for R failing to attend school. Within the context of her sporadic attendance, and beyond mention of a single cousin, there is no cogent evidence before the court demonstrating that R became integrated within a friendship group amongst her peers, that she participated in school activities or activities with friends outside school. There is no evidence that R has spoken of missing friends or teachers from her time in Austria. Further, there is no evidence that at school R developed language skills in German.
72. Second, whilst the evidence before the court does establish that R and H were in the company of paternal family relatives, the evidence with respect to the family relationship most central to each child, namely that with their parents, once again demonstrates a seriously disrupted and chaotic situation. Having regard to the evidence summarised above, whilst R and H did spend some 6 months in Austria living with their parents, that period was characterised by acute domestic strife and instability.
73. Whilst the summary nature of proceedings under the 1980 Convention does not lend itself to making findings of fact, I am entirely satisfied that the evidence before the court demonstrates that whilst in Austria the children lived in a highly dysfunctional home, characterised by frequent arguments, domestic violence involving both parents (the father on occasion being domestically abusive to mother and the mother on occasion being drunk and under the influence of narcotics and physically abusive to father) and consequential disruptions to the children's routine (of which R's sporadic school attendance is an example). This chaotic situation resulted in the children's family life becoming the subject of investigation by the Austrian police and assessment by Austrian social services. I am satisfied that this situation would have further militated against the children's integration in a social and family environment in Austria.

74. Third, and within this context, I also have regard to the fact that the six month period in which the children were in Austria was not uninterrupted. After only 3 months in Austria the mother returned with the children to the United Kingdom. It is clear on the father's own evidence that the mother's intention at this time was not to return to Austria, albeit that ultimately she returned following negotiation involving the father's lawyers in Austria. I am satisfied that this additional disruption would, from children's perspective, have further militated against their integration in a social and family environment in Austria. Likewise, the children's separation from their mother for a period of six weeks following another violent incident in the family home on 6 November 2019 would, I am satisfied, have further disrupted any integration in a social and family environment that the children might otherwise have hoped to achieve following their arriving in Austria in July 2019. Within this context, I again note the conclusion of Austrian social services in November 2019 that R is "suffering under the circumstances".
75. Fourth, and again within the foregoing context, in addition to the high levels of domestic abuse and marital conflict in the family home in Vienna as set out above, I am also mindful of the evidence before the court indicating a high level of conflict involving the parents and some parts of the wider family, including an allegation by the father that he has been the victim of a stabbing at the hands of a relative in the family home, following an allegation of incest made by the mother. Whatever the truth regarding that latter allegation, the father's evidence of the assault on him speaks to an additional level of familial conflict and instability that I am satisfied would have further militated against R and H developing a degree of family and social integration whilst in the jurisdiction of Austria.
76. As I have noted, H is much younger than R and, within this context, her social and family environment is associated with those on whom she is dependent to a greater degree than is the case for R. Within this context, it is necessary to assess the integration of the parents in the social and family environment of the country concerned.
77. Within this context, on the evidence before the court I accept that the Father was well settled and integrated in Austria at the time the children were there and remains so. He has family in that jurisdiction, owns a business there and has strong links to the country more widely. Against this however, within the context I have summarised above, I am satisfied that the mother was not settled and integrated in Austria. The mother was not able to speak German, none of the mother's relatives lived in Austria, on each parent's case the mother's time in Austria was characterised by domestic arguments and domestic abuse, the mother herself conceding that on occasion she was aggressive by reason of her being in drink. Within this context, I am satisfied that the mother had only a superficial level of integration in family and social life during her time in Austria, which time as I have noted was interrupted by a return to England after 3 months with, on the father's evidence, an intention to remain there permanently. In addition, in circumstances where H does not appear to have been of an age to be in nursery and therefore would, I am satisfied, have had significant exposure to the unstable and insecure home life borne of domestic abuse and conflict that I have described above.
78. Finally, whilst in no way determinative of the question of habitual residence, I also bear in mind that both children were born in the United Kingdom, both are British Citizens and both hold UK passports. Further, from her statements to the Cafcass Family Court

Adviser, R clearly did not see Vienna as home and continued to view that concept as applying solely to London.

79. Having regard to the foregoing matters, I am satisfied that neither R nor H became habitually resident in the jurisdiction of Austria during the interrupted six month period they were in that jurisdiction between July 2019 and October 2019 and October 2019 and February 2020. As I observed in *SF v HL* [2015] EWHC 2891 (Fam), where the children's situation in the new country is unsettled, whether physically or emotionally, it will be harder to establish that the children have a degree of integration in a social and family environment, particularly in cases where the children have been in the environment in question for only a short period of time. In my judgment, the six month trial period (as I have found it to have been) that the children spent in Austria, interrupted half way through by a return to the United Kingdom in the company of a parent who intended that return to be permanent, and characterised on both parents' evidence by domestic abuse and high levels of inter-parental and wider familial conflict, alcohol and drug use, the involvement of police and social services and sporadic school attendance, was not sufficient to alter the habitual residence of either R or H from England and Wales to Austria having regard to the test I am required to apply, for the reasons I have set out. The conditions of each child's time in Austria were highly disrupted in both a familial and social context, militating against the necessary degree of integration in a family and social environment.

CONCLUSION

80. In conclusion, I am satisfied that as at the date the mother retained the children in the jurisdiction of England and Wales in February 2020 both children remained habitually resident in *this* jurisdiction. In the circumstances, the court must dismiss the father's application under the 1980 Hague Convention and it follows that it is not necessary for me to go on to consider the question of consent or the exceptions relied on by the mother under Art 13 of the 1980 Convention.
81. Moving forward, the stay with respect to the mother's application under Part II of the Children Act 1989 will need to be lifted in order that those proceedings can proceed to determine the dispute that subsists between the parents with respect to the best interests of R and H.
82. That is my judgment.