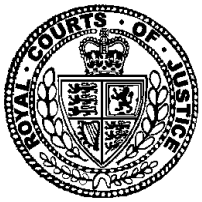

Neutral Citation Number: [2022] EWHC 396 (FAM)

Case No: FD21P00683

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985
INCORPORATING THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION
IN THE MATTER OF IK (A CHILD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 February 2022

Before :

MR JUSTICE PEEL

- -

Between :

VK

Applicant

- and -

LK

Respondent

- -
- -

Michael Gration (instructed by **Dawson Cornwell**) for the Applicant
Anita Guha (instructed by **Goodman Ray**) for the Respondent

Hearing dates: 2, 3 and 10 February 2022

Approved Judgment

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

.....

MR JUSTICE PEEL

Mr Justice Peel :

1. The child who is the subject of these 1980 Hague Convention proceedings is 7 years old; I shall refer to him as "Z". The application was issued by his mother ("M") on 2 November 2021, seeking his return to Russia.

2. Z's parents married in 2012 and separated in 2016, about 1 year after he was born in January 2015 in Russia, where the family lived. Thereafter, he was in the primary care of M in Russia, although he maintained contact and a relationship with his father ("F"). The post separation relationship between the parents seems to have been reasonably good. In 2019, F formed a relationship with a new partner, whom he married in May 2019. At about that time, they relocated to England under the EU Settlement scheme and have lived in London ever since.

3. On 24 July 2021, F brought Z from Russia to London. Until then, Z had lived all his life in Russia. There is no doubt that M did not oppose Z travelling to England with F. The question is whether it was for a short, temporary trip of 2 months or so, ending on or about 31 August 2021 (as M asserts) or a relocation with F for a period of 3 years (as F asserts). Central to the issue is a notarised document dated 15 April 2021 pursuant to which, so F submits but M denies, M agreed to Z leaving Russia to live with F in England until 1 June 2024.

4. F defended the 1980 Hague Convention application on the basis of consent and/or acquiescence pursuant to Article 13(a). The burden of proving these defences lies on F. Counsel confirmed in closing that acquiescence was very much a secondary case.

5. There is a further issue as to whether Z was habitually resident in Russia at the time of the alleged wrongful retention which M says was on or about 31 August 2021; if not, the 1980 Hague Convention application falls away by reason of Article 3 thereof. The burden of establishing habitual residence in Russia lies on M.

6. I bear in mind the dicta of Mostyn J **in FE v YE [2017] EWHC 2165 (Fam), [2018] 2 WLR 200**:

> "14. It is therefore important to recognise that the nature of the relief which is granted under the 1980 Convention is essentially of an interim, procedural nature. It does no more than to return the child to the home country for the courts of that country to determine his or her long-term future. The relief granted under the Convention does not make any long-term substantive welfare decisions in relation to the subject child. If one were to draw an analogy with a financial dispute the relief is akin to a freezing order coupled with a direction that the assets the subject of the dispute be placed within the jurisdiction of the *forum conveniens*.
>
> 15. It is for this reason that the procedure for a claim under the 1980 Convention is summary. Oral evidence is very much the exception rather than the rule. The available defences must be judged strictly in the context of the objective of the limited relief that is sought. Controversial issues of fact need not be decided."

7. I have to say that I have been appalled by the sheer weight of documentation in what are supposed to be summary proceedings. M has filed 6 statements, F 4. Some of the statements were served unreasonably late; one working day before the hearing, M

provided a 92 paragraph statement with numerous exhibits. The bundle far exceeds that which was permitted by case management orders or the Practice Direction. My admittedly relatively limited experience on the bench of Hague Convention cases is that they are becoming increasingly unwieldy and unfocused, with lengthy statements far beyond that which is proportionate (and not subject to any specific court orders, guidance, or practice direction to impose page limits), and an increasing reliance on oral evidence. It cannot be right for proceedings, which should be determined summarily within a matter of weeks, to become bogged down by apparently unlimited witness evidence, written and oral, where every minute detail is advanced. The effect is that cases requiring swift disposal are treated as if they are full blown fact-finding and/or welfare hearings, but shoehorned into inadequate time estimates. Practitioners in this specialist field should adopt a more limited and targeted approach to the case. My personal view is that Hague Convention cases would benefit from updated practice guidance, limiting the length of narrative statements and position statements, addressing the use of oral evidence, and reinforcing bundle limits.

8. Counsel flagged up in their Opening Notes that I might be expected to receive oral evidence from no fewer than 4 witnesses; in the end I heard from 3 (M, F and F's wife), somewhat against my better judgment. In **ES v LS [2021] EWHC 2758 (Fam)** Mostyn J deplored the tendency to adduce oral evidence in almost every 1980 Hague Convention case, and outlined why ordinarily there should be no oral evidence given. I understand that the decision has attracted some controversy, but I agree with Mostyn J. Conventionally, no oral evidence is received in cases where Article 13(b) is pleaded. As Mostyn J said, there is no obvious reason why that defence generally proceeds without oral evidence, but other defences, including consent, proceed with oral evidence. Nowadays, there is usually placed before the court a plethora of emails, text messages, WhatsApps and the like which enable the judge to see real-time documentation, in chronological form. When the court is required to exercise its summary jurisdiction within the set criteria of the Hague Convention, it seems to me that usually such material (and any other written evidence supplied) will enable the court to do so. Contemporaneous documentation of this nature is likely to be the most valuable evidence for the court. I am confident that in this case, had I not received oral evidence but confined myself to the written narrative evidence, documentation, and oral submissions, I would have reached the same decision.

Progress of the proceedings

9. On 22 September 2021 M, who had arrived in England on 20 August 2021, and had spent periods of contact time with Z who was at that time in F's care, did not return Z to F at the end of a contact session. On 24 September 2021, F sought and obtained various Tipstaff orders which were served on M on 30 September 2021.

10. On 28 September 2021, M made accusations to the police (based on what she has allegedly been told by Z) that F had been responsible for physical abuse against Z, including locking him in a loft. A social services assessment dated 17 December 2021 concluded that Z may be being "coached" by M and there was nothing concrete during work carried out with Z to explore the disclosures further. No major concerns were raised about F's care of Z. I cannot make any findings about this matter, which in any event is largely irrelevant to the determination which I must make. For the avoidance of doubt, these allegations do not affect my view of the case. A Cafcass Officer, Ms Demery, prepared a report for the court although I am not entirely clear why she was

asked to do so, given that child objections form no part of F's defence to the 1980 Hague Convention application. Ms Demery referred to the possibility of Z being influenced by his mother, and it is not possible to conclude that his wishes and feelings are his own. The impression I have of this young child is that he is, unfortunately, caught up in the middle of parental conflict which is highly detrimental to his welfare.

11. Having removed Z from the care of F, M did not permit any contact between them until 15 October 2021, and then only because the court made various orders in respect thereof. This was poor conduct by her.

12. F criticises M for her actions including not returning Z to him on 22 September 2021, preventing contact, concealing Z's whereabouts from him, attempting to remove him clandestinely, and raising allegations of abuse. There is much force in F's complaints, although they do not directly affect the issues of consent and acquiescence, and I take the view that they were borne of anger and frustration at what she perceived as being thwarted in her entitlement to take Z back to Russia. If anything, arguably, her actions were inconsistent with the suggestion that she had acquiesced in the manner asserted by F.

13. Hearings took place on 4 October 2021, 14 October 2021, and 5 November 2021; the latter was intended to be the final hearing but had to be adjourned because M issued her Hague Convention application 3 days beforehand. Case management was hampered by M raising issues which were not well founded in law. F criticises M for her conduct of the litigation, with, again so it seems to me, some justification. It was only when she applied, on 2 November 2021, for a return order under the 1980 Hague Convention that the court was able to apply structure to the progress of the case.

14. Much of the evidence presented by each party consists of their views as to the respective welfare arrangements in Russia or England, and the parenting capacity of each parent. These, in my judgment, are not for me to consider. My determination is based strictly on the applicable principles of the Hague Convention. Welfare matters will be for another day.

Consent-the Law

15. The Article 13(a) defence of consent has recently been considered by the Court of Appeal in **Re G (Children) [2021[EWCA Civ 139; [2021] 2 WLR 1013; [2021] 2 FLR 972,** per Peter Jackson LJ:

> "23. Article 13 of the Convention provides exceptions to the obligation under Article 12 to order the return forthwith of a child who has been wrongfully removed from the place of his or her habitual residence. One exception is consent:
>
> > "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… had consented to or subsequently acquiesced in the removal or retention; …"
>
> 24. Consent is an exception that is infrequently pleaded and still less frequently proved. The applicable principles were considered by this court in *Re P-J (Children) (Abduction: Consent)* [2009] EWCA Civ 588 [2010] 1 WLR 1237,

drawing on the decisions in *Re M* (*Abduction*) (*Consent: Acquiescence*) [1999] 1 FLR. 174 (Wall J); *In re C (Abduction: Consent)* [1996] 1 FLR 414 (Holman J); *In re K (Abduction: Consent)* [1997] 2 FLR 212 (Hale J); and *Re L (Abduction: Future Consent)* [2007] EWHC 2181 (Fam); [2008] 1 FLR 914 (Bodey J). Other decisions of note are *C v H (Abduction: Consent)* [2009] EWHC 2660 (Fam); [2010] 1 FLR 225 (Munby J); and *A v T* [2011] EWHC 3882 (Fam); [2012] 2 FLR 1333 (Baker J).

25. The position can be summarised in this way:

(1) The removing parent must prove consent to the civil standard. The inquiry is fact-specific and the ultimate question is: had the remaining parent clearly and unequivocally consented to the removal?
(2) The presence or absence of consent must be viewed in the context of the common sense realities of family life and family breakdown, and not in the context of the law of contract. The court will focus on the reality of the family's situation and consider all the circumstances in making its assessment. A primary focus is likely to be on the words and actions of the remaining parent. The words and actions of the removing parent may also be a significant indicator of whether that parent genuinely believed that consent had been given, and consequently an indicator of whether consent had in fact been given.
(3) Consent must be clear and unequivocal but it does not have to be given in writing or in any particular terms. It may be manifested by words and/or inferred from conduct.
(4) A person may consent with the gravest reservations, but that does not render the consent invalid if the evidence is otherwise sufficient to establish it.
(5) Consent must be real in the sense that it relates to a removal in circumstances that are broadly within the contemplation of both parties.
(6) Consent that would not have been given but for some material deception or misrepresentation on the part of the removing parent will not be valid.
(7) Consent must be given before removal. Advance consent may be given to removal at some future but unspecified time or upon the happening of an event that can be objectively verified by both parties. To be valid, such consent must still be operative at the time of the removal.
(8) Consent can be withdrawn at any time before the actual removal. The question will be whether, in the light of the words and/or conduct of the remaining parent, the previous consent remained operative or not.
(9) The giving or withdrawing of consent by a remaining parent must have been made known by words and/or conduct to the removing parent. A consent or withdrawal of consent of which a removing parent is unaware cannot be effective."

16. Should the defence be established, and the gateway to a return order opened, the discretionary exercise is then engaged. Peter Jackson LJ continued:

34. "In consequence of his conclusion on consent, the Judge was not bound to order the summary return of the children to Romania. As noted above, he directed himself to the leading case of *Re M (Children)*. That was a settlement case in which Baroness Hale surveyed discretion in the context of the Convention generally, with some remarks about the approach to its exercise in the context of the different exceptions.

"39. Thus there is always a choice to be made between summary return and a further investigation. There is also a choice to be made as to the depth into which the judge will go in investigating the merits of the case before making that choice. One size does not fit all. The judge may well find it convenient to start from the proposition

> that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there. A case against his doing so has to be made. But the weight to be given to that factor and to all the other relevant factors, some of which are canvassed in *Re J*, will vary enormously from case to case. No doubt, for example, in cases involving Hague Convention countries the differences in the legal systems and principles of law of the two countries will be much less significant than they might be in cases which fall outside the Convention altogether.
> 40. On the other hand, I have no doubt at all that it is wrong to import any test of exceptionality into the exercise of discretion under the Hague Convention. The circumstances in which return may be refused are themselves exceptions to the general rule. That in itself is sufficient exceptionality. It is neither necessary nor desirable to import an additional gloss into the Convention.
> …
> 42. In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the Contracting States and respect for one another's judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the Contracting States.
> 43. My Lords, in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare. I would, therefore, respectfully agree with Thorpe LJ in the passage quoted in para 32 above, save for the word "overriding" if it suggests that the Convention objectives should always be given more weight than the other considerations. Sometimes they should and sometimes they should not.
> 44. That, it seems to me, is the furthest one should go in seeking to put a gloss on the simple terms of the Convention. As is clear from the earlier discussion, the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will vary enormously. The extent to which it will be appropriate to investigate those welfare considerations will also vary. But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be."
> 46. By way of illustration only, as this House pointed out in *Re D (Abduction: Rights of Custody) [2006] UKHL 51*; [2007] 1 AC 619, para 55, "it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate." It was not the policy of the Convention that children should be put at serious risk of harm or placed in intolerable situations. In consent or acquiescence cases, on the other hand, general considerations of comity and confidence, particular considerations relating to the speed of legal proceedings and approach to relocation in the home country, and individual considerations relating to the particular child might point to a speedy return so that her future can be decided in her home country."

35. In her decision ten years earlier in *Re K* (above), Hale J had declined to make a return order in a consent case. In doing so, she expressed a different view to what she said in *Re M* in the latter part of paragraph 46. In *Re K* at page 220 she said this:

> "The final thing which I have to weigh in the balance is the purpose of the Convention. This is something to which the courts attach the greatest possible importance. We all want children to be returned as soon as possible to the place from which they have been wrongfully removed. The reasons why the Convention exists to secure this are partly that it is bad for children to be uprooted from one jurisdiction to another and partly to fulfil the obvious proposition that if there is a dispute between parents as to the future of their child it is better dealt with in the courts of the country where the child has hitherto been habitually resident because that is where the best information lies.
> However, I have to bear in mind in particular that that factor has a different weight in a case in which consent to the removal or retention has been established. Indeed, in cases of consent, all of those factors carry a rather different weight. But if it has been agreed between parents that a mother may bring her child to another country and, if she so chooses, remain here with the child, then frustrating those two purposes of the Convention scarcely comes into question."

36. Of this difference, Munby J made these obiter observations in *C v H* (above):
> [46] Discretion in every Hague case is at large and unfettered: see in particular the recent judgments of the House of Lords in *Re M (Abduction: Zimbabwe)* [2007] UKHL 55, [2008] AC 1288, [2007] 3 WLR 975, [2008] 1 FLR 251 and in particular the speech of Baroness Hale of Richmond. There was a certain amount of debate before me as to the extent to which the learning in *Re M* requires a re-visiting and re-appraisal of the earlier learning encapsulated in particular, as it happens, in the judgment of Hale J (as she then was) in the case of *Re K (Abduction: Consent)* [1997] 2 FLR 212 in 1997: see in particular her observations in the penultimate paragraph of her judgment. I am inclined to think that the approach which Hale J there set out remains good and wise learning notwithstanding the subsequent elaboration of her thinking as Baroness Hale of Richmond in *Re M*. I am inclined to think that it will be an unusual case in which consent having been established, it is nonetheless appropriate to order a return. But, as I have said, that question does not arise. It is sufficient and dispositive of this case that, in my judgment, for the reasons I have given, the mother has failed to establish the positive and unequivocal giving of consent by the father, which alone is relied upon as the only defence to this claim."

37. The establishment of the consent exception is of course no bar to an order for summary return. In one of the cases referred to above (*Re L*) consent was not established, but a return order would have been made if it had been, while in another *Re D (Abduction: Discretionary Return)* [2000] 1 FLR 24, Wilson J did order the return of two children to France despite their mother having consented to their father bringing them to England. At page 36, he said this:
> "Under the Hague Convention, the father's proof of consent opens the door for me to exercise a discretion as to whether to order the children to return to France. My perception of where their welfare lies is important. But their welfare is not my paramount consideration.
> Mr Setright says that, where a defendant establishes other defences allowed by Art 13, so that where, for example, the children object to a return to the foreign country or where there is a grave risk that a return would expose them to harm or place them in an intolerable situation, it is more likely that those same grave impediments to a return will dictate the result of the discretionary exercise which follows, namely that the children should not be returned; whereas, says Mr Setright, where the defence established is consent, or presumably also acquiescence, such grave impediments would not be present to influence the discretionary exercise. Miss Jakens, on the other hand, might say that the spirit of the Convention is always an important factor in the discretionary exercise; that the spirit of the Convention is that wrongfully abducted children should be returned to the country of their habitual residence; and that, where

> there has been consent to the removal, then, in effect, the abduction is not wrongful, with the result, that the spirit of the Convention a less potent a factor in favour of return than in other cases under Art 13."

That was said in a case that actually turned on the exercise of the discretion in the context of consent. In the end, Wilson J found that the arguments for the children's return to France were "so powerful" that summary return was the only proper order. The children's connection with France was much stronger than with England. The French court was obviously the more convenient court to decide contentious welfare issues that existed in France and a refusal to return the children would conflict with a French order and make contact impossible.

38. In his decision in *A v T* (above), My Lord, as Baker J, found that a father had agreed that a mother could bring the children from Sweden to England if she wished. The children were not returned to Sweden even though they were Swedish nationals who had lived there all their lives.

39. In their leading work, *International Movement of Children: Law Practice and Procedure* (Lowe, Everall and Nicholls, 2nd edition, 2016) at 23.36, the authors note these decisions and refer to Baroness Hale's observation in *Re M* about discretion in consent cases:

> "Notwithstanding the above comment, once consent is established it will be relatively difficult to persuade the court to order a return."

40. The observations on discretion in consent cases in paragraph 45 of *Re M* therefore need to be read with care. They were made when drawing a contrast with cases of grave harm, where policy considerations in favour of return may be weak and welfare considerations against return are likely to be particularly strong. They do no more than say that the relevant considerations "might" point to a speedy return so that future decisions can be made in "the home country". However, they carry a different emphasis to the earlier analysis in *Re K*, which was not cited in *Re M* and where the decision actually turned on the exercise of discretion.

41. To sum up, the exercise of the discretion under the Convention is acutely case-specific within a framework of policy and welfare considerations. In reaching a decision, the court will consider the weight to be attached to all relevant factors, including: the desirability of a swift restorative return of abducted children; the benefits of decisions about children being made in their home country; comity between member states; deterrence of abduction generally; the reasons why the court has a discretion in the individual case; and considerations relating to the child's welfare.

42. In a consent case, the better view is that the weight to be given to the policy considerations of counteracting wrongful removal and deterring abduction may be relatively slight, while the weight to be attached to home-based decision-making and comity will depend critically on the facts of the case and the view that the court takes of the effect of a summary return on the child's welfare.”

Acquiescence–the law

17. The nature and meaning of acquiescence is authoritatively explained in **In re H [1998] 1 AC 72** per Lord Browne at 90E-G:

“To bring these strands together, in my view the applicable principles are as follows:

> 1. For the purposes of Article 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 L.J. said in *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. "

18. In **P v P [1998] 1 FLR 630** Hale J (as she then was) said, at 635:

> "This case has all the hallmarks of what no doubt frequently occurs in these cases, of parents seeking to compromise a situation, allowing the abducting parent to remain in the country to which he or she has gone provided the wronged parent is satisfied as to the other matters which are in issue between them. Only if there were such a concluded agreement could it be said that there was clear and unequivocal conduct such as to fall within the exception….it would be most unfortunate if parents in this situation 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. They should not therefore necessarily fall within the exception or necessarily lead to the conclusion as a matter of fact that there was a subjective state of mind that was wholly content for the child to remain here."

19. As for discretion, should acquiescence be proven, **Re M** (cited above in respect of consent) applies.

Habitual Residence – the Law

20. I do not think I need to go beyond the summary of law relatively recently carried out by Moylan LJ in **Re M (children) (habitual residence: 1980 Hague Child Abduction Convention) [2020] EWCA Civ 1105:**

> 45. "It has been established for some time that the correct approach to the issue of habitual residence is the same as that adopted by the Court of Justice of the European Union ("CJEU"). Accordingly, in *A v A*, at [48], Lady Hale quoted from the operative part of the CJEU's judgment in *Proceedings brought by A* [2010] Fam 42, at p.69:
>
> > "2. The concept of 'habitual residence' under article 8(1) of Council Regulation (EC) No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into

> consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case."

46. It is also relevant to note that the factors listed in paragraph 2 (quoted above) were taken verbatim from the judgment, at [39]. Their purpose or objective appears from the preceding paragraph:

> "[38] In addition to the physical presence of the child in a member state, other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment."

The need for some degree of integration (as again referred to in *A v A*, drawing on Sir Peter Singer's analysis of the CJEU's decision in *Mercredi v Chaffe* (Case C-497/10 PPU) [2012] Fam 22) is, therefore, to distinguish habitual residence from temporary or intermittent presence. It is for the purposes of assessing what Lord Wilson described in *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] AC 1038 at [1] as, "the nature and quality of that residence". Another expression used, again derived from the European authorities, is the "stability" of the residence.

47. Accordingly, as summarised by Lord Wilson in *In re LC*, at [1], "it is clear that the test for determining whether a child was habitually resident in a place is whether there was some degree of integration by her (or him) in a social and family environment".

48. What is meant by "some degree" of integration? As Lord Wilson said in *In re B*, at [39], there does not have to be "full integration in the environment of the new state … only a degree of it". He also said: "It is clear that in certain circumstances the requisite degree of integration can occur quickly". In *In re LC*, Lady Hale, at [60], referred to the "essential question" as being "whether the child has achieved a sufficient degree of integration into a social and family environment in the country in question for his or her residence there to be termed 'habitual'".

49. As referred to above, another relevant factor when analysing the nature and quality of the residence is its "stability". This can be seen from *In re R* in which Lord Reed referred to both the degree of integration and the stability of the residence. In that case the mother (who was Scottish) and the children, with the father's agreement, had moved from their home in France (the father was French) to live in Scotland for a year. The issue was whether, having arrived in Scotland in July 2013, the children were habitually resident in France or Scotland in November 2013. At first instance they were found still to be habitually resident in France. On appeal, this decision was overturned and they were found to be habitually resident in Scotland.

50. As explained by Lord Reed, at [9], an Extra Division of the Inner House of the Court of Session had overturned the lower court's determination because the judge had treated "a shared parental intention to move permanently to Scotland as an essential element" when considering whether the children were habitually resident in Scotland. This decision was upheld by the Supreme Court because, applying *A v A*, it was "the stability of the residence that is important, not whether it is of a permanent character", at [16]. There was "no requirement that the child should have been resident in the country in question for a particular period of time" nor was there any requirement "that there should be an intention on the part of one or both parents to reside there permanently or indefinitely".

51. Lord Reed summarised, at [17], what Lady Hale had said in *A v A*, at [54], emphasising that: (i) habitual residence is a question of fact which requires an evaluation of all relevant circumstances; (ii) the focus is on the child's situation with the "purposes and intentions of the parents being merely among the relevant factors"; (iii) "it is necessary to assess the degree of integration of the child into a social and family environment in the country in

question"; (iv) the younger the child, the more their social and family environment will be shared with those on whom the child is dependent, giving increased significance to the degree of integration of that person or persons.

52. Later in his judgment, at [21], again applying *A v A*, Lord Reed referred to the important question as being "whether the residence has the necessary quality of stability, not whether it is necessarily intended to be permanent". The judge at first instance, by focusing on the parents' intentions, had failed "to consider in his judgment the abundant evidence relating to the stability of the mother's and the children's lives in Scotland, and their integration into their social and family environment there".

The evidence

21. I have read the voluminous bundle. I have received oral evidence, and written and oral submissions. My findings in this judgment are, for convenience, largely set out in chronological (and therefore linear) order. However, I have considered all the evidence in the round, and how each piece of evidence interlocks. I have had in mind the famous words of Dame Elizabeth Butler-Sloss P (which, albeit in the context of a public law fact-finding exercise, resonate here) in **Re T [2004] EWCA Civ 558, [2004] 2 FLR 838** at 33:

"Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof."

22. Both parents in their oral evidence were not entirely satisfactory. Each has deliberately used forensic ploys to attempt to better their cases. M deleted a number of messages which did not help her case, this only coming to light immediately before the hearing. F in his statements omitted a number of text messages which assisted M's case. I was struck by their inability to agree in evidence on just about anything. In my judgment, each were largely impervious to the views of the other, and read and heard what they wanted to. Each in their evidence tended to interpret message exchanges in their favour. As a result, they had, and continue to have, very different perceptions about events.

23. This lack of common ground is evident in the written evidence, including exchanges of messages. It seemed to me that at no point could I detect a clear agreement of the kind advocated by F. Nowhere in the written evidence is there a clear document, or series of documents, affirming a meeting of minds as to relocation of Z to England with F, and the arrangements on the ground. There is no written agreement to that effect. There is nothing to indicate consensus on important matters such as: the reason for Z coming to England, the basis of the stay, the intended length of stay, the type of visa for Z, M's own plans, Z's education, even where F lived. There is nothing as to how much time Z would spend with M, if he were to live with F. Instead, the messages show a continual back and forth, before and after Z came to England, in which they discuss, ventilate, and disagree about Z's future.

24. For completeness, I should add that I heard also from F's wife. Her evidence did not add greatly to my understanding of the case. I was, however, struck that F did not tell her on 5 August 2021, or soon thereafter, that M was actively seeking the return of Z to Russia. She did not learn of this until 23 September 2021, which was surprising. She told me that if M had indeed sought Z's return in early August (a matter of days after

he had arrived in England), F would surely have agreed. In fact, as we now know, he did not agree. This reinforced a view of F which I had formed during his oral evidence, that from the moment Z arrived in this country, he had no intention of returning Z either to Russia or to M's care.

Consent-my findings

25. I am unpersuaded that, prior to Z arriving in England on 24 July 2021, M consented to Z relocating to live here with F for a period of 3 years. Such consent must be demonstrably clear and unequivocal; it was neither. It must be real in the sense of being referable to "circumstances within the contemplation of both parties" (**Re G)**; it was not. At best, the picture before Z came to the UK was confused and uncertain. In fact, in my judgment, one can see from the text messages that M did not consent in the terms alleged by F, although from time to time, during their discussions, various different arrangements were posited. My sense is that F chose to listen to, or read, that which suited what he wanted, in the hope and expectation that matters would turn out as he wished. He probably persuaded himself that M had agreed to relocation, when in fact she had not.

26. F, in his written presentation, places considerable emphasis on the formalised consent document dated 15 April 2021. It seems to me that I must consider that document in the context of the events leading up to it, with particular reference to the objectively verifiable evidence in the form of communications by text between the parties.

27. The starting point is that Z had lived in Russia all his life. He had never before been to England. M had been his primary carer. This was not a case of shared care and regular international travel. Accordingly, it seems to me that for Z to have relocated, to a new country and to live with a different parent, would have been a very considerable step for M to have agreed to, and must be judged in that context.

28. There is no doubt that in February 2021, M was having difficulties in her life with a relationship breakdown, job, and money issues. There is equally no doubt that she turned to F to help her with Z. The question is whether she decided (and F agreed) that Z should go to live with F in London for 3 years. F, consistently in his written evidence, says that agreement to that effect was reached at that time (although in oral evidence he said mid March 2021, rather than February 2021), and nothing thereafter caused him to doubt that agreement had been reached. He did not even refer in his written evidence to discussions from February onwards. I did not find that persuasive. The messages from February onwards plainly show ongoing, fluid discussion and debate about a variety of issues over several months. F himself accepted that M would change her mind, but this did not seem to have affected his view of the agreement allegedly reached in February 2021.

29. Picking up some of the messages to demonstrate this point:

    i) On 15 February 2021, M texted F: "I need to relocate, to Europe now and then to the USA".
    ii) On 17 February 2021, M texted F: "I have a bad situation…I have issues with personal life…I need money ASAP….take son with you….At least for half a year. I will visit….Let him live with you. While there's no school. For now….I need at least 2 years for myself. Before I can be ready to go fully into parenting.

…Need to sort personal life and work". M told me, and I am inclined to accept, that the reference to "half a year" was for Z in England, whereas "2 years" was the time she needed to sort out her own life, including financially, but on the basis that Z would live with her.

iii) On 17 March 2021, F texted M: "In order to get a visa and everything else here, I will need to have official custody of the child, otherwise no one will be able to issue him a visa". M replied "But I don't want to lose him. We need to discuss everything properly….I must understand everything. You can be unpredictable and that complicates everything".

iv) On 25 March 2021, M texted F: "As far as I understand, the main reason is not in the area of caring for the child. It's the wish to do everything in a way that is the most unacceptable to me".

v) On 28 March 2021, M texted F: "It's better for the child to be with me. You know this yourself. Therefore only a temporary option is acceptable…And I love my son very much. There is no way without him.". Clearly, and on any view after the mid March timeframe by when F told me agreement had been reached in the terms he advances, M had in mind only a temporary stay, and the issue of custody (i.e who Z lives with) was at the forefront of her concerns.

vi) Later that same day, M texted: "Our son will be with you from July to August. I will bring him. You will pay for his ticket….He will be on a tourist visa for now….To live OK but you were saying a different thing during the conversation. That you want to apply for custody for yourself and our son will live with you for more than 2 years and even up to going to university. So, the problem is obvious". This text suggests the diametric opposite of what F says had been agreed by M, and in my judgment is clear evidence of M's consent being limited to a trip until no later than the end of August.

vii) On 29 March 2021, F texted M: "In the conversation I said 3 years. And you replied – OK", and M replied: "I am not giving consent to this. What is your status? Work permit/residence permit?".

viii) On 15 April 2021, F messaged: "I have a temporary residence permit. I did not plan to obtain citizenship". M replied: "Why? You will live there. And it would be a great bonus for my son to have British citizenship". She sent to F details of summer holiday programmes in London, which F told me he did not look at.

30. In my judgment, these text messages demonstrate (particularly in the early days) unhappiness, heightened emotion, and a degree of confusion in M's mind. The parties were in discussion, and there was no obvious agreement of meeting of minds. As M told me, no concrete decision was made; dates, length of stay and other such important practical matters constantly changed. On one thing M was consistent, that the problem in their discussions was "custody" which I take to mean the notion of Z living with F. When searching for clear and unequivocal consent to Z relocating to England, to my mind the highest the case can be put, by this stage, was that M had on 17 February 2021 suggested that Z could go to F for "half a year" which would suggest an end point of 17 August 2021. That, however, was overtaken by M's text of 28 March 2021 explicitly referring to July and August. It seems to me, therefore, that the document of 15 April 2021 must be seen against a background where (i) no clear agreement was reached and (ii) M was talking, during somewhat freeform discussions, of a summer trip lasting 2 months. I am confident, having heard her, that M had in mind nothing more extensive than a trip during the holidays (and possibly similar trips in the future), whereupon Z would return to attend school in Russia.

31. The notarised document signed by M dated 15 April 2021 is problematic because the parties do not agree on its correct translation, or its meaning. F asserts that it means M consented to Z going to England to live with him until 1 June 2024. M says that the document does no more than allow Z to travel back and forth between Russia and England. M told me, and I accept, that the intention was for each of them to do mirror consents at the same time; that is evidenced by a message from M to F on 15 April 2021 saying, "Have you drawn up the consent?" to which F replied, "I have not yet had time". F told me in evidence that he envisaged two different types of consent (for him, facilitating relocation, whereas for M permitting holiday trips with Z) but nothing in the messages supported this.

32. The 3 translations differ as follows:

    i) F's translation is that: "I, [M], hereby give my consent to travel of my underage son, [Z],….escorted by [F], from the Russian Federation to the United Kingdom for a period from fifteenth of April 2021 to 1 June 2024. The purpose of travel is studying". The implication is one permanent move.
    ii) M's translation is that: "I, [M], do hereby consent for trips of my minor son [Z], …. Accompanied by [F]….from the Russian Federation to Great Britain for study within the period from 15 April 2021 until 1 June 2024". The implication is a number of separate trips.
    iii) The jointly appointed translation (instructed pursuant to court order) is that: "I, [M] give my consent for [Z], who is a minor,….to travel… in the company of [F]….from the Russian Federation to Great Britain for the purposes of study for the period from 15 April 2021 to 1 June 2024".
    Prima facie, that accords more with F's version of the translation. However, there is an important footnote after the words "to travel" which reads: "tr.note: the Russian word *vyezdy* "departures" is in the plural, so consent is given for more than one journey. That, in my view, tends to support M's version.

33. It seems to me that I must be cautious in circumstances where the precise translation is not agreed. However, I can, in my judgment, make the following observations:

    i) Although it is a document giving consent for travel, it is on any view <u>not</u> a document under which M expressly, and in terms, gives consent to Z relocating for 3 years to England to live with F. Had that been the case, it would surely have said so given the magnitude of the proposed step.
    ii) The expert translation refers to the document as envisaging multiple trips, which, in my view, is supportive of M's case that it was intended to enable Z to travel to and from England with F from time to time, rather than one final, definitive relocation.
    iii) The parties each signed identical (at any rate, identical in Russian, although the translations differ slightly) consents on 19 July 2021 enabling the other to travel abroad with Z to a long list of designated countries (including the United Kingdom) from 15 April 2021 to 1 June 2024. These consents are in very similar form to the one signed by M on 15 April 2021, and it seems to me that they are probably what M envisaged would have been signed by both of them on 15 April 2021.

iv) Although F's written evidence places heavy reliance upon the 15 April 2021 document, in oral evidence he told me it was partly to enable relocation to take place, and partly for visa purposes; he seemed less wedded to the document than had previously appeared to be the case. There is, oddly, no mention of this notarised consent by F in messages after 15 April 2021, even when M later said she wanted Z to return to Russia. One would have expected F to refer M to it time and again during their ongoing, and at times difficult exchanges.

v) F relies upon the document referring to him assuming responsibility for the life and health of the child, giving numerous examples thereof, but it seems to me that this formulation of words fits just as well with M's case that this enabled F to discharge his responsibilities when Z was to be with him in England during study trips.

34. After the documents of 15 April 2021, the following relevant exchanges and events took place between the parents:

i) On 16 May 2021, M texted F: "I'm talking about learning and perspective. For him to study in London. ….You can't judge by the first month. Need more time". F replied: "Well, let's see. In any case, 6 months will be enough to deal with the details of the visa and how [Z] will feel here".

ii) On 16 May 2021, M texted F: "I am waiting for the name of the visa…How can I trust you with my son when there is no even proper communication" to which F replied in respect of schooling that "The criteria are simple. 1. Whether Z likes it himself We will ask him: …do you like it here? Do you want to go to school here? 2. Whether he would be comfortable here among the local children". This was part of a series of exchanges about schooling in both Russia and England from March 2021 onwards. M's perspective on schooling in England (as, in my judgment, the texts broadly show) was for holiday schooling, preparatory courses and tutoring, indicating that she anticipated this to be a temporary arrangement over the summer. She sent details of the SKOLA Regent's Park summer school to F on 15 April 2021 and talked of private tutors on 16 May 2021. Having read these exchanges about schooling carefully, I am not satisfied that M, prior to Z leaving for England, was unequivocally committing to schooling in England, beyond something temporary in nature, during school holidays when she thought he could travel from Russia to England.

iii) As for schooling in Russia, M sent F a list of the best schools in Sochi on 29 March 2021, and, in June 2021, secured places in Russian schools for Z to start in September 2021; I see no reason to doubt letters from the Russian schools to that effect. It is hard to see why she would have done so, had she expected Z to attend school in London permanently.

iv) On 17 May 2021, M texted F: "It is very important to think that I also have a long term visa for the future. Not only the son". M told me, and I accept, that she contemplated a long term visa, and British citizenship, for Z because she thought he might benefit from them in the long term, not because she planned for him to leave Russia. Her own visa plans were designed to enable her to work in different jurisdictions with ease.

v) On 1 June 2021, M texted F: "I am in deep shit with my finances. I have made enquiries. Your employer might be able to pay for your son's education…..We need to apply now. In which case there will be no need to wait for 2 or 3 years….Our son can't stay in this country."

vi) On 4 June 2021, M texted F: "I also love my son. I won't leave him. …I expect from you notarised consent to the departure of the child from the father that the child can go to England with his mother".

vii) In June 2021, F and his wife moved to a larger property to accommodate Z. This arrangement is consistent with each party's case; per F, for Z to live with him, and per M for Z to travel to London regularly and stay with F.

viii) Despite repeated anxious requests in the messages, F did not inform M where he was living (and therefore where Z would live), allegedly because she had previously broken into his flat in Russia without his consent, which does not seem to me to be a particularly satisfactory reason.

ix) On 17 July 2021, M texted F: "A child under 16 needs his mum….And I need him….it's mutual."

x) On 19 July 2021, M asked F for his address, saying "I'm going crazy with anxiety".

xi) On 19 July 2021, the mutual travel consents, to which I have referred, were signed by both parties.

xii) On 20 July 2021, M texted F: "If everything is clearly written down and signed, I will make me feel less anxious". It seems to me that this reflects a lack of clear, written agreement.

xiii) On 21 July 2021, M texted F: "In May I asked you to take our son for a month" which is broadly supportive of M's case generally. That, surely, was an obvious time for F to respond that she was bound by the 15 April 2021 consent; but nowhere did he say so.

xiv) Between 21 and 22 July 2021 there were numerous further exchanges, with ideas, suggestions, and thoughts passing back and forth, but quite clearly no general agreement, let alone one descending to details. They show a level of mistrust, concerns expressed by M and uncertainty. All of this was only a couple of days before Z left for England and I am left with the clear impression that there was no agreement which was "broadly in the contemplation of both parties" (**Re G)**.

35. These exchanges after the signing of the 15 April 2021 document fit with the exchanges prior to its signing, and buttress my conclusions as to the intentions behind the document. I am satisfied that they do not demonstrate clear and unequivocal consent to Z leaving Russia permanently (or at any rate for 3 years) to live with F in London. They are emotional and changeable. They show that M anticipated a short period of travel, enabling Z to receive education in London during that period. Time and again M said that she did not agree to "custody" which is surely what relocation with F for a number of years would have been. The evidence points to this having been a temporary arrangement, as M says, and not a near permanent relocation, as F says. Put another way, the evidence does not demonstrate clear and unequivocal consent, whatever F may have misinterpreted or chosen to believe. Such consent was not explicit, nor can it be inferred, or imputed to M.

36. On 24 July 2021, F flew to Russia and returned to England with Z. I am wholly satisfied that at no time prior thereto, least of all in the 15 April 2021 consent document, did M, clearly and unequivocally, agree to Z moving to London for 3 years to live with F. On the contrary, I am satisfied that M's consent was for a visit to London during the summer holidays to stay with F and attend summer schooling, before returning to Russia by no later than 31 August 2021.

Acquiescence-my findings

37. I am similarly satisfied that M did not subsequently change her mind and agree to F retaining Z in London, nor did she act in such a way as to lead him to so believe. M regularly said she wanted Z to be returned to Russia. True, she did (as I will explain) for a while contemplate Z staying in England for 6 months but (i) that was because F did not return Z's passport to her, (ii) Z therefore could not travel and it would have taken her up to 6 months to obtain a duplicate; and (iii) her partly formed idea was on the basis of Z living with her, and not with F.

38. The following messages and events seem to me to be relevant to the issue of acquiescence:

i) On 5 August 2021, M texted F: "I'm taking my son. I am not going to sign any agreement, so that he only stays with you…You are not complying with the agreement" and said that she would come after 20 August. That could hardly have been clearer. As at that date, only 12 days after Z's arrival in England, M was demanding his return towards the end of August.

ii) On 9 August 2021, M texted F: "I will not leave him to live with you".

iii) On 9 August 2021, F texted M that he was applying for a visa for Z, to which M replied that she was "against the visa".

iv) On 10 August 2021, M texted F: "We can designate a period of no more than six months for custody, if possible. While I'm looking for a job. Indefinitely I do not support. Everything can be discussed as adults".

v) In August 2021, F secured a place for Z at a local school in southeast London, without involving M in any way, including her in the application process or sending her any of the documentation. The omission of M from the process is likely to have been because F knew she would object, she having said that she wanted Z to return to Russia and go to school there.

vi) On 20 August 2021, M came to England. She had a 1 month visa and arranged accommodation for the same period. I am confident that she intended to return with Z to Russia, as she had told F on a number of occasions.

vii) F agreed to a number of periods of 3-4 days contact during August and September which took place, although M was still not told of F's (and Z's) address.

viii) On 4 September 2021, M texted F: "I'll never sign for him only to live with you".

ix) On 7 September 2021, M texted F: "I will take him to school…I will live in London from October".

x) On 10 September 2021, M texted F: "I'll stay here for now. It's better."

xi) On 13 September 2021, M texted F: "My lawyer said that I shouldn't register my son in your name. No way. Otherwise I may never see him again. I will have a visa in 3-4 weeks….I want him to go to Chelsea".

xii) On 14 September 2021, some terse messages were sent by M to F:

a) M said to F: "I only want my son to be with you half a week. But everything will be arranged in my name. I will have citizenship in 5 years. With you 1 Passport 2 £160 for flight 3 Suitcase In exchange for son. If you don't want to stay with your son, I'll take him to Moscow while I arrange everything or stay here. I want him to go to Chelsea. For

now it can be as it is but then he can be moved. It is necessary to live on the spot for at least six months before the school will give him a place."

b) M said to F: "I will take (him). Write what time. While living with me. I won't let him go without a passport. I will lose him forever. Lawyers explained everything to me clearly. I will show that I am his mother and a visa will be issued for me. Until then, we find a private school for a month".

c) M said to F: "If you care about his education, then let's take him to a private school. While I make a visa. But in this situation, that I don't know where my son lives and you don't give me the opportunity to choose a school, you don't do it together, I refuse to agree to the general business".

It is, to my mind, all but impossible to see these messages from M to F as evidence of acquiescence in circumstances where she was seeking a return to Russia for Z, F was resolutely opposed to Z returning, she did not know where F and Z lived, she could not secure a passport for Z, and she was limited to staying in England for 1 month.

xiii) On 14 September 2021, M and F's wife spoke together. I heard oral evidence about their conversation. M said that she was thinking of working in London, doing some business, living with Z in Chelsea, and sending him to school there. I am quite sure that as M told me (but F's wife may not have fully grasped), she contemplated this possibility because she had no real alternatives given that she could not return with Z to Russia in the absence of a passport for Z. She was having to make decisions on the hoof. As she had said to F in a message on 10 September 2021: "I'll stay here for now". On any view, she was not contemplating Z continuing to live with F. And I note, none of this has actually come to pass.

39. M contacted the Russian Ambassador on 20 September 2021 seeking assistance with returning Z to Russia, a step which does not sit easily with the acquiescence defence advanced by F.

40. On 22 September 2021, M texted F: "I warned you that if I don't have son, I'm going to Hague Convention".

41. That same day, on 22 September 2021, the parties agreed that M could take Z to the theatre, and that F would collect Z from M's accommodation at 10pm. When F attended that evening, neither M nor Z were there. A different woman answered and said M had left. M did not answer the telephone.

42. On 23 September 2021, F went to the Russian Embassy where by pure chance he saw M and Z. M was attempting to secure travel documents for Z. After an incident in front of embassy staff, M left the embassy with Z. It is obvious that M was endeavouring to remove Z to Russia. Again, I view this as consistent with M's wish, consistently expressed in words and actions since early August 2021, for Z to return with her to Russia.

43. I am satisfied that M did not acquiesce to the wrongful retention on or after 31 August 2021, by agreeing to Z living long-term with F in England. On the contrary, she had in mind a totally different arrangement which involved her and Z living in London for up to 6 months. That was because she had, as I find it, little alternative. If M discussed this with F, or F's wife, it seems to me to be classic example of the sort of discussions referred to by Hale J in **P v P (supra)**. Having heard the evidence, I am quite sure that M did not subjectively acquiesce. Nor did she clearly and unequivocally lead F to believe that she was not going to assert her rights.

44. Further, the events post arrival in this country, reinforce my findings as to lack of consent prior to arrival.

My determination

45. I have concluded, by a fairly comfortable margin, that the defences of consent and acquiescence are not made out.

46. As for habitual residence, the period between arrival in this country (24 July 2021) and wrongful retention (31 August 2021) was about 5 weeks. In my judgment, Z was clearly habitually resident in Russia at the date of wrongful retention. He is a Russian national who had lived all his life in Russia and never travelled to the UK before. He was in the care of his mother as primary carer. A school place in Russia was arranged. His wider family and previous friends are in Russia. The trip to England, as I find it, was for a temporary visit. Habitual residence did not in that time switch from Russia to England.

47. It follows that the Article 3 requirements are established, and the Article 13(a) defences fail. I therefore will make an order for return of Z to Russia. It will be for that jurisdiction to determine welfare arrangements, including contact arrangements and any application by F for Z to live with him in England.