IN THE HIGH COURT OF JUSTICE FD21P00430

FAMILY DIVISION

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

IN THE MATTER OF R (A BOY) (aged 6) AND J (A BOY) (aged 4)

B E T W E E N:

CC Applicant Mother

and

ME Respondent Father

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published in its entirety

The Applicant Mother was represented by Ms Abida Huda (Counsel instructed by Creighton& Partners, Solicitors)

The Respondent Father was represented by Mr Edward Bennett (Counsel instructed by OliverFisher, Solicitors)

WRITTEN JUDGMENT OF HIS HONOUR JUDGE EDWARD HESS

(SITTING AS A DEPUTY HIGH COURT JUDGE)

(Handed down by email on 15th December 2021)

INTRODUCTION

1. This case relates to two children:-

   (i) R (now aged 6); and

   (ii) J (now aged 4).

   I shall refer to them individually as R and J or collectively as 'the boys'.

2. Their parents are:-

   (i) CC (now aged 25) (herein referred to as 'the mother'); and

   (ii) ME (now aged 28)(herein referred to as 'the father').

3. There is one other child of the parents, namely A (now aged 2). She lives with the mother and is not a subject child ofthis application. I shall refer to her as A.

4. The father is a Spanish/Colombian National. He was brought up in Spain and Spanish is his first language and he has limited English. He has been, and would like to be again, a professional American football player, but he currently works as a chef. He moved from Spain to live in Switzerland in 2013 and he has some family living in Switzerland, including his father and an uncle. He also has family living in England, including his mother, the paternal grandmother.

5. The mother is a Dominican Republic National and her first language is Spanish - she also speaks French, but has limited English. She has lived all her life in Switzerland and has family living in Switzerland, including her mother, the maternal grandmother. She has no connections with England.

6. The relationship between the parents began in either 2013 or 2014 (it matters not which for present purposes). It is common ground that they met in Switzerland and that they lived together in Switzerland throughout their relationship. Three children followed in 2015, 2017 and 2019 – all the children are Spanish Nationals and (commensurate with their respective ages) speak Spanish as a first language. By 2020 the parents' relationship had sadly deteriorated to breaking point. Both parties have blamed the other's conduct for this fact. I do not propose to attempt to determine the respective allegations as they have no significant effect on the dispute with which I now have to deal. The parties never married.

7. As at June 2020 the family was living in rented accommodation in Geneva, Switzerland. This is apparently a local authority property rented by the paternal grandfather and lawfully sub-let to the parents and it remains the home of the mother to this day. In late June 2020 the parents separated. There is a disagreement about exactly how this happened, but it is common ground that on a date between 21st and 25th June 2020 the mother moved out of the family home and went to stay with the maternal grandmother, taking A, but leaving the boys with the father. She says that the agreement was that she would return to take the boys on the following Sunday, 28th June 2020, but the father denies that there was any such arrangement. Whichever version is correct, it is common ground that on 28th June 2020, without giving advance notice to the mother, the father took air flights with R and J from Switzerland to England and that they have lived in England ever since. The boarding cards for this flight (copies of which are in the bundle) suggest that the boarding time for the flight was 12.20 pm (local time, so 11.20 am UK time) but the papers do not contain details

of when the flight took off or when it left Swiss air space or landed in England. At 7.07 pm on 29th June 2020, the father, now in England with the boys, texted the mother a photograph of the children on the plane and on that day or very soon after this the mother was made aware (following a difficult conversation between the father and the maternal grandmother) that the father had taken the children to stay with the paternal grandmother in London. The mother immediately demanded the boys' return, but the father refused. It has not been suggested before me that the mother acquiesced in these developments and the evidence strongly suggests that she was very unhappy about what had happened.

8. A striking feature of this case, though, is that, despite protesting early and clearly about the removal, the mother took a long time to take the step which, objectively, she could and should have taken within a matter of days or weeks after the events described above. It is fair to note that there was an ICACU induced referral to Newham Council in February/March 2021, but this does not really explain the mother's inaction.

9. It was not until 12.44 pm on Monday 28th June 2021 (one year to the day later than the day of the departure, and in all probability almost exactly a year to the minute as to when the plane took off from Swiss soil and/or left Swiss air space) that the mother issued her application in London under Child Abduction and Custody Act 1985 and the 1980 Hague Convention on the Civil Aspects of International Child Abduction (herein 'the Hague Convention'). The application has been through a number of procedural stages, including the direction of a CAFCASS report, such report being produced by Ms Kathleen Cull-Fitzpatrick dated 18th October 2021. Statements and pleadings, including statements relating to protective measures, have been filed by both parents, and both grandmothers have also filed statements. In due course the case came to be listed before me in the Royal Courts of Justice with a three day time estimate (13th to 15th December 2021). The case has been heard entirely remotely on the Teams platform. I am pleased to say that the video and audio quality encountered during the hearing has generally been good and it has not been suggested that the remoteness has prevented this from being a fair hearing.

10. The mother was represented before me by Ms Abida Huda (Counsel instructed by Creighton & Partners, Solicitors). The father was represented before me by Mr Edward Bennett (Counsel instructed by Oliver Fisher, Solicitors). I want to thank both Counsel for their clear and helpful approach to the case. Both parties have been very well represented before me.

11. I have heard oral evidence from the CAFCASS officer, Ms Cull-Fitzpatrick, subjected to cross-examination by both Counsel. By agreement between the parties the case was otherwise conducted on oral and written submissions.

PARTIES' POSITIONS BEFORE ME

12. Ms Huda on behalf of the mother seeks an order for the return of R and J to

Switzerland. She relies on Hague Convention Article 1 (*The objects of the present Convention are (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States*) and Article 3 (*The removal or the retention of a child is to be considered wrongful where…it is in breach of rights of custody attributed to a person…under the law in which the child was habitually resident immediately before the removal*).

13. Mr Bennett on behalf of the father concedes that the prima facie basis of intervention under the Hague Convention, i.e. that the case under Articles 1 and 3 is made out, but (notwithstanding an earlier wider defence) has argued just two points before me:-

    (i) he argues that the Hague Convention Article 12 defence of 'settlement' arises; and

    (ii) he argues that the Hague Convention Article 13 defence that return would involve a 'grave risk' of exposing the boys to 'physical or psychological harm' or otherwise placing them 'in an intolerable situation' also arises.

14. It is important to remember in this case, like every other case under the Hague Convention, the message pointed out by Mostyn J in *B v B* [2014] EWHC 1804 that a decision by the court to return a child is, no more or less, a decision to return a child for a limited period of time pending the court of his or her habitual residence making a decision on long-term residence. This is the very policy of the Hague Convention. This fact does not, however, detract from the strong views of the respective parties, in this case as in many others, held no doubt in the context of their mutual feeling that pursuing subsequent litigation in a country not of their choosing puts them to inconvenience and at a financial and possibly strategic disadvantage.

ARTICLE 12 DEFENCE

15. I shall start with the Hague Convention Article 12 defence – this Article reads in full as follows:-

    "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 paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

    Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child".

16. There has been a live dispute before me about the meaning of the expression "*at the date of the commencement of the proceedings…a period of less than one year has elapsed from the date of the wrongful removal".* In the context of the facts of this case, where the proceedings were issued right on the cusp of the one year mark, this dispute potentially makes a significant difference to the outcome because if the commencement of the proceedings was more than one year after the wrongful removal then the court has a discretion not to return the children if they have '*settled*' in the '*new environment'*, but if it was less than one year then (subject to an Article 13 defence) there is no such discretion and the court '*shall order the return of the children forthwith'*. The Hague Convention contains no discretion to extend the time limit in a meritorious case and no specific guidance on how the period of one year is to be calculated. Ms Huda argues that the mother had until the end of 28th June 2021 to make the application within one year and that she complied with that. Mr Bennett has argued that that the mother had until the end of 27th June 2021 to make the application within one year and that she did not comply with that.

17. The question thus arises: how is the one year to be calculated? When does it begin and when does it end? I want to thank Mr Bennett in particular for leaving no stone unturned in seeking out any helpful authority from the English courts, or elsewhere, whether specifically or only inferentially related to the Hague Convention, as to how the one year mark is to be calculated for these purposes. Perhaps surprisingly there is no authority within this jurisdiction dealing specifically with these questions, but a wider search has lead us to the following materials:-

(i) The persuasive decision of Kay J in the Family Court of Australian in *SCA v CR* [2005] Fam CA 1050 is perhaps the most on point. The decision was made on domestic Australian legislation reflecting the terms and effect of the Hague Convention, which for these purposes is not in my view materially different from the Hague Convention itself. On facts not dissimilar to those in the present case, but which concerned a flight out of the USA, Kay J decided that the period of one year started when the plane carrying the removed children crossed the frontier of the territory from which they were being removed (in that case 21st July 2004). He decided that it was the date of the event, not the precise time within the date, which mattered for these purposes. He applied an Australian statute of interpretation to the effect that "*where in an Act any period of time, dating from a given day, act or event, is prescribed or allowed for any purpose, the time shall, unless the contrary intention appears, be reckoned exclusive of such day or of the day of such act orevent*". Kay J concluded that to exclude the Article 12 settlement defence, the proceedings in that case had to be issued on or before 21st July 2005. In that case the proceedings had been issued on 21st July 2005 and the Article 12 settlement defence did not thus arise and he ordered the return of the children to the USA.

(ii) Although there is some analysis in the papers as to the precise time on 28th June 2020 that the father and the boys boarded the flight in Geneva, I have not been presented with information about the precise time the plane took off or crossed the Swiss frontier. If the one year period year was to be calculated by reference to times in minutes rather than in dates then it may have been necessary to

make further enquiries of when the plane set off and when it left Swiss air space; but neither Counsel has advanced the proposition that this question should be answered by reference to time rather than date. I agree with Mr Bennett's submission that theuse of the word 'date' rather than 'time' in Article 12 really decides this question. This view is indeed consistent with the Australian decision of Kay J above.

(iii) In the English decision of Macur J in *RS v KS* [2009] EWHC 1494, probably the closest the English courts have come to considering the issue, the way the facts were decided avoided the need to deal with the precise question which arises in this case.

(iv) In the setting of the commercial courts there is the decision of the Court of Appeal in *Zoan v Rouamba* [2000] 1 WLR 1509. In the lead judgment Chadwick LJ said:-

> *"Where, under some legislative provision, an act is required to be done within a fixed period of time "beginning with" or "from" a specified day it is a question of construction whether the specified day itself is to be included in, or excluded from, that period. Where the period within which the act is to be done is expressed to be a number of days, months or years from or after a specified day, the courts have held, consistently since Young v Higgon (1840) 6 M&W 49 , that the specified day is excluded from the period; that is to say, that the period commences on the day after the specified day. Examples of such an "exclusive" construction are found in The Goldsmith's Company v The West Metropolitan Railway Company [1904] 1 KB 1 ("the powers of the company for the compulsory purchase of lands for the purposes of this Act shall cease after the expiration of three years from the passing of this Act") and in In re Lympe Investments Ltd [1972] 1 WLR 523 ("the company has for three weeks thereafter neglected to pay"). In Stewart v Chapman [1951] 2 KB 792 ("a person ... shall not be convicted unless ... within fourteen days of the commission of the offence a summons for the offence was served on him") Lord Goddard, Chief Justice, observed, at pages 78–9, that it was well established that "whatever the expression used" the day from which the period of time was to be reckoned was to be excluded. Where, however, the period within which the act is to be done is expressed to be a period beginning with a specified day, then it has been held, with equal consistency over the past forty years or thereabouts, that the legislature (or the relevant rule making body, as the case may be) has shown a clear intention that the specified day must be included in the period. Examples of an "inclusive" construction are to be found in Hare v Gocher [1962] 2 QB 642 ("if within [the period of two months beginning with the commencement of this Act] the occupier of an existing site duly makes an application ... for a site licence") and in Trow v Ind Coope (West Midlands) Ltd [1967] 2 QB 899 ("a writ ... is valid ... for 12 months beginning with the date of its issue"). As Lord Justice Salmon pointed out in Trow v Ind Coope , at page 923, the approach adopted in the Goldsmith's Company case and Stewart v Chapman can have no application in a case where the period is expressed to begin on the specified date. He observed, at page 924, that "I cannot ... accept that, if words are to have any meaning, 'beginning with the date of its issue' can be construed to mean the same as 'beginning with the day after the date of its issue'".*"

Although this decision does not, of course, specifically relate to the Hague Convention, nor indeed to the precise wording within the Hague Convention, Article 12, I agree with Ms Huda that the propositions advanced by Chadwick LJ can properly be construed to cover the wording in the Hague Convention and persuasively place this case in the category of cases where "*the period commences on the day after the specified day".* The decision is, in effect, not dissimilar to the effect of the Australian statutory interpretation Act relied upon by Kay J in the decision referred to above. Mr Bennett has also drawn my attention to some passages from Benjamin on Sale of Goods, which suggests that "*there is no hard and fast rule as to whether the date, act or event is to be excluded or included*", but I have not been persuaded that these references should cause me to doubt the authority of the words of Chadwick LJ cited above.

(v) Mr Bennett has advanced some erudite general submissions about the way in which Article 12, being part principally of an international treaty rather than a domestic statute, should be construed. He has argued:

"Article 12, along with every other provision of the Convention, has to be interpreted in a manner that is autonomous to the Convention. As Lord Browne-Wilkinson explained in Re H (Abduction: Acquiescence) [1998] AC 72 § 881H: "An international Convention expressed in different languages and intended to apply to a wide range of differing legal systems cannot be construed differently in different jurisdictions. The convention must have the same meaning and effect under the laws of all Contracting States"... As the Convention is an international treaty, and as the UK has ratified the 1969 Vienna Convention on the Law of Treaties, regard should be had to Articles 31-2 of the Vienna Convention…What the Vienna Convention requires is that the Convention is interpreted purposively having regard to its objectives, and in a manner accepted internationally. A consequence of this is that when applying the Convention, courts should not attribute to any of its terms a specialist meaning which it may have acquired under domestic law, see Lowe & Nicholls (2nd edition) at 17.51-2. The objectives of the Convention are set out in the preamble and in Article 1. Whilst part of those objectives are to secure the prompt return of children to the jurisdiction of habitual residence, the importance to be given to a child's best interests permeates through it. For example: The Convention recognises that there are a number of circumstances where it is not in a child's best interests to be returned summarily. To quote the well known line of Ward LJ in Re T [2000] 2 FLR 192: "…the interests of the children in remaining here should not be sacrificed on the altar of comity between nation states". In the one year time limit in Article 12 itself, see Lord Hughes, giving the judgment of the majority in C (Children) [2018] UKSC 8, a case concerning repudiatory retention, § 47: "But it is a mistake to think of the 12 month period as a limitation period, of the kind designed in Limitation Acts to protect a wrongdoer from claims which are too old to be pursued. It is not a protection for the wrongdoer. Rather, it is a provision designed in the interests of the child. It operates to limit the mandatory summary procedure of the Convention to cases where the child has not been too long in the destination State since the wrongful act relied on. Where it applies, it does not prevent a summary return; it merely makes it discretionary". By parity of reasoning, the passage applies, with equal

force, to left behind parents issuing proceedings very late. In the same way that Convention is designed to have children's best interests at its centre, ambiguities in evidence or in interpretation must be resolved in the child's favour. If there is an ambiguity over, say, the twelve month limit, it must be resolved in the child's favour through finding that it has been crossed. It would be artificial, and to import too much of a limitation act type character, to the provision, where a child has been in a jurisdiction for so long as to make the notion of a 'hot pursuit' redundant….It would be artificial to exclude from the time period the very date upon which the stopwatch is started. A child potentially starts settling from the moment of a wrongful removal, not from the next day. If, say, the wrongful removal took place at 1am, it makes no sense to exclude the other 23 hours of the day before starting the clock. Such an interpretation prejudices the child, unlike F's interpretation, which caters for it. This provision, along with all other aspects of the Convention, is geared towards the child and what is happening to it, and what it is experiencing, not the parent…as alluded to above, to the extent that the aids to interpretation of the Convention do not assist, there is no English procedural rule or statute relevant, and there is ambiguity, these have to be resolved in the child's interests in favour of the 12 month period being made out. The court ought not to sacrifice those on the altar of technicality, not least because the court is not concerned with a pure 'limitation period' in the civil sense."

Whilst I concur with the general proposition that Article 12 should be construed in such a way that "*ambiguities…in interpretation must be resolved in the child's favour"* I do not myself find this proposition helpful in determining whether or not to count the day of the event in the calculation of the one year period. Further, in the absence of a generally acknowledged international guidance on this point it seems to me that the court should properly take into account domestic interpretative aids such as the Court of Appeal decision in *Zoan v Rouamba* (supra), just as Kay J took into account the Australian statutory interpretation Act in the case referred to above.

(vi) I have also discussed with Counsel whether FPR 2010 Rule 2.9(5) has any application here. Ms Huda argues that it does. Mr Bennett argues that it does not,drawing attention to the fact that the rule does not refer to the interpretation of statutes, merely rules, practice directions or orders of the court. This rule reads: "*Computation of time…2.9(1) This rule shows how to calculate any period of time for doing any act which is specified (a) by these rules; (b)by a practice direction; or (c) by a direction or order of the court…(5) When the period specified (a) by these rules or a practice direction; or (b) by any direction or order of the court, for doing any act at the court office ends on a day on which the office is closed, that act will be in time if done on the next day on which the court office is open*." Whilst I consider Ms Huda's point of view to be arguable, I am inclined to think that Mr Bennett is correct about this, so that when (as in the present case) a period of one year ends on a Sunday an application made on the following Monday is out of time so that in practice an applicant needs to make the application on the preceding Friday.

(vii) The judgment of Thorpe LJ in *Cannon v Cannon* [2004] EWCA Civ 1330 authoritatively makes clear that the start date should not be extended by any period of concealment by the removing parent: "*I would not support a tolling*

rule that the period gained by concealment should be disregarded and therefore subtracted from the total period of delay in order to ascertain whether or not the 12 month mark has been exceeded".

18. Having considered all of these materials I have reached the following general conclusions:-

    (i) The measurement of the period of one year for the purposes of Article 12 starts on the date (not the time) when the removal took place. I do not propose to address here the complicating factor where the date was different (because of international date lines) as between the two jurisdictions concerned as it does not arise in the present case.

    (ii) If the removal took place by the child concerned being taken on a flight out of the country of habitual residence then the relevant date is the date at the moment that the flight concerned crossed the frontier to leave that country.

    (iii) For the purposes of calculating the period of one year, the date of removal should be excluded.

    (iv) If the end date is a date when an application cannot be issued (e.g. it is a weekend) then the one year period will <u>not</u> be extended to the next working day.

19. Applying these conclusions to the facts of this case I find that the children were removed on 28th June 2020 and the period of one year for the purposes of Article 12 ended at the end of the day on 28th June 2021. Accordingly, the mother's application having been made in the course of 28th June 2021, it was within the one year period and therefore the Article 12 'settlement' defence does not arise.

20. I have been invited by Counsel, however, to consider the question of settlement (whatever my decision on the one year issue) and I propose to do so.

21. In doing so I should say that I have been addressed by Counsel on the meaning of the word 'now' in Article 12. There appears to be a difference of view between those judges who assert that 'now' means the date of the application (in the present case 28th June 2021) or that 'now' means the date of the hearing (in the present case December 2021). Perhaps the leading articulation of the first view is that of Bracewell J in *Re N (Minors)(Abduction)* [1991] 1 FLR 413. A recent and leading articulation of the second view is that of Mostyn J in *ES v LS* [2021] EWHC 2758. I find myself more persuaded by Mostyn J'sarguments in favour of the second view, but in the present case I do not think there is a material difference between the children's state of settlement as between June 2021 and December 2021 and so the question is academic.

22. I have also been addressed on the proper interpretation of the expression 'settled in its new environment' in Article 12. I propose to follow the decision of Thorpe LJ in

Cannon v Cannon [2004] EWCA Civ 1330 in this respect, where he said:

"*…A broad and purposive construction of what amounts to "settled in its new environment" will properly reflect the facts of each case, including the very important factor of concealment or subterfuge that has caused or contributed to the asserted delay….I would unhesitatingly uphold the well-recognised construction of the concept of settlement in Article 12(2): it is not enough to regard only the physical characteristics of settlement. Equal regard must be paid to the emotional and psychological elements."*

23. I want to say that this is not a case where concealment or subterfuge play any part. The mother was aware of the whereabouts of the children (in broad terms at least) very soon after their removal. In so far as there has been a delay in this case arriving at a final hearing this is for the most part the consequence of the mother's long delay in issuing her application (albeit just within the one year period as I have found). She has sought to explain the delay by reference to her not really understanding the system and also that those advisers from whom she initially sought advice not really giving her the correct advice, but the explanation is not wholly convincing or satisfactory. As a result the father has established the children in suitable accommodation and schooling – they have now attended schools for four academic terms, along time in the life of the child. There is, in my view, no real doubt that they are physically settled, but Thorpe LJ's words (see above) require a consideration of the emotional and psychological elements of their settlement.

24. In this context I have had the benefit of reading the CAFCASS report of Ms Cull-Fitzpatrick and of hearing her full oral evidence. I found her to be a compelling witness who had given careful thought to the issues involved and dealt with questions put to her convincingly and thoughtfully. Her overall conclusions, which were underlined and strongly maintained by her oral evidence, can perhaps be encapsulated in the following passages from her written report of 18th October 2021:-

"In meeting R and J, I was mindful of their young age, their lack of knowledge and understanding about the current proceedings and the degree to which they would be able to communicate with me and convey their wishes and feelings. Mr E's confirmed that he had previously spoken to the children about my visit. It quickly became clear however that R and J were unable to express any memories of living in Switzerland, as a place. Further to this, during the time that I spent with the children they were most interested in talking of things that were important to them, showing me their home and play. All of which was not unusual giventheir young ages.

R and J were both keen to talk about their life in London, especially their nursery/school. This was evidently somewhere that they both enjoy, and they proudly told me their teachers names. When I tried to explore what life was like when they lived with their mother, R whispered in my ear 'my mum has a boyfriend' but this is all he said. When trying to explore their wider family, Ry dismissed my questions by saying that family was boring, and he didn't want to talk or draw about that. When pushing to explore it further, R said that he did have a sister and when I asked what her name was, he went out of the room to his father and came back, telling me hername was A.

Given that I felt I had gained limited insight into the family circumstances from the

children's perspective, I contacted the school for more information and to see if they would be able to assist. R's teacher undertook a short whole class lesson on families. It was noticed that R was uncomfortable when his class were reading the 'mum' book but when they were reading the 'dad' book, he had lots of things to say and his face lit up. R during the lesson initially said that he didn't have a mum but later said that he did but that she was not here, she is taking care of his sister. R said that his mum used to give him chocolate and never gave him showers, appearing to view both negatively. When drawing who was important to R, he drew his father and grandmother.

When I tried to explore with ME why he had to leave so urgently, he explainedthat he didn't want to remain in Switzerland because the relationship had ended. It does appear that at this point, emotions were heightened given the nature of the situation and from what ME told me, it appeared that his decision to leave Switzerland urgently was a way of prioritising his own needs. Within this situation, ME has not demonstrated that he was prioritising the needs of the children, nor considering the short term and long-term implications. Initially for the children this must have been confusing because they are experiencing the loss of their mother, sister,maternal family as well having to comprehend a change in environment, home and having to learn a new language. ME says that he loved CC but when speaking about her, he showed little regard towards her.

When I asked if they remembered living in Switzerland with their mother, R said no and they both continued drawing. It was evident that the children remember livingwith their mother, however, they did not have any memories of Switzerland as a placewhich is not surprising given that R was 4 years old, and J was 2 years old when they left.

Following the time that I spent with the children I did not get a sense that either held strong wishes or feelings in respect of living in either Switzerland or England, therefore their views cannot be considered an objection to a potential return. Given their ages and stages of development they rely on their parents to make decisions on their behalf and with their parents help, they are capable of managing change. Though, it is important to recognise that R and J have adapted to family life since moving to England which has involved them living with their father and grandmother; attending school which is taught in the English language and developing friendships.

When considering R and J's physical settlement, they have now lived in England for 16 months. They have continued to reside with their father, paternal grandmother and they consider their current accommodation to be their home. They have stable and appropriate accommodation; ME is employed, and the family are in receipt of benefits. The children are registered with a local GP, are in receipt ofsupport from the generic health services and are accessing the necessary community resources. From my observation and through the feedback from the nursery/school, R and J appear to have a close relationship with ME and their paternal grandmother. They have an established school life and their experiences of school in England are positive. Prior to them joining their schools in England, the children had not previously attended an educational or nursery provision in Switzerland. R and J appear to be supported in attending school, however, Inote that their attendance has dropped this academic term to 75% (R) and 66.7% (J). Although I would view this as considerably low, the school did not raise any concerns, stating that it was due to the children being unwell.

The day-to-day life of the children therefore appears to be settled within England, and the primary relationship with their father contributes to both their emotional and

physical settlement as does the sense that this country is now their home. However, when turning to their psychological settlement, R and J have experienced the separation and loss of their mother, sister and maternal family. Prior to them leaving Switzerland, they were not able to say goodbye to their family nor would they have been able to comprehend what was to happen next. R and J had been residing with their mother, father and sister and had regular contact with their maternal family. Although R and J have continued to have contact with theirmother and sister via video call, it appears that at times this has been inconsistent. Additionally, video calls as a means of maintaining a meaningful relationship at Rand J's age can be difficult because their attention spans and level of conversation is limited.

Within the piece of work completed by the school, it appeared that R has a loving relationship with his father, with his face being described to lit up when he was discussing his dad. However, when discussing mum, R initially said that he didn't have a mum but later when on to say that he did and that she was looking after his sister. It is sad that R had initially said that he did nothave a mother. R may currently be feeling a sense of abandonment and anger towards his mother. R feelings towards his mother and the situation are likely to have been compounded by his lack of understanding of the reasons for this, and the absence of receiving reassurance from her in person.

ME does not speak of CC positively, especially in respect of her parenting and CC shared that during a video call, R had asked her why she didn't love him anymore. R and J will have undoubtably picked up on their father and grandmother's apprehension, via the emotional connection that they have with them and this will have been amplified for R, through his role of interpreting within the home. For example: during my visit to the home, ME was noticeably nervous and apprehensive, and this is something the children would have been receptive to.

Therefore, whilst I consider that R and J are physically and emotionally settled in England, in my view they are not psychologically settled. The lack of the presence of their mother, sister and maternal family undermines their ability to settle within this jurisdiction. The impact on R and J ofthe loss of their mother's involvement in their daily life cannot be overlooked, especially given the absence of any direct with her over the course of the 16 months. In my view ME has contributed to the negative and absent view that R holds of his mother.

Furthermore, R and J have been separated from their younger sister, A. All three children are relatively close in age and prior to their parent'sseparation they had an opportunity to grow and develop alongside each other. Whilst it appears that in June 2020, the family separated from my understanding thiswas a temporary separation whilst the parents acclimatised to the ending of their relationship. The father's actions in removing R and J from Switzerland, has prevented them from benefiting from having regular interaction with their sister. The sibling relationship is one of the longest held relationships and it provides us with a sense of identity and belonging. Given the sibling's ages, this is an important stage within the development and formation of their relationship. R and J's separation from A, further affects their ability to be psychologically settled withinEngland.

As noted above, whilst I consider that R and J are physically and emotionally

settled in England, the ability to consider them fully settled is undermined by the fact that I do not consider them to be fully psychologicallysettled here."

25. Overall, I take the view that this a fairly evenly balanced case on the question of 'settlement'. On the one hand the children are from many points of view – housing, schooling, language - settled in England, no doubt assisted by the passing of time since the removal on 28th June 2020. On the other hand, both the school and Ms Cull-Fitzpatrick have picked up a real sense of psychological absence of settlement arising from their abrupt departure from their mother and sister and the absence of any direct contact since then, probably fueled by a confusion as to their feelings for their mother and how their father deals with those feelings. I found the evidence of Ms Cull-Fitzpatrick on this point to be persuasive and I agree with her overall conclusions and analysis.

26. On balance, for the reasons set out above, I have reached the conclusion that the children cannot be considered as being 'settled' in their environment in England within the meaning of Article 12 or generally.

ARTICLE 13 DEFENCE

27. The Hague Convention, Article 13 reads in full as follows:-

"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."

28. The important part of this for my purposes is this. I am not bound to order the return of the children if the father has established that : "*there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation",* i.e. the father runs an Article 13b defence.

29. Mr Bennett has drawn my attention to a recent judgment by Mr Teertha Gupta Q.C., sitting as a Deputy High Court Judge, namely *BS (a Child) (Child abduction)* [2021] EWHC 2643 which provides a succinct summary of the relevant legal landscape in relation to Article 13b:-

"The relevant case Law that I have considered on Article 13(b) is as follows…In Re E (Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 AC 144…Lady Hale and Lord Wilson JJSC held that the following approach should be undertaken when considering whether the Art. 13(b) exception is made out: "First: the burden of proof lies with the "person, institution or other body" which opposes the child's return. It is for them to produce evidence to substantiate one of the exceptions to the civil standard of proof. Second, the risk to the child must have reached such a level of seriousness as to be characterised as "grave". And Third the words "physical or psychological harm" are not qualified. However, they 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".... Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate". Fourth, article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. Once this evaluation is made:

– where the court is not satisfied that the evidence presented / information gathered, including in respect of protective measures, establishes a grave risk, it orders the return of the child;

– where the court is satisfied that the evidence presented / information gathered, including in respect of protective measures, establishes a grave risk, it is not bound to order the return of the child, which means that it is within the court's discretion to order return of the child nonetheless."

30. Further, in *Re W* [2018] EWCA Civ 664 the Court of Appeal suggested that the court should consider the allegations and protective measures in the round, per Moylan LJ: "*The question of whether Article 13(b) has been established requires a consideration of all the relevant matters, including protective measures*". In considering protective measures offered and in deciding what weight can be placed on them, "*the court has to take into account the extent to which they are likely to be effective. This applies both in terms of compliance and in terms of consequences, including remedies, in the absence of compliance*".

31. Further, Mr Bennett also seeks to rely upon the authority of *RS v KS* [2009] EWHC 1494 (Fam) to the effect that, even where proceedings have been issued within one year, undue delay by the left behind parent and settlement of the children could constitute the basis of an argument that the child would be exposed to an intolerable situation, under Article 13b, if summarily returned to the country of habitual residence.

32. Although the statements in the case suggested that the Article 13b defence might relate to certain conduct and behavioural issues alleged by the father against the mother, these have not been pursued at the hearing before me. This is perhaps not surprising in that the father appears to have been content to leave A in the mother's sole care since June 2020 and there is nothing in the CAFCASS report to suggest that there is anything amounting to a grave or even a significant risk to the boys arising from these matters.

33. The father has chosen to pursue his Article 13b claim before me as really arising from the absence of a satisfactory practical plan (in terms of schooling, housing for the father and children in Switzerland, financial support, health care and flight details) for how the children might be cared for if they had to return to Switzerland. It has to be said that the written statements from the mother in this respect are rather vague and non-committal and rather lacking in supporting documentation. That having been said, in the course of the hearing these issues have been worked on and the broad plan now offered by the mother is as follows:-

    (i) She will move out of the former family home, which she still occupies, and allow the father and the boys to move back into it and instead move back into the maternal grandmother's house. She believes that the paternal grandfather would regard this as a satisfactory solution and the father has not suggested otherwise. She accepts that, in the first instance at least, and until any different order from the courts in Switzerland, the boys will live with the father.

    (ii) She will make immediate plans for the boys to be enrolled in the school in Geneva which it was planned for R to attend before the events of June 2020. I was told that the mother had already made contact with the school andhad been informed by the school that they could attend that school, but I havenot seen confirmation from the school of this fact.

    (iii) She will take steps to commence whatever proceedings are necessary in the local court to determine where the children should live in the longer term.

    (iv) She will take steps to ensure that the boys have appropriate health insurance cover on their return to Switzerland.

    (v) In so far as she has an option under the laws of Switzerland, she will give an undertaking not to support the prosecution of the father in the criminal courts in Switzerland for the June 2020 abduction.

34. Given that these commitments are now on offer from the mother, and provided they are properly and clearly set out in writing with appropriate signatures attached (with propersupporting documentation from the school), and given that it is my understanding of thefather's position that if the children are to be returned to Switzerland he would choose to go with them rather than stay in England himself, it is my view that the father's case under Article 13b cannot be made out at anything like the requisite level suggested in the legal tests referred to above. No doubt the move of school and home for the childrenwill be a challenge, but I do not think that it could be

said to be ‘intolerable’ for them (in this respect I agree with the view to this effect expressed by Ms Cull-Fitzpatrick). The children are in all probability young enough to adapt to this sort of change, just as they were when they arrived in England and adapted to an English-speaking school andthe situation might very well be ameliorated by their regaining contact with their mother and sister in addition to having the ongoing care of their father.

35. I recognise that this new arrangement will create a financial challenge to the father, but it falls well short of creating an intolerable situation for the boys and this is in my view certainly no greater a challenge than would be involved in the mother trying to stay in England to pursue her case in the English courts.

CONCLUSIONS

36. For all the reasons set out above I have reached the conclusion that I should accede to the mother’s application for me to order the return of the children to Switzerland.

37. I acknowledge that the normal order in these cases is for the prompt return of the children, typically in 14 days or so, but I have been persuaded by Mr Bennett that on the facts of this case I should allow a little more than the usual period for the return to be effected. There are a number of reasons for this. First, it may take a little while to execute the documents recording the commitments by the mother referred to above, in particular to sort out for definite the schooling and housing situation. Secondly, given the delay in making the application, and the obligations (in terms of employment and rent) that the father has not unreasonably taken on in England, he may reasonably need a period of time to unpick them. Thirdly, it is reasonable to allow him some time to seek and hopefully find some work in Switzerland (with an appropriate visa if necessary) to replace that which he will be losing in England to enable him to fund normal living expenses. Fourthly, it seems to me reasonable to allow the children to have as orderly a move of school as is possible and also perhaps to have increasing amounts of indirect contact with their mother (possibly direct contact if she was able to come briefly to England for that purpose). Fifthly, it may take a little while to sort out and fund flights and Covid arrangements – for avoidance of doubt (absent any agreement to the contrary) my view is that the parents should pay one half each of any flight costs incurred on behalf of the children, but pay themselves for any flights taken by themselves respectively. In the circumstances I think it is reasonable for me to set a time limit on the return as being the beginning of the February 2022 school half term week.

38. I am sending this judgment to Counsel on the afternoon of 15th December 2021 on the basis that the case will be listed before me remotely at 2.00 pm on 16th December 2021 and on the basis that the interpreters will attend at that time fully to translate this judgment to the parties and that I will join the link at 3.00 pm, by then hopefully presented with an agreed order consequent upon this judgment with the parties fully aware of the contents of my judgment. I propose to place a suitably redacted version of this judgment on BAILII.

His Honour Judge Edward Hess
Sitting as a Deputy High Court Judge
15th December 2021