Neutral Citation Number: [2023] EWHC 2717 (Fam)

Case No: FD23P00240

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/10/2023

Before :

THE HONOURABLE MR JUSTICE COBB

- -

Between :

MY	**Applicant**
- and -	
(1) FT	**Respondents**
-and-	
(2) SYT	
(By her Children's Guardian, Kay Demery, Cafcass)	

- -

Re S (1980 Hague Convention; Habitual Residence; Article 13)

- -

Michael Gration KC and Harry Langford (instructed by **Dawson Cornwell LLP**) for the Applicant (mother)
Clare Renton (instructed by **Wilson Family Law Solicitors**) for the First Respondent (father)
Cliona Papazian (instructed by **Cafcass Legal**) for the Second Respondent (child)

Hearing dates: 16-17 October 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 31 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE COBB

The Honourable Mr Justice Cobb : .

Introduction

1. The application before the court, dated 27 April 2023, concerns one child, who I shall refer to as 'S'. She is the only child of the Applicant ("the mother"), and the First Respondent ("the father"). She is 9 years old. At the pre-hearing review, and with the agreement of both parents and the support of the Family Court Adviser, Ms Kay Demery, I joined S as a Second Respondent to the application. All parties have been represented at this final hearing.

2. The application is brought under the 1980 Hague Convention on The Civil Aspects of International Child Abduction ("the 1980 Hague Convention") as incorporated by Schedule 1 of the Child Abduction and Custody Act 1985. The mother seeks the summary return of S to Japan. The father and S both oppose the application.

3. At the pre-hearing review, the mother – through leading and junior counsel – sought to vacate this final hearing in order for me to re-list the application for a 7-day hearing, so that the court could hear evidence about, and determine, a range of matters of fact. The mother also argued, through counsel, that an adjournment was necessary in order for her more fully to prepare her case. I refused both applications. I determined the parameters of this hearing (declining to embark on an elaborate fact-finding exercise), and gave directions giving leave to the mother to file a further (second) statement within 7 days. I retained the original listing. The mother failed to file the said statement.

4. On 13 October 2023 (i.e., the last working day before the hearing), the mother's solicitor filed a form C2, again seeking an adjournment of the hearing of her application, on the basis that the mother was too unwell to participate in it; a medical certificate accompanied the application. For what it is worth, I should say here that the certificate did not impress me as adequately supporting the application. On the same day, Mr Gration KC and Mr Langford filed a position statement arguing vigorously for an adjournment, in order for their client to be able to recover sufficiently from 'acute' illness to participate in the proceedings. That document (clearly prepared on instructions from the client) included the following:

> "On Thursday 12 October… Her instructions were that she remained very unwell.
>
> …the mother's recent ill-health is <u>particularly acute</u>.

> …the mother will not be able to participate effectively or at all in the forthcoming hearing (she had hoped to travel to London to attend in person. That is now impossible. She may not be able to engage at all, even remotely)" (emphasis by underlining added).

It was, to say the least, something of a surprise that as the case was called on for hearing on 16 October, the mother entered the courtroom in London in person, having flown from Japan on the previous day. She attended the hearing throughout, paying full attention, making notes, conversing with her legal team through an interpreter, and displaying no apparent signs of illness.

5. I was not asked to admit any updated statement of evidence from the mother out of time; Mr Gration confirmed that he would fill in any evidential gaps in the mother's case during his submissions by reference to the filed material.

6. For the purposes of determining this application, I have:

   i) Read the parties' lengthy witness statements and the exhibits to which my attention has been specifically drawn; the bundle was over 1000 pages in length, and I have plainly not been taken to every document;

   ii) Read the two expert reports of Makiko Mizuuchi in Japanese law, and the report of Ms Demery (Cafcass);

   iii) Heard the oral submissions of counsel for each of the parties and read with care their Skeleton Arguments;

   iv) Viewed / listened to a clip of video/audio-recordings of FaceTime and other conversations between the father and mother and S.

7. This is a somewhat complex case factually; hence I have set out the background history in a little more detail than may be expected for a judgment dealing with an application under the 1980 Hague Convention. It will be apparent that the history gives rise to a number of potential safeguarding issues which are also discussed – at least in some respects – in the judgment which follows. The consequence is that this is, I regret, a long judgment; there has been a great deal of factual and legal territory to cover.

The mother's case in summary

8. The mother accepts that the burden is on her to establish that there has been a wrongful removal or retention of S. The mother puts her case in the alternative – that there was an unlawful removal of S from Japan on 24 June 2022, or an unlawful retention by 26 August 2022 (the first date on which S was due back to Japan) on or about 28 October 2022 (the second date). Different factual considerations apply in determining S's habitual residence relevant to each date.

9. It is the mother's case that:

i) S had lived her whole life in Japan from birth until she travelled to England with the father on 24 June 2022; she was habitually resident in Japan throughout that period (this is not disputed);

ii) S was unlawfully *removed* from Japan on 24 June 2022, when the father travelled to this country with her; the mother maintains that the father tricked her into removing S on that day, in that at that time he had no intention of returning her;

Alternatively:

iii) S was unlawfully *retained* by the father shortly after S's arrival in this jurisdiction in the summer holidays; the father very quickly developed an intention not to return S to Japan; there can be little doubt that S was habitually resident in Japan when the father formed that view;

iv) There was an unlawful retention as of 26 August 2022, when the father should have returned S at the end of the agreed visit; S was still habitually resident in Japan at that time;

v) There was an unlawful retention as of 28 October 2022 when the father did not return S at the end of the *agreed* extended stay. S was still habitually resident in Japan at that time. It is on this basis that the application was framed via the Central Authority / ICACU.

10. The mother contends (it is not in fact disputed) that at all material times she had rights of custody in respect of S.

The father's case in summary

11. The father opposes the application for summary return, raising arguments across the whole range of 'defences' in and around Article 3 and 13 of the 1980 Hague Convention. Specifically, he asserts that:

i) He did not unlawfully *remove* S from Japan; when he left Japan with S on 24 June, he fully intended to return her;

ii) There is no dispute that after S had left Japan, while she was in England during the summer, the mother agreed that S need not return on 26 August 2022;

iii) Indeed, during the summer of 2022 the mother consented to S remaining in this jurisdiction without limit of time;

iv) At the time of the alleged *retention* (28 October 2022), S's habitual residence had changed, and she was not then in fact habitually resident in Japan;

v) That since the late-summer of 2022, the mother has acquiesced in S remaining in this jurisdiction;

vi) That a return would cause a grave risk of psychological or physical harm to S or otherwise place her in an intolerable situation;

vii) That S objects to a return and that she is of an age and understanding at which it would be appropriate to take account of her views;

viii) That I should exercise my discretion not to return S.

The burden falls on the father to establish any of these exceptions to a return (save for in relation to habitual residence, in respect of which the burden falls on the mother).

Background facts: Life in Tokyo: Removal and Retention

12. What follows (in §13-54 below) is a summary of the background facts. Where I make findings in this section of the judgment, I do so on the balance of probabilities. It is, unusually for a case presented without oral evidence, possible to make some findings about the past, based on the incontrovertible evidence contained in transcripts of conversations and video-recordings.

13. The mother is 41 years old; she is Japanese with Korean heritage. She is a successful businesswoman, and lives in Tokyo. She currently spends about half of her life in South Korea where she has business interests. She is single but has recently referenced having a new partner in South Korea.

14. The father is 42 years old; he is a British national; he resides in England. He is married.

15. S has dual nationality, British and Japanese. S's first language is English.

16. The parents first met in 2007 in Japan when the father was working there; they lived together for a period. They separated in 2009, when the father first returned to the UK, but reconciled in 2012 when he was posted back to Tokyo. It was within this second phase of their relationship that S was born in Japan in 2014. It appears that both parents played a reasonably significant part in the upbringing of S, though the extent of their respective contributions is contentious, and I do not need to decide this. The evidence suggests that the parents visited the UK and USA regularly for holidays; the father says that they visited the UK at least every 2 years, for one or two weeks at a time. I am advised that the paternal family visited Japan, (the father's mother on three occasions, and his brother on six). In 2018, the parties had a marriage 'celebration' and 'ceremony' at a renowned hotel in England, but this was not a formal registered marriage, and they are not legally married.

17. I am satisfied from what I have read that the parental relationship was turbulent; there are cross-allegations of domestic abuse. The parents separated finally in May 2019, when the father was relocated to the USA for work; he remained there for one year, before returning to the UK in 2020. After the father's departure for the USA, S remained with her mother. At or about the time of the parents' separation in May 2019, the police were called to intervene in one of their disputes; the mother had sent WhatsApp messages to the father repeatedly telling him to take S, that she "hates" both of them and that she wanted both of them to "die in pain". She told social services (in Japan) that she had asked the father to take S, but then contacted the police complaining that the father was about to abduct S from Japan. The police visited the father; he denied an intention to abduct S but was reluctant to return S to the care of the mother given her erratic behaviour. The father ultimately returned S to

the mother but only because he needed to leave the country, and the police had advised him that they would otherwise have to place S into the care system.

18. After his move to the USA in 2019 it is the father's case that he regularly visited S in Japan (every 4-5 weeks); he says that he also paid for the mother and S to visit him in the USA. I believe that this is uncontentious. When the world effectively locked down in 2020 during the CV-19 pandemic his visits necessarily became more limited.

19. S attended an international school in Tokyo where she was taught in English. It is the father's case that the parents had always wanted S to be educated outside of Japan in due course. I find that this is probably so; the mother herself went to university in the USA, and she herself told the father in 2019 that: "I'm thinking to move to London with [S] one day... for few years because I want her to know where [her] dad is from and learn the culture and history of England." (WhatsApp message).

20. It is evident from all that I have read and seen that after the breakdown of the relationship their behaviour towards each other continued to be extremely confrontational; their language (in messages sent by WhatsApp and similar) contained regular profanities and insults. My assessment of the evidence before me is that in this period the mother's behaviour was particularly histrionic; she was abusive to both the father and to S. Notable of the incidents revealed by the evidence filed for this hearing are:

i) In January 2020, S went to school complaining to her teachers that her mother had hit her. She said that she had told her mother that she had liked her father's beard; her mother disagreed, and hit her;

ii) In video-calls recorded on 11 June 2020 (which I viewed), the mother is seen screaming hysterically and uncontrollably at S, who appears to be cowering and terrified. In a separate video recorded in June 2020 the mother is seen pulling S's hair, and threatening her with a knife ("do you want to die?" … "Mama's got a knife… you deserve this") which she holds close to the child, to which S shouts "Mama's killing me"… "Papa help me";

iii) In January 2021, when the father was visiting Japan, the mother sent him a message in which she threatened to kill herself. The father spoke with the mother by video-call; she seemed to be taking an overdose of pills with alcohol; she passed out and became unconscious; S was (fortunately) in the care of the father at this time. The father's case is that he raced to her apartment and called the emergency services; the mother could not be taken to hospital as she had Covid. When she regained consciousness, it is the father's case that she had to be physically restrained from jumping from her 13th floor balcony. The mother accepts that she took an overdose but denies that she was trying to kill herself;

iv) On 3 February 2021 the mother sent a message to the father: "I'll kill [S]. if you keep treat me and [S] like this, we will drink many pills and whisky. Don't forget that";

v) On 1 March 2021, "I'll kill her ([S]) and I'll kill myself. I really want to die… my feeling to die is strong and serious". The mother then posted photos of S apparently asleep but with a large butcher's knife at her throat;

vi) In March 2021, the mother messaged the father to say she intended to take cocaine and leave S alone and she intended to torture S and give her cocaine. She says she will "make [S] sad and slowly kill her"; and "I actually enjoy beating her"… "I will keep her and damage her… torture her… you will never have her"… "she is bothering my life.. but I don't want to give you what you want";

vii) In a video recorded in April 2021, S asks "are you really gonna punch me?" to which the mother responds "Punch you? Yeah, if he f***ing text me like that I will f***ing punch your face". In other recorded scenes, the mother is heard shouting at S and repeatedly calling her a "motherf***er" and "bitch", and on occasions slapping her;

viii) In November 2021, the mother sent the father a text message in these terms: "If you send me $300,000, I'll give her to you…I don't need this kids….I need money…she can die…wish she wasn't even alive…hope she can get car accident and die";

ix) In a recent video (February 2022) she sent the father a message:

> "I'll keep abuse (sic.) her as long as you are nasty to me. You have to know how to talk to me… that's what she gets… fear, abuse, hurt pain… I'll kill [S], hit her, wake her up now… she is crying, I'll beat her. .. I'll keep pull (sic.) her hair and make her cry and beat her" (the mother is seen pulling S's hair).

21. The father has produced extensive transcripts of other videos, WhatsApp and text messages, and audio recordings which show behaviour in a similar vein.

22. The mother denies that the video-recordings show her actually abusing S. It was said on her behalf (by her solicitor, in the first statement in the proceedings) that the mother was *pretending* to the father that she was abusing S in order to put pressure on him to return to the family after he left, and that he was aware that it was a performance. In her own sworn witness statement, the mother herself says this:

> "I can see that I have often crossed the line in terms of the language I used, and I do regret that. I have no doubt that there were times when my messages were stressful for [the father] to receive both in terms of volume and content. I felt I was in a hellish situation and that I could only get his attention if he believed [S] was in distress. [S] is an excellent actress and finds it fun. I would tell her to pretend she was crying and really scared of me so we could send a video to [the father]. I do now appreciate how wrong I was to involve [S] in this way. I appreciate how

> harmful and disturbing it will have been for [S] to play that role. I would never intentionally harm my only daughter. I deeply regret what I did and I have since apologised to [S]";
>
> "[S] was always clear to me that she understood it was a game and that she was just pretending to be scared in the videos… [S] has recently started to say that she was scared and was not pretending when we made those videos".

23. The mother further comments (same statement):

> "[The father] has produced a video where I am attempting to kick down a door with my mother and [S] inside. My mother did not need to put herself in that situation when I was angry and aggressive. She did so to protect [S] from my behaviour and I am grateful to her that she did".

24. The mother acknowledges that she has a "temper" though denies that she has ever been violent. She told the police and social services in Tokyo in 2019 that she was at times "out of her mind" with anger. She accepts that she had "threatened [the father] that [she] left [S] alone in the apartment and took cocaine" but denies that she had in fact taken cocaine or any other recreational drugs and had not left S in the apartment "for more than a couple of minutes". The mother admits to lying to the father, and says that she did so in order to "get him to return to us". The mother admits that after the separation she "struggled with depression" but did not get any support or treatment.

25. The mother reflects further (same statement):

> "I fully appreciate that our WhatsApp history often reads as a torrent of abuse from me to [the father]. I can see that I have often crossed the line in terms of the language I used, and I do regret that. I have no doubt that there were times when my messages were stressful for [the father] to receive both in terms of volume and content".

26. It is the father's case that he viewed with mounting concern the mother's displays of erratic behaviour and apparently ungovernable temper, fearful that she may be suffering from deteriorating mental ill health. He expressed concerns that the mother would seriously harm or even kill S. The father maintains that he forwarded the photos and some of the messages to the maternal grandmother and asked for her help, but no help was offered. Although not explored with the father in the hearing, I noted that when the father subsequently spoke to the police in England in April 2023 about the mother's threats to harm S and himself, he is reported to have said that "[he] did not believe these would be carried out … Dad does not believe there is an immediate threat".

27. In May 2022 the father visited Japan. About this visit he says this:

> "I was desperately concerned about S's safety and well-being following [the mother's] unstable behaviour... the mother became increasingly more emotional and erratic".

During this visit, the mother agreed that the father could take S back to England for an extended summer visit. On 24 June 2022 the parents signed a notarised agreement confirming this trip; the agreement was that S would return to Japan on 26 August 2022. The father maintains that the signing of the agreement was at his instigation to prevent any allegation that he was abducting S; his case is that he fully intended to return S at the end of the visit. A second agreement was also signed on the same date, in which the father agreed to a number of conditions, some of which pertained to the summer holiday visit (i.e., accommodation for the mother if she were to visit the UK during the summer period) and others more far-reaching (i.e., that "[the father] won't marry or have kids until S is 18"). He wrote himself an e-mail on 24 June 2023 saying that he has signed the second document under duress "for fear of my own and my daughter's emotional, physical and mental well-being…".

28. The father and S travelled to England on or about 24 June 2022.

29. The arguments between the parents (conducted largely on WhatsApp or other messaging platforms) continued. The mother was abusive to the father; he was abusive to her in return. When told that S was enjoying life in England, the mother responded to him: "she changed like cold white people. I need to keep her in Asia". The father nonetheless confirmed (11 July) that he recognised that had the mother's permission for S to be in the UK only until 26 August 2022, and repeated several times over the summer that the return flight was booked.

30. Records show that on 11 July 2022 the mother attended a police station in Tokyo and reported her concern that the father would not return S to Japan. Significantly, the police record contains the following:

> "The police advised as follows:
>
> • this incident is not categorised as a kidnapping case
>
> • Japan and U.K are parts of the Hague Convention (Act for Implementation of the Convention on the Civil Aspects of International Child Abduction)
>
> • Ministry of Foreign Affairs offers support such as application for assistance in child's return and arranging contacts between the parties.
>
> • to consult the Ministry of Foreign Affairs and a lawyer immediately
>
> We have printed the homepage of the Ministry of Foreign Affairs and handed it to the consultee.

> The consultee said the following
>
> • she will consult the Ministry of Foreign Affairs and a lawyer" (emphasis by underlining added).

31. The mother messaged S from the police station. She said, "I'm at the police station to save you, [S]", to which S replied:

> "Are you crazy, Mommy? I hate it when you act like a kid. I wanna stay. I wish you didn't do that. It is not like an adult and a normal mom."

The mother replied:

> "Be careful white people food. They might poison you. Don't get brainwashed baby. You will always be my baby… you are under my name 100%"

32. In a WhatsApp exchange three days later (14 July 2022), the father sought to persuade the mother that S's life "is so much better here", and that she is "happy". He proposed that the mother and he try to work out a "deal" in respect of S's upbringing in England. The couple appear to have spoken on the phone, and the evidence suggests that the mother agreed to S remaining with the father. However, in an exchange which followed this was not confirmed:

> F: "You have been violent and abusive to S too".
> M: "I was acting. It was only video" …
> F: "You just told [S] she could stay literally an hour ago... she thinks she is staying now. You said, that she could stay here if she wants, to her directly"
> M: "No. She has to come back on 8/26".

33. It is now apparent that on 28 July the father applied for a place for S at the Junior School of a well-known fee-paying school proximate to his family home ("the Junior School"). S was offered a place, and was enrolled at the Junior School on 12 August 2022.

34. On 3 August 2022, the father and the mother had a video-call. S repeated to her mother that she wished to remain in the UK for the long-term. Again, it is the father's case that the mother agreed to this on the phone. The parents then communicated by WhatsApp message, with the mother once again revealing her change of heart:

> F: "You just said you were happy for her to stay here, to live here".
> M: "Words are just words".

35. On 18 August, in further exchanges, the father confirmed that he was planning to return S on 26 August ("that's the plan; nothing has changed"). On the following day (19 August 2022), by arrangement, the mother travelled to England to visit S. The father contends that at a lunch shortly after the mother's arrival, and following

discussions, again she orally agreed to S remaining in England. The parents agreed to look at the Junior School on the following day.

36. On 22 August, the parents and S visited the Junior School together. The mother took many photographs. That evening the mother gave the father her credit card, and he withdrew money (£650) which was clearly expressed to be her contribution to the purchase of S's school uniform for the Junior School in England, confirming in a WhatsApp message on the following day that she just wants "S to have the best life" (inferentially at the Junior School and in England). The conversation which took place in the mother's hotel room (recorded by the father and which I have heard) appears to be cordial. The mother states that she has done her best for "us as a parent".

37. There is now a dispute between the parties, discussed below, about the terms on which the mother agreed to S remaining in England. It is the mother's case that she agreed to S attending the Junior School on a 'trial basis', until the end of the October half term; she contends that it was agreed that S's place at the school in Tokyo was to be kept open and paid for by the father. She says:

> "I made [the father] promise that [S] would not be withdrawn from the [school in Tokyo], and that any arrangement for her to attend [the Junior School] would be short term only".

However, on the evening of 22 August 2022, the parents drafted an e-mail to S's international school in Tokyo in these terms:

> "I am very sorry for our delayed response - I was waiting right to the last minute to see if this was truly necessary but due to unforeseen business reasons, I have to leave Japan on work and move to the UK - I am not sure exactly how long this will last but for the time being we will have to take [S] out of [the international school] and bring her back to the UK to attend school here and we will no longer need the bus service either at the moment. I have also completed the withdrawal form as requested".

I have listened to an audio recording (taken by the father) of at least part of the discussion between the parents when this e-mail was drafted. The mother plainly participates in the conversation and after the draft is read to her, she says "OK". The e-mail was, I believe, sent to the Tokyo school that evening. This is inconsistent with the mother's further case that she was unaware of the terms of the e-mail to the international school in Tokyo, as she had blocked the father's e-mail account.

38. On the day after these developments (23 August), I note the following WhatsApp exchange between the parents:

> F: "Thanks again for the support with the school uniform… I'll take LOADS of photos for you and your mum.

> M: Thank you
> F: Thanks for coming over as well to see the performance - I know that made her so happy. And also to come see the school and give your blessing for her to go there … it means a lot to me and I know it means HUGE for [S].
> M: I just want [S] to have the best life."

In a continuation of the conversation on the following day, the mother suggests that she will move over to live in the UK too, to be with her daughter.

39. On 26 August 2022, the parents both signed the parent contact form for the Junior School. It is agreed that the mother participated in choosing extra-curricular activities for S.

40. On 6 September 2022, the father posted a message on the parents' WhatsApp group for S's school in Tokyo. The message read:

> "Hi everyone - I hope all is well with you! I just wanted to write a quick note to say that as of Monday, [S] will be starting school in the UK!
>
> Due to business and the need for me to now be based in the UK for the foreseeable future, [the mother] and I made the decision over the summer to send her to school here. [S] misses her friends at [the Tokyo school] very much, but she is also really excited to start a new school here in the UK. We'll make sure to get in touch when [S] is back in Japan as I know she would love to see everyone again. In the meantime, please don't hesitate to reach out if you should need anything and definitely get in touch if you are coming through London!! Best regards, [the father]."

41. Significantly, the mother immediately responded to this message on the group WhatsApp chat by posting a photograph of S in her school uniform for the Junior School in England. The obvious inference is that the mother was supportive of this.

42. It is agreed that S started the Junior school in September. She did well there. S did not return to Japan at the end of October 2022. She has not, of course, returned at all. At the end of October, in further WhatsApp conversations, the mother asked for a photograph of S, and the opportunity to see her in London. In mid-November, she corresponded asking the father for S to visit Tokyo for the New Year period (27 December 2022 to 8 January 2023) with the mother and grandmother; the mother agreed to return with S on 8 January 2023. In an argument by messaging in December 2022, the mother said this:

> "If you don't come [for the New Year] I'll be angry [like] you [have] never seen. I don't care. You will

> see how psycho I'll be … I don't care what you think of me…".

43. It is the mother's case that "she felt powerless", and hoped that the father would return S at Christmas / New Year. Indeed, in her statement she says:

> "I agreed to her staying until Christmas, with her returning on 27 December in time to spend New Year's Eve with me in Japan".

44. She further says in her evidence that:

> "I am not proud of the way that I expressed my extreme upset during this period. At times I made threats against him and [S] and pretended I didn't care and said he could have her, which I thought might make [the father] more likely to bring [S] back because he would think I wouldn't keep her in Japan".

45. In the early part of 2023, the father instructed lawyers to formalise the arrangements for S's care through court order. The mother declined to engage:

> "I don't need her. I am busy with my boyfriend. … I will have new kids with my man and be happy. You poor useless c***… I can't take care [of] kids. I'm working and … with my man."

46. On 13 January 2023, the mother texted the father indicating that she had 'moved on' with her life and did not want S anymore; she said that she was happy to talk about finalising an order.

47. In January 2023, the father moved out of the paternal grandmother's home into a home with his wife (who was by now pregnant) and S.

48. In February 2023, the mother sent a WhatsApp message to the father:

> "Don't send me this, I don't care what you want, listen what I want and then I read. Otherwise just take her. I don't give a shit."

49. On two separate occasions, the father requested, and the mother supplied, letters of authority enabling him to fly with S for holidays in the early part of 2023. I believe that the father and S visited Paris and on a separate occasion they went skiing.

50. In April 2023, the mother flew to England to spend time with S. The mother and S stayed at a hotel in London together for what the parties agreed would be a period of four days; the father had booked them into one hotel, but the mother checked out of that, and actually stayed elsewhere. During that time it is accepted that the mother secretly took S to the Japanese Embassy to obtain travel documents in order to take S

back to Japan; S later reported to the father that her mother had threatened her that if she told her father, they would go to prison "for a long time".

51. During the visit to London, an incident occurred while the mother and S were in Harrods Department store, Knightsbridge. S visited the toilets and it appears that she alleged to a stranger (i.e., I believe another customer) that her mother had hurt her. The mother accepts (in her statement of evidence) that she had hit S across the head ("[S] was quite shocked") and the department store's security staff were called and returned S to the mother. The father was informed and arranged for a taxi to take the mother and S to their hotel. The father called the police and reported to them that the mother had assaulted S and was planning to abduct her to Japan; the mother appears to have told the police that she was intending to take S back to Japan on the following day and showed them a document which in the view of the officer appeared to be a forged consent form from the father. The police incident report contains the following:

> "During a conversation with [S], in which [S] has become visibly distressed at the thought of remaining with mum, she has divulged: On 17/04/23 at approximately closing time, [S] alleges that she was hit on the head by mum in Harrods … – and even spoke to a member of staff there saying that her mum was hurting her. [S] then tried to run away from her mother but her mother took her belongings, such as her phone, so [S] could not run off as she had no means of contacting her father. – [S] states that she has no injury, no marks can be seen, but it did make her cry". (Emphasis by underlining added).

The bodycam footage records the officer reporting this to his station (contemporaneously):

> "The mum's been a bit aggressive, child's been absolutely fine, mum's been saying she is not her daughter anymore and she's going to go to her boyfriends and have a new baby and forget about her…
>
> …. the child doesn't want to go back to Japan… umm.. basically said "yeah you are not my daughter any more"…. I mean the mum is very very irate, she's very shouty and the daughter's very timid, very like she shudders away". (Emphasis by underlining added).

The bodycam also contains the recording of S in the background (while the officers are speaking with the mother):

> "I don't want to go to Japan today or tomorrow or ever".

The mother denied harming S in any way or planning to abduct S. The police removed S from the mother's care and returned her to the father. The mother flew back to Japan alone.

52. On 19 April 2023, the father applied to the Family Court for an order under the Children Act 1989. A prohibited steps order was made by a District Judge on the same day, without a hearing, preventing the mother from removing S from the care of the father or from the jurisdiction, and providing for an 'on notice' hearing on 2 May 2023.

53. The mother responded by initiating this application for summary return under the 1980 Hague Convention on 27 April 2023.

54. On 1 May 2023, S alleged to the father's wife that her mother had sexually assaulted her. The police commenced an investigation. The mother was to be interviewed by the relevant police force immediately after the hearing of this application.

Article 3; unlawful removal or retention; habitual residence

55. Article 3 of the Hague Convention reads as follows:

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

Article 12 provides:

> "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".

56. Given that counsel agree on the applicable law in this case in relation to habitual residence, I do not propose to rehearse it here at any length. It is essentially a question of fact, but the cardinal principles which I have applied in this case have been drawn from a number of cases including but not limited to: *Proceedings brought by A* Case C-523/07, [2010] Fam 42, *Mercredi v Chaffe* (Case C-497/10PPU) [2012] Fam 22), *A v A and another (Children: Habitual Residence) (Reunite International*

Child Abduction Centre intervening) [2013] UKSC 60 [2013] 3 WLR 761, *Re LC (Children)* [2013] UKSC 221, *Re B (A Child)* [2016] UKSC 4, [2016] AC 606; *Re B (A Child)(Custody Rights: Habitual Residence)* [2016] 4 WLR 156; *Re J (a child) (Finland: habitual residence)* [2017] EWCA Civ 80, *Proceedings brought by HR* [2018] 3 W.L.R 1139, at [54] and [45]; *Re M (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105, and the recent comments of Moylan LJ from *Re A (A Child) (Habitual Residence: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 659.

57. On the evidence, I am satisfied that when the father removed S from Japan on 24 June 2022, he fully intended to return S to Japan some eight weeks later; in this regard, I note that:

i) He bought a return flight;

ii) He repeatedly confirmed to the mother his intention to return S up to the middle/end of August (even though they were also discussing alternatives);

iii) He was plainly aware of his obligations under the Hague Convention 1980, and the penalties for failure to comply with those obligations;

iv) He signed the notarised agreement on 24 June 2022, and specifically drew to the mother's attention in correspondence the existence of the 1980 Hague Convention and the unlawful nature of any retention. His unhappiness focused on the ancillary agreement by which he would be bound by a number of conditions about his future relationships – i.e., which went far beyond the scope of the summer visit.

Accordingly, I do not find that the removal of S from Japan was wrongful.

58. S had not been in this country for long before she started to articulate, and with some force, her wish to stay. It is clear from the evidence that the father was keen to achieve this – in the main, to protect his daughter from the ongoing abuse which he had witnessed through the video calls. It is undisputed that during S's stay over the summer, the mother agreed to S *starting* the term at the Junior School; on the evidence overall, I find that she gave an *open ended agreement* to S remaining at the school. I consider below whether her alleged agreement was sufficiently clear and unequivocal as to amount to consent under the 1980 Hague Convention (see §61 below). There had, it seems, been a discussion at one time between the parents about S returning to Japan at the end of half-term (28 October 2022). It however, when the time came, is clear that the mother did not actively seek S's return.

59. In determining the issue of habitual residence, the factual enquiry which I have undertaken has been centred throughout on the circumstances of S's life. My investigation has been child-focused and I have considered most carefully the particular situation of this particular young person. On the basis of all the circumstances of this individual case, I am satisfied that by the end of October 2022, S had established a reasonably firm "degree of integration" in the social and family environment of the father and his wife, and life in England. Accordingly, if there was a 'retention' at the end of October 2022, it was not unlawful, because I find that S was, by then, habitually resident in England and Wales.

60. In making this finding, I repeat that I have firmly focused (as I must) on the circumstances of S's life and those elements in the evidence which are most likely to illuminate her habitual residence; I have taken particular account of the following facts:

i) S's apparent unhappiness at aspects of her life in Japan in the care of her mother enabled her quickly to integrate into life in England with her father and stepmother; her wish to remain here was expressed very soon after her arrival;

ii) In June 2022, S had returned to England, a country which she had visited in the past; she enjoyed her summer holiday in England, participating in a dance group which had put on a performance in London to which both her parents came;

iii) S started at the Junior School in early September and was enjoying it; S was being taught in her first language, English; she was doing well (a sign of having settled) and had a growing network of friends (which was evidently well-established by the time she met with Ms Demery some months later);

iv) S believed (with justification) that her mother had given her blessing to S starting school in England, and that this was to be "fulltime" (see §60(x) below); the mother had visited the school, appeared enthusiastic (taking multiple photographs), contributed to the cost of the school uniform, and had helped S to choose her extra-curricular activities, including tennis, cookery, music, guitar, drama and horse riding; this enabled S to relax into her new school and life;

v) The parents had agreed that S should live with her father, step-mother and paternal grandparents for a period; this arrangement was plainly working well, and it appears that S had a good relationship with her stepmother (a development which irked the mother). S was very much part of the family;

vi) S was registered with the father's local GP and dentist;

vii) It was clear that the father – on whom S was and is dependent – wished S to remain in England; parental intention is relevant to the assessment, but not determinative (*Re KL, Re R* and *Re B*);

viii) By the end of October, S had been in England for four months; it appears that her situation was considerably more stable and secure with her father in England than it had been with her mother in Japan; this will have helped S to integrate into her social and family environment in this country. It is the *stability* of S's residence as opposed to its *permanence* which is relevant (*Re R* and earlier in *Re KL* and *Mercredi*);

ix) S was continuing to experience some negative telephone calls with, and messages from, her mother during the summer and early autumn which were doubtless serving to reinforce her unhappiness about aspects of her life in Japan;

x) While not yet an adolescent[1], S's perception was that she was to be living in England full-time from September 2022. Ms Papazian records in her position statement what S told the Guardian at their recent meeting that she "loves school" and:

> "She was asked if when she visited the school, whether she thought that she would be going there for a trial or for full time arrangement. She said she knew it was fulltime, adding her mother was there and she said OK to this. She reiterated it was fulltime" (Emphasis by underlining added).

Consent

61. I have already touched on the issue of whether the mother gave her consent to S remaining in this country, and if so when (see §58 above); it may have been apparent that I was not so persuaded. In order to set the legal context for my assessment of the facts, I take as my guide to the law the helpful summary set out in Peter Jackson LJ's judgment in *Re G (Consent; Discretion)* [2021] EWCA Civ 139:

> "[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

[1] During the hearing counsel and I considered what Lord Wilson said in *Re LC* [2014] UKSC 1 at para.37

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.

[26] … as a matter of ordinary language the word 'consent' denotes the giving of permission to another person to do something. For the permission to be meaningful, it must be made known. This natural reading is reinforced by the fact that consent appears

> in the Convention as a verb ("avait consenti/had consented"): what is required is an act or actions and not just an internal state of mind. But it is at the practical level that the need for communication is most obvious. Parties make important decisions based on the understanding that they have a consent to relocate on which they can safely rely." (Emphasis by underlining added).

62. Having regard to "the words and actions of the remaining parent" (see *Re G* at [25](2) at §61 above) there is good evidence which supports the conclusion that while the mother had initially agreed for S to visit England for a holiday, she came round to agreeing to her remaining in this country for the long-term:

i) The mother visited the Junior School and agreed to S starting in September; there is no evidence to support the mother's case that this was for a 'trial' period; the school has confirmed that it does not take pupils on this basis;

ii) The mother paid over £600 towards the school uniform for S, which she would not have been likely to do if this was just for a short and temporary stay at the school;

iii) The mother was, I find, in the same room as the father when he drafted (with her) the e-mail to the international school in Tokyo withdrawing S's place there (see §37 above);

iv) On the day after the visit to the Junior School (see §38 above), the parents' exchange reads: "Thanks… also to come see the school and give your blessing for her to go there … it means a lot to me and I know it means HUGE for [S]. M: I just want [S] to have the best life."

v) She appeared to acknowledge to the parents of the international school in Tokyo that S had now started school in England and – materially – would not be back in Japan at any specific or defined time in the future;

vi) In WhatsApp messages in the summer (probably after the visit to the school) the mother says: "she can go to school there if she wants, but you have to come to discuss with me"… "I am happy she is there and school (sic.)" … "thank you [father] … Amazing school .. well done [father]" … "I can't raise her now… impossible to take her to school";

vii) As the end of October 2022 approached there is – significantly in my view – no evidence of any (or any meaningful) discussion between the parents about S returning to Japan; no arrangements were made for flights, and there was no discussion about her returning to the school in Tokyo, no conversation about the care arrangements, or otherwise.

63. However, the mother appears to have, as I have said above, a tendency to histrionic behaviour, and even after appearing to support S's relocation to England (once S was here), she can be seen at times in the correspondence to have been wavering, indeed

explicitly seeking confirmation from the father that S would indeed be returning to Japan as originally agreed.

64. Thus, while I am satisfied that the mother *did* at times signal her agreement to S remaining in this country over the period of the summer of 2022 this agreement was neither constant nor "clear and unequivocal". The father himself acknowledges that the mother is a "highly volatile" person, who "changes her mind on a whim", and her changeability and her unpredictability is well demonstrated by the WhatsApp and other messaging which I have read. As an example, after S had started school, and two days after the mother had posted a picture of S in her Junior School uniform on the Tokyo parents' WhatsApp group (ostensibly supporting the move of school), the mother sent a message to the father:

> "[S] goes to school in UK. It doesn't mean I agree. You put pressure on me.... Brainwash her. I had no choice. … You made me. … I never agreed….".

It follows that I cannot find that the mother 'consented' to S remaining in England, as the father contends.

Acquiescence

65. The father raises the alternative argument that the mother acquiesced in S's retention and enduring stay in England, and the burden of proof is on him to establish on the balance of probabilities that this is so.

66. Lord Browne-Wilkinson's summary of the law in *Re H and Others (Minors) (Abduction: Acquiescence)* [1998] AC 72, at 90 is still regarded as the 'locus classicus' (as Ms Renton described it):

> "(1) For the purposes of Art 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill LJ said in [*Re S (Minors) (Abduction: Acquiescence)* [1994] 1 FLR 819 at 838]: "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 clearly 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."

67. This test has been more recently considered in *JM v RM (Abduction: Retention: Acquiescence)* [2021] EWHC 315 (Fam) at [43]-[53], where Mostyn J started his discussion of the relevant law by referencing the Oxford English Dictionary definition of the word:

> "[45] … according to the OED "to acquiesce" means "to agree, esp. tacitly; to accept something, typically with some reluctance; to agree to do what someone else wants; to comply with, concede". The word carries with it a much greater sense of passivity; of acceptance of a state of affairs by doing nothing; of tacit compliance. In ordinary language it obviously covers active consent *ex post*; but it also covers passive acceptance by just "going along with" the proposal".

Mostyn J went on to draw on the speech of Lord Browne-Wilkinson (also at [45]):

> "In his speech Lord Browne-Wilkinson stated at p.87:
>
> "What then does article 13 mean by "acquiescence?" In my view, article 13 is looking to the subjective state of mind of the wronged parent. *Has he in fact consented* to the continued presence of the children in the jurisdiction to which they have been abducted?" (my emphasis)
>
> Here Lord Browne-Wilkinson is clearly using acquiescence in its first sense. However, at p.89 he says:
>
> "In my judgment, therefore, in the ordinary case the court has to determine whether in all the circumstances of the case the wronged parent has, in fact, *gone along* with the wrongful abduction." (My emphasis)

> Here he is using acquiescence in its second sense."

Adding at [46]:

> "… to succeed in a defence of acquiescence, it is not necessary to show more than the second sense of its meaning, namely that the left-behind parent has passively gone along with the removal or retention".

68. The *ordinary* case of acquiescence is one where the left-behind parent has subjectively consented to, or has gone along with, the continued presence of the child in the place to which they had been taken. The *exceptional* case is that identified by (4) in the quote at §66 above, where the left-behind parent did not subjectively acquiesce, but where their outward behaviours:

> "… showed clearly and unequivocally that the left-behind parent was not insisting on the summary return of the child",

in which case, as per Lord Browne-Wilkinson:

> "…he cannot be heard to go back on what he has done and seek to persuade the judge that, all along, he has secretly intended to claim the summary return of the children." (*Re H* at p.88)

69. In my judgment, the evidence objectively assessed demonstrates that from early September the mother was indeed acquiescing – in the ordinary sense of the word – in S's continued residence in England. In so concluding, I have taken account and rely, without repeating them here, on all of the matters which I set out at §62 (i)-(vii) above which tend to show the mother's state of mind in 'going along' with S's indefinite residence in England. To those matters, I add the following:

i) In the autumn of 2022 (probably 10 November) the mother sought to persuade the father to fund her flight to the UK to see S; materially, she was not seeking to persuade him to send her home;

ii) In the autumn 2022, the mother sought to agree with the father a New Year visit for S to Japan, on the basis that S would return to England on 8 January 2023 (see §42 above);

iii) It seems that the mother twice gave letters of authority for S to travel out of the UK (October 2022 and February 2023), on family trips to Europe (Paris and skiing); in fact, the February 2023 authority covers any travel in the period to July 2023;

iv) In January 2023, the father sought (through solicitors) to agree a court order by which S could formally remain in England; the mother did not engage with this process constructively, responding to the father, memorably, "[d]on't send me this. I don't care what you want. Listen what I want first and I read.

Otherwise just take her. I don't give a shit"; on 13 January (see §46 above), the mother indicated that she would be happy to talk about finalising an order.

v) I find as a fact that the mother well knew about the 1980 Hague Convention and its implications from (at the latest) June 2022:

a) The father had told her about it in a WhatsApp message on 24 June 2022 and on the same day he sent the mother the link to the Ministry of Foreign Affairs, with the comment: "Japan signed up to Child Kidnapping laws meaning – IF I kept her in the UK after that date you could arrest me and she would be flown back"; the mother referred to engaging an international lawyer;

b) It is clear that the Japanese police had reminded the mother about the 1980 Convention during her visit to the station on 11 July 2022; she had further been advised of the importance of consulting with lawyers in the event that she considered that her daughter had been unlawfully removed or retained abroad.

Yet, the mother did not seek to assert her rights under the 1980 Hague Convention or otherwise until *after* the father had issued proceedings under the CA 1989 in England in mid-April 2023 following her ill-starred visit to England.

70. If I am wrong about the mother's state of subjective intention (which is after all a pure question of fact, established from the evidence), I am satisfied that her words or actions clearly and unequivocally show, and have led the father to believe, that she clearly was *not* asserting or going to assert her right to the summary return of S and were inconsistent with such return. This would be one of those "vanishingly infrequent" cases (*JM v RM* [supra] @ [50]) where justice requires that the mother be held to have acquiesced.

Objections

71. Whether a child objects to a return to the country from which they have been removed or retained is a simple question of fact; the degree of maturity that the child has is also a question of fact (see Black LJ in *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26 at [35]. There is no fixed age below which a child's objections will not be taken into account.

72. It is clear from the authorities that the court is only concerned with an 'objection', and nothing less:

> "… the child's views have to amount to objections before they can give rise to an Article 13 exception. This is what the plain words of the Convention say. Anything less than an objection will therefore not do. This idea has sometimes been expressed by contrasting "objections" with "preferences"." (*Re M* at [38]).

And with regard to the use of the word/concept of 'preference':

> "I do not see it as a gloss on the Convention or as a term of art but rather as one way of summarising that, for reasons which will differ from case to case, the child's views fall short of an objection" ibid. at [41]).

73. In this case, it is the mother's case that S:

i) is expressing no more than a preference not to return, it is not an 'objection',

and/or

ii) is in fact simply expressing a view about a return to the mother's care not to the country.

74. As to the first point (§73 (i) above), this is a matter of fact. The mother points to S's comments to Ms Demery that she "wishes to remain in the United Kingdom with her father and stepmother. She has provided cogent reasons for her views" suggesting that this is a reasonably subdued view. Even if that is the right interpretation of that phrase (I am not so sure) it is only one illustration. The papers contain many more examples of S's views as expressed to:

i) the Guardian (S: "a million gazillion to infinity wants to remain in the UK" – 10 October 2023);

ii) to her mother herself (see §31 above: "I wanna stay");

iii) to the police (with congruent distress) in April 2023

> "I don't want to go to Japan today, tomorrow or ever";

iv) directly to me, in a letter in these terms:

> "I don't want to go back to Japan because she was abusing me. But my daddy is so so … more kinder than my mummy so I want to live in England please. I begging."

75. The Guardian expresses the view (reflected by the terms of the letter which I set out above) that S's emotional ill-treatment by her mother underpins her objection to a return to Japan and to her mother; it is clear, argues Ms Papazian, that for that reason among others S strongly does not want to return to live with her mother.

76. In this case I am clear that S's views are clearly and vehemently expressed, and amount to an objection. That does not of course mean, as Black LJ was at pains to point out in *Re M* (below), that her view determines the application: hearing the child is not the same as giving effect to his/her views. But that calls into focus the second question – to what is S objecting?

77. On this, the second of the points listed in §73 above, counsel drew my attention to *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26:

> "[43] The ground for this acknowledgment of the potential difficulty was laid in what Balcombe LJ said *Re S* [1993] at 782D. However, it may be convenient to rely upon what he said a little later in *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716. Commencing at 729, he set out the principles which he considered were to be deduced from the authorities dealing with child's objections. He described the second of these as follows:
>
> > "The second principle to be deduced from the words of the Convention itself, and particularly the preamble, as well as the English cases, is that the objection must be to being returned to the country of the child's habitual residence, not to living with a particular parent. Nevertheless, there may be cases….where the two factors are so inevitably and inextricably linked that they cannot be separated. Support for that proposition will be found in the judgment of Butler-Sloss LJ in *Re M (A Minor)(Child Abduction)* [1994] 1 FLR 390 at p 395…."
>
> [44] In *Re M* [1994], Butler Sloss LJ had said:
>
> > "It is true that article 12 requires the return of the child wrongfully removed or retained to the State of habitual residence and not to the person requesting the return. In many cases the abducting parent returns with the child and retains the child until the court has made a decision as to the child's future. The problem arises when the mother decides not to return with the child. It would be artificial to dissociate the country from the carer in the latter case and to refuse to listen to the child on so technical a ground. I disagree with the contrary interpretation given by Johnson J in *B v K (Child Abduction)* [1993] Fam Law 17. Such an approach would be incompatible with the recognition by the Contracting States signing the Convention that there are cases where the welfare of the child requires the court to listen to him. It would also fail to take into account article 12 of the United Nations Convention on the Rights of the Child 1989. From the child's

> point of view the place and the person in those circumstances become the same….I am satisfied that the wording of article 13 does not inhibit a court from considering the objections of a child to returning to a parent."
>
> [45] Ward LJ's approach in *Re T* was similar. Listing the matters that had to be established in a child's objections case, he began with the following (at 203):
>
> "(1) Whether the child objects to being returned to the country of habitual residence, bearing in mind that there may be cases where this is so inevitably and inextricably linked with an objection to living with the other parent that the two factors cannot be separated."" (In each case, my emphasis by underlining).

78. S's case, as presented by Ms Papazian, is that S does indeed object to returning to Japan because that would inexorably mean returning to the care of her mother. S strongly associates Japan with her mother; they are "inextricably linked" – that is unsurprising as it is all she has ever known there. Ms Papazian argues that in this case a return to Japan is essentially indistinguishable from a return to the mother; the father cannot travel to Japan given his personal and professional commitments in England.

79. The father supports S in expressing her objection to returning to Japan, acknowledging that he is unable to return to live in Japan, even for a short time, given his family and work commitments in England.

80. I am further invited by Ms Papazian to conclude that S is of an age and has "attained an age and degree of maturity at which it is appropriate to take account of [her] views" (per Article 13). Ms Demery says this:

> "[S] is a well-spoken young girl and has good communication skills and was able to effectively convey her feelings during our meeting. … Her range of vocabulary and her ability to express herself verbally suggest that her cognitive maturity is commensurate with her chronological age. This would appear to be supported by the information received from the school which she attends in England.
>
> At her current stage of development, [S] does not have the capacity to make decisions in her best interests and is likely to express views that will meet her emotional needs to remain close to the person who is providing her care. However, she is approaching an age when her views will carry some weight but are not determinative".

S says that she wants to see her mother but is worried about the risk of kidnap. Ms Papazian fairly argues that S's expressed wish to see her mother shows a good degree of balance and maturity in her approach.

81. Taking all of these matters into account, I am satisfied that S 'objects' to a return to Japan within the meaning of Article 13.

Grave risk of physical / psychological harm; Intolerable situation

82. Article 13(b) of the Hague convention provides that the court is not bound to order a return of the child if the person who opposes the return establishes that:

> "(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".

83. The legal principles engaged on an application under the 1980 Hague Convention where Article 13(b) is raised are well-established. They were extensively discussed in *Re A (Children) (Abduction: Article 13b)* [2021] EWCA Civ 939, ("*Re A*"). In his judgment in that case Moylan LJ drew from the Supreme Court decisions of *In re E (Children) (Abduction Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 ("*Re E*") and *Re S (Abduction: Article 13(b) Defence)* [2012] 2 AC 257 ("*Re S*"). I have also found particularly useful the judgment of Baker LJ in *Re IG (Child Abduction: Habitual Residence: Article 13(b))* [2021] EWCA Civ 1123, and Moylan LJ in *Re C (Article 13(b))* [2021] EWCA Civ 1354 ("*Re C*").

84. The following principles emerge from these authorities, relevant to the 1980 Hague application:

i) Article 13(b) is, by its very terms, of restricted application: [§31: *Re E (Children)*]; the defence has a high threshold;

ii) The focus must be on the child, and the risk to the child in the event of a return;

iii) The burden of proof lies with the person, institution or other body which opposes the child's return. The standard of proof is the ordinary balance of probabilities, subject to the summary nature of the Hague Convention process: [§32: *Re E (Children)*];

iv) It will rarely be appropriate to hear oral evidence of the allegations made under Article 13(b) and so neither the allegations nor their rebuttal are usually tested in cross-examination;

v) The risk to the child must be "grave" and, although that characterises the risk rather than the harm, "there is in ordinary language a link between the two": [§33: *Re E (Children)*];

vi) "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. Amongst these are physical or psychological abuse or neglect of the child: [§34: *Re E (Children)*];

vii) Article 13(b) is looking to the future, namely the situation as it would be if the child were to be returned forthwith to his home country: [§35: *Re E (Children)*];

viii) The separation of the child from the abducting parent can establish the required grave risk (*Re IG* at para.[47](3)"

ix) In a case where allegations which amount to grave risk are disputed:

> "… the court should first ask whether, *if they are true*, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison Judges are so helpful." [§36]: *Re E (Children)* (Emphasis by italics added).

x) The court must examine in concrete terms the situation in which the child would be on a return. In analysing whether the allegations are of sufficient detail and substance to give rise to the grave risk, the judge will have to consider whether the evidence enables him or her confidently to discount the possibility that they do;

xi) The situation which the child will face on return depends crucially on the protective measures (including the efficacy of undertakings) which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Thus:

> "… the clearer the need for protection, the more effective the measures will have to be" [§52: *Re E (Children)*]

85. Moylan LJ in *Re C* [2021] (citation above) emphasised that the risk to the child must be a *future* risk (§49-50). He cited from the Good Practice Guide to emphasise that:

> "… forward-looking does not mean that past behaviours and incidents cannot be relevant to the assessment of a grave risk upon the return of the child to the State of habitual residence. For example, past incidents of domestic or family violence may, depending on the particular circumstances, be probative on the issue of whether such a grave risk exists. That said, past behaviours and incidents are not per se determinative of the fact that effective protective measures are not available to protect the child from the grave risk". (§50)

86. Thus, an assessment needs to be made of the:

> "… circumstances as they would be if the child were to be returned forthwith. The examination of the grave risk exception should then also include, if considered necessary and appropriate, consideration of the availability of adequate and effective measures of protection in the State of habitual residence" (§50).

He added:

> "It is also axiomatic that the risk arising from the child's return must be *grave*. Again, quoting from *Re E*, at [33]: "It must have reached such a level of seriousness as to be characterised as 'grave'". As set out in *Re A*, at [99], this requires an analysis "of the nature and degree of the risk(s)" in order to determine whether the required grave risk is established" (emphasis in the original).

87. I am clear that my role is not to engage in a fact-finding exercise, but as Moylan LJ went on to observe:

> "… unless the court properly analyses the nature and severity of the potential risk which it is said will arise if the child is returned to the requesting State, the court will not be in a position properly to assess whether the available protective measures will sufficiently address or ameliorate *that* risk such that the grave risk required by *Article 13(b)* will not have been established. As set out in *Re E*, at [36], the question the court is considering is "how the child can be protected against *the* risk" (my emphasis). The whole analysis is contextual and forms part of the court's process of reasoning, as referred to by me in *Re A*, at [97], adopting this expression from *Re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257, at [22]". (§58)

88. It is relevant that I look at the allegations cumulatively and not independent of each other. In *In re B (Children)* [2022] 3 WLR 1315, Moylan LJ said:

> "[70] The authorities make clear that the court is evaluating whether there is a grave risk based on the allegations relied on by the taking parent <u>as a whole, not individually</u>. There may, of course, be distinct strands which have to be analysed separately but the court must not overlook the need to consider the <u>cumulative effect of those allegations for the purpose of evaluating the nature and level of any grave risk(s)</u> that might potentially be established as well as the protective measures available to address such risk(s)." (Emphasis by underlining added).

89. This is a case in which the Article 13(b) exception is presented on the basis that S has suffered:

i) *Physical abuse* (i.e., S being slapped by her mother as reported by S to her Tokyo school; being punched on the arm several times [reported to staff at her school in Tokyo on 29 January 2020]). It is also alleged (see above) that the mother assaulted S while at Harrods in April 2023; the police observed S being "visibly distressed at the thought of remaining with Mum" and "shuddering away". Most recently S made further report to the Cafcass officer:

> "[S] elaborated on her experiences of her mother in Japan. She told me that "my mummy was mean, was abusive, she slaps me. When I was 4 I didn't know days of the week. She was so mad at me she slapped my cheeks. She often got mad at me. I don't know why."

ii) *Emotional abuse* (i.e., being exposed to her mother's shouting, abusive language and intimidating behaviour while in Japan (see the comments about the video-recordings at §20-23 above); being threatened with a knife; the attempted unscheduled and clandestine removal of S back to Japan by her mother in April 2023;

iii) *Neglect* (i.e., being left alone in the flat in Japan for extended periods). On this point, the father has produced messages passing between himself and S's nanny which strongly suggests that S was left alone for extended periods. I note that the mother says: "I told [the father] on a few occasions that I left [S] alone in the apartment for days at a time. I did not do that and I never would as it would be unsafe and frightening for her. I just told [the father] that to try to scare him into coming back to support us". While I do not make any finding that the mother did leave S for extended periods, I do take into account the mother's conduct in telling the father that she *had* done so;

iv) *Sexual abuse* (i.e., allegations made to her step-mother and investigated by the local police; the suggestion – raised by the mother herself – that she had had sexual intercourse with a man in the presence of S: "My WhatsApp messages are at times just a string of ridiculous threats which [the father] knows to be nonsense").

The evidence relevant to this alleged abuse is found throughout the documents filed by the father, and is to some extent independently recorded by S's school in Tokyo, the police in England (who have investigated her allegation of sexual abuse), social services in England, and S's Guardian.

90. For reasons which will become apparent, I propose to limit my attention to the issue of physical and emotional abuse.

91. It is the father's case that:

Physical abuse

i) S has given compelling accounts of being physically abused by her mother in the past, including in April 2023; the account given by the police officer which is referenced in §89(i) above is chilling;

Emotional abuse

ii) Some of the video-recorded conversations show very abusive behaviour of the mother towards S – threatening her with a knife, and screaming abuse at her; it is obvious that S is terrified by her mother's conduct;

iii) The mother's contention that the video-recordings have been staged for the father's benefit is absurd; that the mother suggests this speaks volumes about her lack of insight into the effect of her damaging behaviour;

iv) The mother has repeatedly spoken with her daughter by Facetime in ways which are both hurtful to S and harmful to her; S is entitled to feel rejected by her mother and manipulated. The mother tells her daughter that her "prayer for [a] curse [on either S or the father] is very strong", adding that she has never done so "fiercer" and repeatedly calls the father a "terrible human". In a recent telephone call (26 September 2023), I note that the mother said to S:

a) "you are being mean to me…."bullied mama" that's what everyone calls me….Look at this" and shows S her mobile phone;

b) "I am too tired to spend my energy on you and then your dad and all mean people you know";

c) "you tell I am abusing you bla bla bla you know…I'm gonna have another new baby and gonna love my daughter and son … I will give all my expensive stuff, everything to my daughter my new baby … all my important my treasure I give to my new baby… I am always dreaming about having new baby you know again and take care of new baby and love my and sleep with my new baby you know …";

d) "I'm gonna spend all my time and all my money for that kids … and no time for you byeeee";

e) "I am so disappointed with you though … I loved you so much the last 8 years…but you know, I guess now you don't love me. (sighs). I gave up on you [S]";

f) "Just stay wherever you want to stay.. I don't really care … cos I don't need you… I have nothing to talk to you about";

g) Her next child will not become a "nasty kid like you…" … "nasty person like you, a nasty daughter like you talking bad things about me"… "Truly you have become a horrible child";

h) S: "Do you love me?" Mother: "I used to"; S: "do you like me?", Mother: "I am not sure";

i) "Your dad is a bad person";

j) S: "I am acting like the Mum here, you're acting like the baby. Like the crybaby here, like the angry baby"; Mother "Shut up you f***ing idiot".

v) Further illustration of this conduct is the way in which the mother undermines S's relationship with her stepmother who the mother refers to as a "f***ing bitch"; she says "in reality when they [the stepmother] get their own child or their own baby she's gonna love her own child and then become mean to you … it's famous! Stepmothers all definitely become like that" and adds in another call "when you grow up you gonna know how important real mum you know…not a step-mum. So many news in Japan that all the stepmother and stepfather they always mean to the kids…" When S challenges her mother and tells her that her stepmother is not mean, the mother replies "they will change, you will see". She directly accuses her daughter of being "brainwashed" by the father.

92. The mother's case can be summarised thus:

Physical abuse

i) The mother accepts that she has smacked S as a method of discipline (which the mother says is common in Japanese culture) but not more than 5 times in her life, and never with enough force to cause an injury.

Emotional abuse

ii) The mother accepts "that I have a fiery temper. When I am upset, angry, scared or desperate, my kneejerk reaction is to swear at and threaten [the father]". She adds:

> "The WhatsApp messages, voice notes and videos produced within these proceedings do not show an accurate picture of who I am or how I behave generally towards, [S], my family or in society. They reveal a problematic behaviour which I am fully aware I need to address … I have a tendency to say the most extreme things I can think of, as a release. I make death threats and say shocking things"…

iii) The incidents in which S appears to be abused on the videocall, while she brandishes a knife are just "a game":

> "[S] is an excellent actress and finds it fun. I would tell her to pretend she was crying and really scared of me so we could send a video to [the father]. I do now appreciate how wrong I was to involve [S] in this way. I appreciate how harmful and disturbing it will have been for [S] to play that role. I would never intentionally harm my only daughter. I deeply

> regret what I did and I have since apologised to [S]. … [S] was always clear to me that she understood it was a game and that she was just pretending to be scared in the videos."
>
> "The vast majority of my seemingly abusive behaviour is just performative, either as a way of releasing extreme upset or as a way of getting attention. Almost all of that behaviour is directed at [the father] and [S] is not exposed to it. 99% of my interactions with [S] I am a loving, caring, responsible, fun, relaxed mother. [S] is not afraid of me, I do not harm or scare her and she is safe and happy in my care".
>
> (Both extracts from the mother's 3 July 2023 witness statement).

iv) S was just pretending to be scared in the video.

93. The mother accepts that "very serious allegations have been made" about her behaviour towards S (see the final paragraph of her 3 July 2023 witness statement); this places the adequacy of protective measures firmly under the spotlight.

> "I suffered a depressive breakdown. On occasion, I completely lost my self-control and made videos of myself behaving in such a way to [S] that I thought would compel [the father] to return. It did not work. I deeply regret that behaviour. Whilst I explained to [S] that it was just a performance for [the father], I understand that she must have found my behaviour, my uncontrolled upset and my performance really frightening. I have apologised to [S] and I will never behave in that way around her again" (Emphasis by underlining added).

There is no evidence that the mother *has* taken steps to address her behaviour.

94. I am wholly satisfied on the evidence which I have seen that S is at grave risk of physical or psychological harm if she were to return to Japan; the mother's behaviour has been, I find, extremely abusive and "frightening" to S, as the mother largely accepts. On the evidence which I have seen from the video-recordings, the mother has demonstrated at times an ungovernable temper, and loss of self-control, which she has unleashed on S in the past. I reject completely her case that S was play-acting in the videos; the short videos contain extremely disturbing footage of child emotional harm, of a seriousness rarely seen in the Family Court. The fact that the mother suggests that S saw this as a "game" raises the index of my concern yet higher.

95. Significantly, there is no good evidence that the mother has taken any, or any reliable, steps to address her behaviours or develop insight into her conduct.

96. The mother's actions in seeking to remove S back to Japan in April 2023 in an unplanned and clandestine way, taking her from her father and from the school where it was known that she was happy, was another illustration of the mother's aberrant conduct which was likely to harm S. I am satisfied that S would have suffered, and would now suffer some 16 months after arriving in this jurisdiction, a grave risk of harm if she were to be separated from her father, particularly in this way.

Protective measures

97. The mother proposes a number of protective measures:

i) That S remains temporarily with the father, and the father returns to Japan with S (the father maintains that this is impractical/impossible);

ii) That the father would be in a position to make an application to the Japanese court for it to determine who holds parental authority, and that, if he were to hold parental authority, he could relocate with the child to England without an application to the court and does not require permission;

iii) That S is placed in the care of the maternal grandmother, either with the mother or separately (the mother spends half of her life in South Korea).

98. As to the first two points above, I am satisfied that the father – given his work and family commitments in England – would not now be able to travel to Japan for any extended period, to litigate there in respect of S. He last worked there in 2019. It seems likely to me that he would need to litigate because as an unmarried father, particularly with no residency rights, he has very limited legal rights in respect of S in Japan. In his reports dated 14 August 2023 and 9 October 2023, Makiko Mizuuchi, the jointly instructed Japanese lawyer, advises:

i) The father (as an unmarried father) does not automatically have parental authority, but can apply for parental authority from the court (in the absence of agreement); he can apply for a 'transfer of authority' to himself but cannot obtain *joint* custodial rights;

ii) Only a parent with parental authority can relocate with the child away from Japan; this can actually be done without the need to obtain a court order;

iii) If the parent with parental authority is "unsuitable for the welfare of the child" the family court can order a transfer of parental authority; there is also a mechanism for removing the child into the care system; there are Child Guidance Centres, which play a "central role among the agencies involved in abuse". Foster homes exist.

iv) It appears that the views of a child aged 15 and over are taken into account in any court determination as are the views of a child of under 15 (which will be taken by a family court investigation officer).

It seems reasonably clear that while in many ways the procedures mirror those which exist in this country, the father would face very considerable difficulty in claiming

custodial rights and permission to remove the child from Japan to England as an unmarried father without the agreement of the mother.

99. As to §97(iii) above, I am unpersuaded that the solution lies in S being placed (even part-time) in the care of the maternal grandmother; although S is plainly fond of her maternal grandmother, she has not come forward to support or endorse this proposal. Moreover, the father advises that:

i) The maternal grandmother is an elderly lady suffering from numerous chronic illnesses including the possibility of early onset Alzheimer's; I am not in a position to make any finding about her medical condition;

ii) The maternal grandmother lives in Osaka which is 250 miles from Tokyo;

iii) The maternal grandmother cares for her elderly husband who is in extremely poor health; it is said that he is dependent on the maternal grandmother;

iv) It is the father's case that the maternal grandmother has demonstrated many times that she has not been able to control or manage the mother; it appears that she was actively involved in the mother's plans to abduct S from England in the Easter holiday visit in 2023.

100. Moreover, I have reason to be concerned – on what I have seen and read – that the mother may find it difficult not to subvert the arrangement proposed in §97(iii), particularly given that this would not be her preferred outcome; her primary case (in the context of the protective measures) is that:

> "I believe I am best placed to care for [S], having been her primary carer and then sole carer for her entire life until her wrongful removal from Japan in the summer of 2022".

101. The father argues that no protective measures can address the grave risks to S of physical or psychological harm to which I have just referred. He is concerned that pending any determination by a Japanese Court of any application for custodial rights, S would be placed in state care given that the mother is regularly out of the country in South Korea. The Guardian argues that the situation in Japan would be 'intolerable' for S and that the protective measures do not begin to address S's needs.

102. I find that the protective measures proposed by the mother would be wholly insufficient to address the deeply damaging impact of the mother's extreme behaviours. There is, regrettably, no real reason to believe that the mother has changed her ways, or would do so in a timeframe which meets the current situation.

Discretion

103. If the outcome of this case were to turn on one of the Article 13 exceptions (i.e., acquiescence, child objections, grave risk) then I must consider whether I would exercise my 'discretion' to order S's return to Japan. In this regard, I have regard to the speeches in the case of *Re M (Abduction: Zimbabwe)* [2007] UKHL 55 at §43, as to which I highlight:

> "… 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."

104. I have further considered the judgment of Peter Jackson LJ in *Re G (Abduction: Consent/Discretion)* [2021] EWCA Civ 139 at §41:

> "…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."

105. On the facts of this case, I can do no better than to turn to the speech of Baroness Hale said in *Re D (A Child) (Abduction: Custody Rights)* [2007] 1 AC 619, at [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."

In short the discretion will almost inevitably be exercised – and it would be exercised in this case if required – by refusing to make a return order where the Article 13(b) exception is made out on the basis of a grave risk of harm.

Conclusion

106. This is in many ways, for reasons which need no further amplification here, a deeply troubling case. It will be apparent from this judgment that I have very serious concerns about the mother's conduct towards the father and towards S, and the long-term impact which this may have on S.

107. In summary, my conclusions are as follows:

i) I am satisfied that by the time of the alleged retention of S in England at the end of October 2022, S was as a matter of fact habitually resident in England; thus, the 'retention' was not 'unlawful' and the claim for summary return under the 1980 Hague Convention fails on this basis;

ii) If my assessment of her habitual residence is wrong, I am satisfied that the mother nonetheless acquiesced in S remaining in this country after October

2022, in that she consciously 'went along' with the arrangement for many months, until the father issued proceedings here in mid/late April 2023;

iii) If the evidence were not in fact to have shown that the mother had acquiesced in S's continued retention in England, I am satisfied that S genuinely objects to a return to mother and (inextricably) Japan, and that she has reached an age and level of maturity at which it would be appropriate for me to have regard to her views; her objection appears to me to be firmly and legitimately rooted in what she describes (and what I have seen to some extent) of her lived experiences in the care of her mother;

iv) Further, I am satisfied that S is at a grave risk of physical or psychological harm or would otherwise be placed in an intolerable situation if she were to be returned to Japan; the protective measures proposed by the mother are not likely in my judgment to mitigate that serious risk;

v) In the event that the outcome of the application was to be decided on the basis of any of the bases set out in (ii)-(iv) above, I am satisfied that it would be wrong – in the exercise of my discretion – to order S to return to Japan. This is particularly so given my clear findings about the grave risk of physical or psychological to S in such an event, and the inadequacy of the so-called protective measures. This is not a case in which the mother seeks a "swift restorative" return of S to Japan; S is now integrated into life in England, and it is right that the English courts should consider her future;

vi) For the avoidance of doubt, I am *not* satisfied that the mother ever 'consented' (in the way that term is understood under the 1980 Hague Convention) to S living in England long-term.

108. That is my judgment.