



Neutral Citation No: [2023] EWHC 3237 (Fam)

**IN THE HIGH COURT OF JUSTICE
FAMILY D**

Case No: FD23P00027

**IN THE MATTER OF THE CHILD ABDUCTION & CUSTODY ACT 1985
AND IN THE MATTER OF THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF
INTERNATIONAL CHILD ABDUCTION
AND IN THE MATTER OF THE SENIOR COURTS ACT 1981
AND IN THE MATTER OF FRED (a boy, dob: 29.06.20) AND ALEX (a boy, dob: 29.03.22)**

**Royal Courts of Justice
Strand, London, WC2A 2LL**

Date: 15/12/2023

Before

**Miss Katie Gollop KC
sitting as a Deputy High Court Judge**

BETWEEN:

EC	<u>Applicant</u>
-and-	
BM	<u>Respondent</u>

**Mr Michael Gration KC and Mani Basi (instructed by Hopkins Murray Beskine Limited) and the father in person
Mr Christopher Hames KC and Jonathan Evans (instructed by Brethertons) for the Respondent**

Hearing Dates 13-17 November 2023
Judgment Handdown 15th December 2023
Approved Judgment

This judgment was handed down remotely at 10.30am on 15th December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MISS KATIE GOLLOP SITTING AS A DEPUTY HIGH COURT JUDGE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Miss Katie Gollop KC

1. I am concerned with two little boys. The elder, who I will call Fred, was born on 29 June 2020 in America and is now almost three and a half. The younger, who I will call Alex, was born on 29 March 2022 in Italy and he is now almost one year eight months. They are the only children of the applicant (“the father”) and the respondent (“the mother”).
2. In June 2022, all four of them were living together in an apartment in Miami. On 9 June 2022, their mother (“the mother”) left the USA with the boys without their father’s knowledge or consent. The three of them have been living together in England since 2 September 2022 pursuant to the Homes for Ukraine scheme. The father remains in America.
3. The parents are married (though the mother filed for divorce in England and Wales in October 2023). The father has Russian, Ukrainian and US citizenship. The mother has Ukrainian citizenship and holds a US Green Card. Both boys have Ukrainian and US citizenship.
4. By an application dated 17 January 2023 made pursuant to The 1980 Hague Convention On The Civil Aspects Of International Child Abduction (“the 1980 Convention”) as incorporated by Schedule 1 of the Child Abduction and Custody Act 1985, the father seeks an order for their summary return to the USA. The application is resisted by the respondent mother on the following grounds (the pleaded defence of acquiescence not being pursued):
 - i) The children were not habitually resident in the USA on 9 June 2022 so that this court has no jurisdiction to make a return order; *but if this court does have jurisdiction*
 - ii) There is a grave risk that returning the boys to America would expose them to physical or psychological harm or otherwise place them in an intolerable situation pursuant to Art 13(b) of the 1980 Convention.
5. I heard the matter over five days from 13 to 17 November 2023. For reasons that will become clear, I start with the procedural history and the procedural difficulties that arose during the hearing, before turning to the facts.

Case Management Hearings and Representation

6. On 12 December 2022, Ms Christina Theodorou, solicitor, was requested by the International Child Abduction and Contact Unit to act on the father’s behalf. She did so until 2pm on the 17 November 2023. There was a hearing on 28 February 2023 at which the father was represented by Mr Basi, counsel. The father was represented by Mr Gratton KC and Mr Basi at a directions hearing in mid-March when the matter was listed for a three day final hearing to start on 10 July. At the pre-trial review (“PTR”) on 15 June, Roberts J made a detailed order requiring the mother to make the children available at a named contact centre on specific dates in the run up to the final hearing. That was so that they could spend time with their father, whom they had not seen face to face since 7 June 2022, prior to the start of the trial. The father attended the March and June hearings remotely from America.

7. The father did not come to England in July for contact or for the listed final hearing as planned. On 10 July, he again attended remotely from America represented by the same counsel. In the week prior to the final hearing, he sought an adjournment on the ground that the expert immigration evidence was incomplete. The mother agreed to that. The final hearing was adjourned and on 13 September 2023, the court sent notice of a four day hearing (day one to be a reading day) starting on 13 November. There was an entirely remote, second PTR in mid-October at which the father was represented by Mr Basi alone. The Order directed the father “*to attend in person if possible*” at the November trial but permitted him to attend remotely if personal attendance was not possible.

The Situation Arising At the Start of the Hearing

8. At the final hearing before me, the father was again represented by Mr Gration KC and Mr Basi. The mother was represented by Mr Hames KC and Mr Evans. I am grateful to all of them for their written submissions and their unfailing assistance.
9. The father’s skeleton argument informed me that he would not be attending in person but did not explain why. There were five witnesses listed to give oral evidence, and each of the parties required an interpreter. There was, therefore, a lot to get through in three days and I was keen to ensure that nothing delayed the start of oral evidence. I therefore requested a lawyers’ only, one hour, remote “housekeeping” hearing at noon on day one.
10. Mr Gration KC explained that it was not possible for the father to attend to give evidence in person because of a medical condition of recent onset, the nature of which the father wished to remain confidential. Whilst not anticipating a long-term health problem, the father did not think he would be fit to travel internationally for some time. As the Order permitted remote attendance, I accepted that explanation without enquiring further or requesting a medical certificate.
11. The two legal teams had various case management matters to discuss. I made it clear that a clean start the next day was important and that if any further matters arose that would benefit from pre-evidence discussion, I was available that afternoon to deal with them. Later in the day, I was told that the parties had reached agreement that no oral evidence from Mr Heller, the expert on US immigration law, was required and there were no other preliminary matters requiring case management.
12. The next morning the father attended remotely from America. Both legal teams and the mother were present in court in person. The father was sworn in and confirmed the truth of his two witness statements which bore the same address. He was then asked if he had moved house since making his second statement in July 2023. He said that in August he had moved to another address in Florida. He had, he said, informed his legal team of his change of address a few weeks earlier, after the PTR in October.
13. He said he was prepared to provide his address to the court but not the mother. When asked why, he explained that he had received information from an acquaintance of both parties, which he considered to be credible, that were he to travel to England, his personal safety would be in danger from the mother’s family. He was not prepared to name the acquaintance because if he did, that person’s safety would also be in jeopardy. He declined to say anything about what caused him to consider the information reliable, the nature of the threat, or the identity of the person likely to carry it out. He said that

he had been made aware of the threat in July and it was one of the reasons he did not come to England for contact (others being practical matters such as the contact centre being fully booked). He had not mentioned the threats in his July statement because at that stage, he was not sure how reliable the information was. Since July, all his devices had been hacked and he had lost e mails and messages. He could only assume this was the work of the mother and/or her family. He was adamant that it was too unsafe for him to risk coming to the UK now or in the future.

14. He confirmed he had a medical condition but said it was “*nothing to interest a lawyer*” and it was “*not true*” that he was unfit to fly. It was the information about the threat to his safety posed by the mother’s family, not the medical condition, that made it not possible for him to attend at trial in person. When asked why he had told his lawyers to inform the court the previous afternoon that it was illness that made that not possible he said, “*I think it’s incorrect information.*” Difficulties with technology and an interpreter, and the time inevitably spent in cross examination exploring this newly arising issue, significantly delayed the start of questioning on substantive matters. Evidence timetabled to last half a day took two days.
15. I mention here matters of communication. The father speaks four languages: Russian (his first language), Ukrainian, Polish, and English. He has lived and worked in the US on and off from the age of 23. For many years he has been a qualified and licensed realtor in the state of Chicago. During the pandemic he gained a like qualification and license enabling him to practice as a realtor in the state of Florida. Despite that, he asked to give evidence through an interpreter. His understanding of spoken English and his own spoken English were good. However, it was clear that he could express himself more fluently and with greater ease and precision in Russian. As his legal team had not had confirmation that the court had arranged an interpreter, they had done so themselves. This interpreter did his best and we made progress, but there were delays in sound transmission and mother reported that some interpreted answers were incomplete. The court staff were able to secure the excellent services of an in person interpreter who attended on the afternoon of day two and on days three and four. Generally, only interpretation of the father’s answers to questions was required. On the rare occasion when he did not understand a question, he asked for it to be interpreted.
16. I am entirely satisfied that communication difficulties had nothing to do with the father’s changing explanations, on day one and the morning of day two, for his decision not to come to London to give evidence. I am also satisfied that his legal team had minimal advance notice of his instructions about the threat to his personal safety and his change of address. Had Mr Gratton KC been aware of either matter, he would have told me about it at the housekeeping hearing on day one.

Evidence

17. After hearing remote evidence from the father on days two and three, on day four I heard evidence from the mother’s mother Mrs K who attended in person, the mother’s friend Mrs X who attended remotely and finally, the mother herself who attended in person. All three attended court in person. Very helpfully, the parties, all counsel and both solicitors were able to make themselves available the next day at 10.30am for oral closing submissions which I directed would be heard remotely and without interpreters.

18. In addition to the oral evidence, I had two statements from the father, three from the mother, statements from the other witnesses, written evidence from Mr Heller, and a trial bundle all of which I read. There was a separate bundle of documents from various proceedings in the Ukrainian courts. Save for one determination, I did not read that and was not taken to it by either party. The father provided an internet link to a video interview with him and the mother (Fred was there too) and a Washington Post journalist, filmed whilst they were all staying in the basement of a hospital in Kyiv at the start of the war in March 2022. I watched that more than once.

The Situation Arising Prior To Closing Submissions

19. At 10.24 on the morning of day five, Mr Basi asked for more time which I granted. We convened at noon when Mr Gratton KC told me that at 9.45 that morning the father had communicated that he no longer wished to be represented by any member of his legal team, solicitor or counsel. That being so, Mr Gratton was unable to make any submissions on the father's behalf. He was also unable to indicate whether the evidence was at a close, or whether there might be further documents or witness evidence the father might wish to adduce.
20. Both parties were in receipt of legal aid and had been throughout. Ms Theodorou very helpfully explained that in the event of an adjournment, the father would need to identify a different legal team willing to act. Once that was done, the new team would have to request the case file which she would provide. On an application for further funding, the Legal Aid Board might ask for information about how the situation had arisen, the costs that had been incurred to date, and the basis on which public funding of the father's costs at a second final hearing might be justified. I released Mr Gratton KC and Ms Theodorou when it was apparent that they faced professional difficulty in assisting further. Through the industry of court staff, an interpreter attended remotely at 2pm to assist the father.

Application to Adjourn

21. The father, now acting in person, applied for an adjournment. Before he did so, I allowed him time to gather his thoughts and suggested that he think about whether he had documents that were not before me that he would want me to consider, whether there were additional witnesses from whom he would want me to hear, and the reasons why he believed it would be unfair for the hearing to proceed.
22. On resuming, the father explained that he had e mailed to his counsel a list of questions he wanted put to the mother which had not been put. Specifically, he had wanted her to be cross examined on her written application for a divorce and maintenance in the Ukrainian court which, as originally filed, failed to mention Alex's existence. This was an issue he had addressed extensively in both of his statements. The point, going to credit, was that in Ukrainian law, a couple cannot apply for divorce if they have a child under twelve months, which Alex was when the application was filed. In that context, the father contended that the application constituted, in his words, fraud, forgery, deception, deceit and deliberate misrepresentation. (The mother's written response was that the omission of Alex's name on the form was a mistake on her lawyer's part which had been corrected).
23. Next, the father advised that he wanted me to hear oral evidence from two nannies, both of whom had provided character reference letters which were in the bundle. The

additional matter he wanted them to tell me about was that before they left Italy, he and the mother had made unsuccessful attempts to acquire visas for the nannies so that they could come to the US with the family. This evidence was relevant to shared parental intention to live in America on a long-term basis. Finally, he wanted me to see and take into account photographs of himself and Fred on the beach in Miami on 9 May 2022, the mother's oral evidence having been that none of them went to the beach that day.

24. After a brief adjournment, I informed the parties of my decision to refuse the application to adjourn. I explained that I would provide my reasons in writing and that the hearing would proceed. I invited him to send me the questions he wanted put to the mother that he had already sent to his former legal team. I said that I could ask them of the mother on his behalf (that seemed a reasonable and proportionate, if unusual, step given the circumstances and taking into account the provisions of Family Procedure Rules Practice Direction 3AB). At this point the father backtracked and declined to send the questions to me. I invited him to send me the pictures of him and Alex on the beach. He declined to do that.
25. He said that all of the final hearing had been unfair because he had only received the bundle a short time before it started and only realised very late that there were very many documents that I needed to see that were not in the bundle. With the assistance of Mr Hames KC and Mr Evans we went through the chronology of prior hearings. The father agreed that he had had the July trial bundle prior to 10 July. We established that that bundle was around 740 pages and the bundle for the November hearing around 800 pages. The difference was accounted for by additional expert immigration evidence and a short, procedural statement from the mother. After completing that exercise, the father did not disagree either that he had had ample time between July and November to consider the bundle's content, or that he was well aware of the contents when the final hearing started.
26. I outlined to him the matters relevant to integration in family and social life that it would be helpful for him to tell me about and the reasons why he said I should find that the children had a stable, integrated life in America at the time the mother removed them. I said that I would hear from him last so that he could respond to the mother's submissions. We then had a fifteen minute adjournment so that he could prepare. When we reconvened, the father refused to continue. At this point he said, as he had not before, that he had been misrepresented not just at this final hearing but throughout the whole proceedings from their beginning in January 2023. He felt unable to proceed without lawyers and would not be participating further. After the father left the hearing, I heard closing submissions on behalf of the mother and reserved my decision.

Reasons for Dismissing the Application to Adjourn

27. I had regard to the decision in *Solanki v Intercity Technology Ltd & Another* [2018] EWCA Civ 101. That states that although a decision as to whether to adjourn a hearing is a case management decision, the test is one of fairness and the application must be granted if not to do so amounts to a denial of justice.
28. I dismissed the application for the following reasons:

- i) A fair trial was possible despite the lack of closing oral submissions on behalf of the father;
- ii) the children's welfare required a resolution of the proceedings: it was not in their best interests to have a lengthy delay;
- iii) I had from the father's leading and junior counsel detailed written submissions on the facts and the law. Habitual residence is a finding of fact. I had read and heard all of the evidence and been able to question the witnesses myself. I was content that I was able to make a fair determination of this factual issue without oral submissions on behalf of the father;
- iv) The adverse effect on mother of having to live with further uncertainty and give evidence a second time;
- v) There was a real risk that if the hearing was abandoned and started afresh, the father might not secure a different legal team. If he did, he might not obtain legal aid for a second four day hearing. A fresh hearing at which he appeared unrepresented would be less fair than proceeding with the hearing at which he had been professionally presented up to the point of closing submissions;
- vi) I could minimise any prejudice (which I considered unlikely to arise) stemming from the gaps in the evidence identified by the father by accepting that: there were real grounds for considering that the mother may have misled the Ukrainian court, the parents had tried to bring nannies from Italy to the US in May 2022 and that was evidence of a shared intention to live in America on a long term basis, he did go to the beach with Fred on 9 May 2022;
- vii) The father had had the opportunity to stay and hear the submissions made on the mother's behalf and to make submissions;
- viii) I could not accept the father's statement that he had been misrepresented throughout the proceedings in circumstances where: there was no evidence of any discontent with his representation until the morning of the last day of a five day final hearing, he had attended several interlocutory hearings between January and November, he could have changed his legal team after the trial was adjourned on 10 July 2023.

Witness Impression

- 29. There were internal inconsistencies in the father's written evidence. In oral evidence there were occasions when he did not answer questions directly and contradicted himself. When May 2021 text messages were put to him, which clearly evidenced a serious disagreement, he said they never had rows or arguments. In cross examination he said that there were no problems in the relationship until early 2022 when the mother experienced complications with her pregnancy and became very stressed. Ms Theodorou's statement of 5 January 2023, based on information from the father which he confirmed in oral evidence was true, said that when they were in the US between May and June 2022, he "*believed that matters were fine between them*". But in his April 2023 statement he agreed that they were discussing separation and said that in early June 2022, he asked for his mother-in-law's help with resolving their differences.
- 30. I had the sense of a man for whom appearances are important. In the period with which I am concerned, he thought of himself as a financially successful, self-made, businessman who was happily married and a good husband and father. He wanted to be perceived as such. At the same time, he was under financial pressure and his marriage was troubled. Whether through continued denial of those facts, or a desire to preserve appearances, he was not a reliable witness on several key matters.

31. This is a convenient point at which to say something about the involved evidence about leases and sub-lets of apartments in America. The parties lived at more than one rented address in Florida and at least one twelve month lease was in the mother's sole name. The father's case was that the leases evidenced a shared parental intention to live in America permanently, or at a minimum on a long-term basis. I am satisfied that the leases and sub-lets (from which the father benefitted financially) were arranged and funded by him. The evidence was of routine trading arrangements whereby blocks of time in apartments in the prestigious tower blocks on the Miami beach are bought and sold so that people may spend the winter months in that part of the world. Those, like the father, who understand this market can make good money by taking out a twelve month lease, sub-letting during the lucrative high season, and residing there in the low season. Given the fluidity and impermanence of these residential arrangements, I did not find the evidence about the Florida leases helpful in determining parental intention or the wider issue of habitual residence.
32. The mother gave her evidence in a measured and straightforward way. She was at pains to correct errors. She readily conceded that Fred and his father had a very good relationship and that Fred loved and needed him. Her account of the difficulties in the marriage and other matters was supported by contemporaneous documents and the written and oral evidence of Mrs K and Mrs X, both of whom were compelling witnesses. Overall, I prefer the evidence of the mother.

The Facts

33. The father, now 49, has a Russian mother and a German father. He was born and raised in Lviv (then part of the USSR now part of Ukraine). He spent some time in Germany before moving to Chicago in his early twenties. He worked as a realtor in Illinois until 2006. He then spent a year working in Ukraine and another six years working in Russia. He returned to the USA in 2013. He was married from 2001 to 2014, and then had a civil partnership which ended in 2016.
34. The mother, now aged 32, was born in Ukraine and lived there continuously until age 28, save for a two year period when she attended a boarding school in Switzerland. She has several degrees in law, finance and banking. She had not had a serious relationship before meeting the father. The mother's parents separated when she was 12, remaining on good terms. Both remarried and both have two children with their second spouses, thus Fred and Alex have young uncles and aunts. All of these people now live in England having fled the war in Ukraine. The mother's grandparents, now 89 and 91, refused to leave and are still there.

May 2019 to January 2020 – Kyiv/Chicago/Kyiv – pregnancy - marriage

35. The parties had a whirlwind romance. They were introduced by a mutual friend, talked on the phone before meeting, first met in person in Kyiv in May 2019, and within a week were living together in the mother's apartment. In his oral evidence, the father suggested (contrary to his witness statement) that whilst they were in Kyiv, they came to a joint decision that the mother would move with him to live in America permanently. I am satisfied that this is not so and that they went to Chicago for a holiday.
36. They stayed in the father's large, three storey townhouse. The mother says that here, she saw a controlling, jealous side to her then boyfriend which she had not seen before. She told him she was going home to Kyiv. There was a furious row at the end of which

he unzipped her packed suitcase and threw the contents down the stairs. Afterwards he apologised and said it wouldn't happen again. He said his life in Chicago was over anyway and suggested they go back to Kyiv and start afresh there. The father denied that they decided to relocate to Ukraine and said the row never happened. I prefer the mother's evidence.

37. He had business matters to finalise so they stayed on for two weeks after the row. She helped him pack up his house ready for sale and they shipped ten boxes of his possessions to her mother's address in Kyiv (where, I was told and accept, they remain). The father gave his dog (who could not travel to Ukraine) to a breeder, arranged his mother's relocation from the US to Moscow, and put his house on the market.
38. The father agreed some parts of this account: they shipped a dinner service to Ukraine not ten boxes, he gave his dog away because the mother hated the dog not because they were relocating to Kyiv, and his mother returned to Moscow and did not revisit the US because her visa had expired not because she was emigrating.
39. In September 2019 they returned to the mother's flat in Kyiv. The mother says this was the start of their new life together in Ukraine. There were, the mother says, tensions because the father could not find work in Kyiv and began to resent her independence. He tried to restrict her movements and she lost friends. The father says that they were just there for a holiday taken because the mother disliked being in the Chicago house when potential buyers came to view it. Again, I prefer the mother's evidence.
40. The father went back to Chicago in October to finalise the house sale (on which he made a substantial six figure profit) and around this time, the mother discovered that she was pregnant. The parties had talked about getting married before but made no plans. She was conflicted: on the one hand she had concerns about the viability of their relationship, on the other she took a traditional approach and wanted to be married before giving birth. The father wanted them to be married. The mother says that the father became "*obsessed*" with the baby having US citizenship: he did not gain citizenship until March 2020 and his application was in the pipeline in late 2019. He proposed an extended stay in the US during which she could give birth. She agreed to that. Together they chose Miami, Florida. At the beginning of December they leased a property in Florida for a year.
41. There was a small wedding in Kyiv on 11 December 2019. Mrs K and her husband gifted them a piece of land close to their house in the country. On repeated questioning by Mr Hames KC, the father accepted that they had received this gift and that he had arranged for an architect friend to assess the plot. However, he said that any plan to build a house there was no more than a pipe-dream, to be contemplated if ever they had the funds. A week later they embarked on a long honeymoon in various European cities returning to Ukraine on 6 January 2020 for, I infer, the Orthodox Christmas.

15 January 2020 to 25 June 2021 – Miami – Fred's birth and first year

42. They arrived in the US in mid-January 2020. Their plans to travel over the coming months were undone by the start of the Covid-19 pandemic and they were confined to the apartment.
43. They got married again on 5 June 2020. It seems that they were advised that this might confer an immigration benefit and parental rights for the father in US law. Whether the

ceremony had any validity given that they had already had a recognised marriage is unclear.

44. Fred was born on 29 June 2020. Mother and baby had some post-birth health problems which resolved but troubled the first few weeks of Fred's life. The mother says that the father did not adjust well to fatherhood and delegated all domestic and childcare duties to her. He spent a lot of money (she assumed the proceeds of sale of his house) buying stocks and shares, which activity he described as his "work". Her mother could not come over from Ukraine to help her post-partum because of the pandemic and the father would not pay for any childcare. She felt lonely and isolated. However, she applied for a Green Card in September 2020. She was desperate to go back to Ukraine but stayed on for immigration reasons - she needed an "advance parole" before being able freely to leave and return to the US.
45. The mother was so unhappy that from September to December 2020 she sought weekly therapy from a psychologist in Ukraine who made contemporaneous records. A letter from the psychologist provided for these proceedings states that the mother's source of stress was financial instability and fear that she would have to use her savings to support the family.
46. In his April 2023 statement, the father suggests that she was seeing a psychologist to "*strengthen her case when she knew that she would be criticised for abducting our children from the US*". This makes no sense: non-consensual removal of the children was not something that entered the mother's mind until over two years later. The father accepts that his work as a realtor dried up in March 2020 with the Covid-19 lockdown which lasted to the end of the year but strenuously denies any money worries. In relation to shared intention to settle in the US permanently, he points to the mother's September application for a Green Card and says she knew that this was conditional on her not leaving the US for a year.
47. By May 2021, the mother says that the marriage was in real trouble. She told the father she was going back to Ukraine with Fred no matter what her US immigration status. There was a row whilst Fred was in her arms and for the first time, the father laid hands on her in anger. She produces a series of electronic messages between the two of them on 5 May 2021 where she wrote: "*if you don't want all of our relatives to know that I want to leave urgently because you hit me, I would just ask you to let me go home with the child*". In his messaged response, the father denied ever hitting her and said she was making things up. I am entirely satisfied that she was not.
48. On 10 and 17 May the mother consulted a psychiatrist and was diagnosed with a panic disorder. The psychiatrist's report, produced for these proceedings, records the mother's report that the father hit her in the shoulder, grabbed Fred from her hands, and pushed her forcefully. It also records "*a long stay*" in a situation of threats and humiliation. I accept that this is an accurate account of what the mother said at the time.
49. There was a reconciliation. The mother's advance parole, which enabled her to leave and re-enter the US without jeopardising her application for a Green Card, came through in June 2021 and they flew back to Ukraine later that month. The mother says that they were going back to live there. The father says they were visiting for a short holiday to celebrate Fred's birthday and for his christening.

25 June 2021 – 11 September 2021 – Kyiv – Fred aged 1 year to 14.5 months

50. On arriving in Ukraine they stayed in the mother's family's apartment. They learned that she was pregnant again. The mother's Green Card came through on 14 July 2021.
51. Mrs K provided me with a picture of Fred's life in Ukraine. The mother and Fred stayed at Mrs K's flat in Kyiv whilst Mrs and Mr K were at their house in the countryside. The mother had the use of a car. She and Fred had a quiet time in the week and saw friends. At weekends, the whole family gathered at the house in the country: Mrs K's family of four, her parents (Fred's great-grandparents who doted on him), her sister and husband, and the mother and Fred. Sometimes they would go to church. Fred's baptism in the Orthodox church in Kyiv was beautiful. There was a large celebration at an expensive restaurant for around 20 people.

11 September 2021 to 16 October 2021 – Florida – Fred aged 14.5 to 15.5 months

52. The mother and Fred returned to Florida in September. This was a holiday – a last chance for Fred to be on the beach before the property was sub-let. It was originally intended to last for two weeks but was extended to a month so that she could help the father pack up their belongings and furniture and generally make the apartment ready for the new tenants. I was shown flights from the US to Ukraine leaving on 29 September 2021 booked by the father and messages between the mother and her friend where the mother says they are coming back to Ukraine and just going to the US for a holiday.
53. In cross-examination, the father initially denied that the mother and Fred were coming back for two weeks. He said that the mother only told her friend she was returning to Ukraine on 29 September because the friend was needy and had to be appeased with misleading reassurances of a speedy return. When shown the plane tickets, he had to agree that a return on 29 September was what was originally intended and the mother had not misled her friend. I am quite sure that this was a holiday and that the father knew that at the end of it, they would all be travelling back to Ukraine where, on his own evidence, he was planning to celebrate his birthday in November with friends.

16 October 2021 to 11 March 2022 – Kyiv – Fred aged 15.5 to 20.5 months

54. All three returned to Kyiv in mid-October 2021. Here the mother felt happier in herself and was surrounded and supported by family and friends. The relationship was still strained.
55. The mother told me that the father had a "boys group" circle of friends there and that they would go out a lot together. When the war started, it was his with his good friend in Lviv, whom they saw often in Kyiv, that they stayed before crossing the border. Her grandparents were particularly fond of the father and the father and her step-father were similar ages and got on very well indeed. On her account, he was fully integrated into her family.

56. The parties contracted Covid at the end of October and in a written statement, the father says that was the reason they did not go back to the US. In cross examination, he accepted that Covid affected only his travel plans (he was significantly unwell and needed oxygen treatment), not the mother's or Fred's. The mother and Fred did not leave Ukraine because it was agreed she would give birth there (she had arranged private ante-natal and obstetric care in Kyiv).
57. That Christmas, the mother and father entertained Mrs and Mr K and their two children at their own rented apartment. Mrs K described a "wonderful" relationship between Fred and his young uncle – the uncle did not tire of the toddler and was endlessly interested in what he did. They spent (and still spend) a lot of time playing together.
58. At the end of January 2022, on top of the pandemic there emerged a new threat, namely the possibility of a Russian invasion of Ukraine. They booked return flights: Kyiv to the US flying out on 1 February 2022. The mother says – and I accept - that the flights were booked not because they wanted to leave at the end of a holiday (as the father asserts), but because the US authorities were sending out warnings that US citizens choosing to remain in Ukraine would not be supported.
59. There were complications of pregnancy. The mother was unable to fly and in hospital from 9 to 16 February 2022 (her due date was at the end of March). She arranged a live-in nanny so that the father would not have to be in sole care of Fred. On 12 February 2022, the father signed a one year lease on a Kyiv apartment which they had for just two weeks because on 24 February 2022, the Russian Federation bombed Kyiv.
60. The mother gave a graphic account of what happened next. After two days of ceaseless worry and air raid sirens, they escaped to the family house in the countryside. There was a terrible day when a Russian plane was shot down nearby and Russian soldiers parachuted into the surrounding fields. She tried to protect herself and Fred by lying motionless with him in a bathtub for many hours. It was impossible to get a doctor because they were all deployed to war hotspots. The ambulance would not come out because the house was too rural and it was not safe. They could not get help at night because of the curfew. She had medication from a doctor which gave her a day's respite from contractions and delayed onset of labour. On 27 February they made it to a large private hospital which had converted its basement into a temporary facility for pregnant and postpartum mothers and which was welcoming all comers. They did not leave the basement until 7 March 2022. It was safe but chaotic with expecting, labouring, and just delivered mothers all check by jowl, beds in the corridors, fathers and children everywhere, whole families camping out, and people arriving with their cats and dogs.
61. A newspaper team visited the maternity hospital and filmed an interview with both parents (the mother was 35 weeks' pregnant at the time). The father told the reporter: *"For the most part we live in Chicago, Illinois. For the past year and a half we stayed in mainly Florida. In the middle of October, we flew here to Ukraine to baptise Fred and introduce Fred to his big family in Ukraine, then unfortunately we got Covid and we decided to stay for the holidays."* The mother then picked up the conversation and said: *"Afterwards I got some complications with my pregnancy and afterwards they said I can't fly. So we decided to stay a bit more and then it was too late."*
62. Although the father had lived in Chicago (and, it seems, had and has an address there) the mother and Fred had not. When I asked him about the interview, he said that he had misspoken because of his limited English and meant to say that they lived in Florida. The video shows him talking in a fluent, relaxed manner, the language he uses is not

complicated, and he is precise in what he says. In cross examination he said that he had been intending go back to the US in November 2021 to rent an apartment for them to spend the winter in. My sense is that the father's real centre of gravity was always America, specifically Chicago. Miami was somewhere that suited him and the mother when they were newly married, and where they became stuck during the pandemic. When asked by a stranger in this setting, he identified as living in Chicago. The mother's case is that when they went to Ukraine in June 2021 it was on a long term basis. Further, that the shared intention was for them to live in Ukraine for at least a year, after Alex's birth. That fits with the father renting an apartment in Kyiv for a year and Mrs X's evidence that she remembered sitting round the table in the parents' Kyiv apartment and understanding from what they said that they intended to be there for Alex's birth. It fits less well with the newspaper interview where the mother suggests that they had been intending to return to the US before Alex's birth.

63. The mother told me that the father liked being able to earn dollars in the US and spend them in Ukraine but that it was "*nice to have something in the US*". They planned always to have some connection to America and she frankly admitted that she "*wouldn't mind the US passport as well as it does provide some benefits*". Personally, she never planned to live there full time and all of her family and her support network was in or around Kyiv and she had other important friends in different European cities.
64. The interview took place at a time of intense pressure on the parents but I think both of them said what they meant to say and meant what they said. The mother was rooted in Ukraine and the father in America. There was a shared understanding that there would be regular travel between both countries but, I think, no concluded agreement about which country the family would base itself in after Alex's birth. The mother's statement in the interview suggests that such plans as there were in March 2022 were more fluid than they appear to her in November 2023.

12 March 2022 to 9 May 2022 – Italy via Germany – Fred aged 20.5 months to 22.5 months, Alex birth to age 6 weeks

65. While they were in the hospital's basement, Mr K drove Mrs K and their children to the Polish border and they travelled on to Bratislava. Mr K then returned to Kyiv and lent the mother and father his car so that they could also leave. Using country roads and plotting a route between hospitals, they drove to Lviv staying there two nights. They then crossed the border into Poland and made a long drive into Germany. On arrival, the accommodation was in a remote, converted monastery in a forest with no hospital close by. It did not feel like a safe place to give birth so after one night they travelled on to Lombardy where the family of the Italian husband of Mrs X, the mother's old school-friend, had a holiday home. In his April 2023 statement, the father says that it was agreed in advance that they could stay for two months. Mrs X says she made it clear to them that they could stay as long as they needed without charge. I prefer her evidence.
66. Nothing in the parties' statements provided anything like the wealth of information I obtained when I asked Mrs X and the mother about their day to day life during this time. The "holiday home" turned out to be a nine bed mansion with its own chapel set in extensive grounds containing tennis courts, a swimming pool and a playground. The mother described overwhelming emotion when they arrived: there was orange blossom on the trees and the warmest welcome from Mrs X's Italian in-laws, their hosts who

lived nearby, put themselves entirely at the parents' disposal, and took care of everything.

67. The mother had a check-up at the hospital not long after arriving and all was well. There was time before the birth for the parents and Fred to take day trips and they visited Lake Como enough times to establish a favourite restaurant and for Fred, a favourite *gelateria*. Twice a week, the Italian hosts would come for lunch prepared by the housekeeper couple who lived in the mansion. They all spoke English and had many long and interesting conversations.
68. The X family arrived for five days at the end of March, timing their stay around Alex's due date though as it happened, they had to leave just before he arrived. They had a little girl of Fred's age and the two toddlers would play together. Mrs X was already planning a two family summer there with the children in the pool.
69. Alex was born in hospital on 29 March 2022 – the Italian state provided this medical treatment free of charge. The mother had a post-partum haemorrhage and was rushed to theatre. She was discharged quickly afterwards at her request because she wanted to get back for Fred, worrying about how the father would manage without her. She engaged nannies so that she could rest and attend to Fred as well as the baby.
70. In mid-April the Miami apartment was sub-let for six months with another advance payment. There was another row. She wanted to stay in Italy, or at least in Europe, so that they could get back to Ukraine quickly if it was safe to do so. The father wanted to go back to the US. He threatened her physically and left the house. On return, he said he had been to the US embassy to arrange a US passport for Alex. She says the father told her that he would be going back to America with Fred and she and Alex could join them or not as she wished. By this point, the K family had gone, or were planning to go, to the UK to live there. She asked the father if they too could go to England and he said no. The mother says that at this point, she felt she had no real choice in the matter: she was desperate to avoid the family being split in half and the only way to keep it together was to do what the father wanted.
71. Around this time, the family X returned for the summer. Mrs X did not witness any arguments or threats and felt that the father was good at keeping up appearances. She knew the mother was unhappy and there was conflict about money and pressure from the father to go to America which was not what her friend wanted to do. In oral evidence she said she could see the situation from the father's side – they couldn't go back to Ukraine and had no other obvious option in Europe. On the other hand, she could not understand his urgency in wanting to take the mother and children away from a beautiful, child-friendly, rent-free, safe haven with friends, particularly when there was nothing and nobody waiting for them in Florida. She told me about Alex's christening in the property's chapel. Her in-laws helped the parents locate someone who could conduct an Orthodox service. There were at least a dozen people. She and her husband were godparents as were another married couple, friends of the mother's. Mr K came for a few days and the housekeeper couple prepared a special meal and also attended the ceremony.
72. Alex's US passport came through in early May 2022 and they left Italy shortly afterwards.

73. In a statement, the father says it was a “*great day*” when they arrived in the US because they were all finally together and back home. This I find to be an example of him describing the world as he wanted it to be, not as it was. In oral evidence he described the mother as emotional, tired, hormonal and “*edgy*” at this time.
74. She said she was isolated and saw no-one other than a breast-feeding consultant and the nannies. She described crying all the time while feeding Alex and how Fred would give her hugs to comfort her. She experienced rapid weight loss and followed the war in Ukraine obsessively, looking for signs it might be ending.
75. The nannies who worked for the parents over this three to four week period speak of the father, and the family unit, in glowing terms. They also speak well of the father’s parenting ability and his bond with the children. I am sure that was their perception and that the father was closely bonded to both children, very involved with Fred and as involved with Alex as possible given that he was a tiny, breastfeeding baby. It is quite clear that the nannies did not witness any rows and they appear not to have sensed any marital tension. I suspect that the father, in particular, took care to keep up appearances in their presence and that the mother spent a lot of time in her bedroom with Alex
76. In cross examination the mother said that not only was it not a relief to be in Florida, “*This stay was harder for me than my stay even in the shelter of the maternity hospital*”. She says that when or just after they arrived, they had another row. The father told her frankly that he had paid the deposit and a month’s rent up front and did not know what would happen at the end of the month. (The father says that he had paid for a five month lease but this is the only rental document he references but does not produce. In e mail correspondence between the parties on 20 June 2022, the mother wrote: “*...on arrival, it turned out that we are facing the threat of eviction from the apartment, because you did not know if you can pay for the next month to live there.*” I do not think she made that up. He said he didn’t know what to do with their relationship and life and maybe she should go back to Italy with the children. Two days later he changed his mind, refused to let her leave with the children, and took their travel documents.
77. The father spoke of taking Fred to the beach on the day of arrival (which I accept he did) and many other days after and to the playground. The mother said she could see them from the apartment window but from her perspective the beach was problematic. As they had taken this different apartment at very short notice (the one they rented being sub-let), their presence there had not been regularised. Therefore, they used the access cards belonging to the authorised tenants which bore the tenants’ photos and names. The beach was private, the beach attendants would ask for ID, and production of the tenants’ cards prompted questions and the need for a lengthy explanation before they were allowed on to the beach. Fred, who had been very happy in the waves as a baby, seemed to have lost his water confidence. And it was so hot that the beach was only enjoyable in the early morning and late afternoon.
78. The father slept in one room with Fred and she in the other with Alex. The father took to locking himself and Fred into their bedroom at night, she assumed to prevent her from taking the boys’ passports. They were barely speaking to each other. He came and went as he pleased and would not let her use his car so she was largely confined to the apartment. In oral evidence she described the difference between Kyiv, where they could stroll in the park and along the pavements with a push chair, and Miami where

life without a car was not easy and there was no pleasure in talking a toddler and a baby for a walk in the hot sun along a busy four lane highway.

79. A report from the psychiatrist she consulted on 18 May 2022 says: “*The main request for consultation in 2022 was diagnostics of her mental state in order to confirm mental health and legal capacity, since the husband accused the patient of a mental disorder and threatened to “commit her to a psychiatric hospital and take away the children”.*” As the father also threatened her with deportation, she spent a lot of time on the phone seeking legal advice from a range of lawyers.
80. On 24 May 2022, two weeks after arriving in the US, the mother wrote to the father by e mail because they were unable to “*talk without emotions*”, asking questions about the fate of the relationship and suggesting family therapy if they were to stay together. She complained of his recent actions in leaving suddenly at night without warning and at the weekend so that there was no childcare, and taking all the travel documents, bank cards and cash when he went. She had discovered he had gone when she found Fred wandering around the apartment in the middle of the night with the bedroom door open. The mother says the father was absent for about five days. In his April statement the father denied ever leaving Fred alone when they returned to America. In cross examination he said he might have been gone for two or three nights. I prefer the mother’s evidence.
81. The father accepts that on 5 June 2022 they agreed to separate. In his statement he says he helped the mother to pack. That day, she searched the father’s room, found the boys’ passports in a bag, and took them. On 7 June she moved out with the boys. On 9 June she found she could not carry on, made a rushed decision to buy tickets to Milan where her step-father was doing some business, and flew away with them.

Events After 9 June 2022

82. The mother took the boys to Italy and they stayed there for four days after which she took them to Vienna where she rented a flat. On 16 June 2022 she filed for divorce in Ukraine and the father successfully overturned the court’s acceptance of jurisdiction. There was an abundance of litigation between the parties in Ukraine. Most of the documents postdated the events with which I am concerned and did not seem relevant. I read one determination by the Ukrainian court in which it was decided that the children were not habitually resident in Ukraine. The determination did not set out the evidential basis for that finding and therefore it was not a factor to which I was able to attach weight.
83. In July 2022 she took them to Greece for a holiday, after which they returned to Vienna. In August 2022, the mother applied for Ukrainian citizenship for the boys. In the three months after leaving the US in early June, the mother was in a constant state of hope that situation in Ukraine would resolve to an extent that made it safe to return there, whilst also casting about for somewhere they could settle.
84. The family K had been in England since April 2022, and her father and his family arrived there at the end of August 2022. On 2 September 2022, she and the boys also moved to England. Initially, they were invited to stay with an English couple but since November 2022, the mother has privately rented a house within driving distance of the K family and her father’s family. Her aunt lives in Birmingham. Fred’s godmother and Alex’s godparents all live in London. The mother and the boys meet up with all of these

people regularly. Fred goes to nursery. In October 2023, the mother filed for divorce in England and Wales.

The Law

Article 3 of the Hague Convention says:

*"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 ;"*

85. The law on habitual residence has been clarified by the Supreme Court in five cases decided between 2014 and 2016. In *Re B (A Child: Custody Rights Habitual Residence)* [2016] EWHC 2174, 4 WLR 156 EWHC 2174 paragraph 17, Hayden J distilled the principles to be drawn from them and that summary, which I have had in mind when making my decision, has been approved at appellate court level. In *Re A (A Child) (Habitual Residence: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 659, Moylan LJ reviewed Hayden J's summary and (at paragraphs 41 and 45) restated that the words "*some degree of integration by the child in a social and family environment*" are not a substitute for the required global analysis but a shorthand summary of the approach to be taken. Also that the issue of habitual residence requires consideration of all relevant factors. Further, where a child might be said to have some degree of integration into more than one State, the court must consider the factors which connect the child to each State where they are alleged to be habitually resident.

86. Of specific relevance to Fred and Alex given their very young ages are the following paragraphs of *Mercredi v Chaffe (Case C-497/10 PPU) EU:C:2010:829*:

“54 *As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of.*

55 *That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where, as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the Court's case-law, such as the reasons for the move by the child's mother to another Member State, the languages known to the mother or again her geographic and family origins may become relevant.*

56 *It follows from all of the foregoing that the answer to the first question is that the concept of 'habitual residence', for the purposes of Articles 8 and 10 of the Regulation, must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity,*

conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case."

87. In *Re B (A child) (Habitual Residence: Inherent Jurisdiction)* [2016] UKSC 4, [2016] AC 606 at paragraph 30, Lord Wilson, giving the sole judgment of the Court, said (paragraphs 30, 42 and 45):

"it is not in the interests of children routinely to be left without a habitual residence."

"if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former."

"the modern concept of a child's habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo in which the courts below have placed B. The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one."

88. At paragraph 46, he set out three expectations:

- "(a) the deeper the child's integration in the old state probably the less fast his achievement of the requisite degree of integration in the new state;*
- (b) the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and*
- (c) were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it."*

89. In response to a question I asked, the mother's legal team identified two reported cases where the court found that it was not possible to establish a child's habitual residence: *W and B v H (Child Abduction: Surrogacy)* [2002] 1FLR 1008 and *Re: NH (1996 Child Protection Convention: Habitual Residence)* [2015] EWHC 2299 (Fam). In *Re NH*, Cobb J said this at paragraph 39:

“It will, I consider be a relatively rare case where it is impossible to establish a child’s habitual residence; such a conclusion is likely to reflect a material level of rootlessness in a child, which is not common and may indeed be indicative of some interference with the child’s emotional and/or physical welfare and development.”

The Position of Each Party

90. The father points to the fact that prior to 9 June 2022, Fred had spent a total of 430 days in the US and 222 days in Ukraine. Alex had spent 31 days in the US and had never been to Ukraine. Fred was in an unstable environment in the Ukraine after the country was invaded and he cannot, it is submitted, have gained habitual residence in Italy. The trip there was short, intended by both parents to be temporary, and for some weeks before leaving they were making arrangements for a return to the US. Any habitual residence acquired by either child in Italy was lost when they left. The US was home for both parents, they had prior links to the environment to which they returned and the intention was to stay there long term. Overall, Fred was either habitually resident in America from birth to 9 June 2022 or alternatively, if he became habitually resident in the Ukraine, he reacquired habitual residence in America quickly after arriving on 9 May 2022. Alex likewise obtained habitual residence in the US soon after arrival.
91. The mother’s case is that the burden is on the father to prove habitual residence in America on 9 June 2022 and it is one he has not discharged. Fred was habitually resident in Ukraine at the point of leaving that country in March 2022, that remained the case throughout the time he was in Italy and during the month in America. Alternatively, the instability of the family environment and lack of integration into society in the US indicated that Alex had no country of habitual residence on 9 June 2022.

Analysis

92. In my judgment, the father has not proved, on a balance of probabilities, that either Fred or Alex was habitually resident in the USA on 9 June 2022.
93. I start with the date of wrongful removal. I accept the mother’s account of the events, and the state of the relationship, during the four weeks between 9 May and that date. I accept the submission that there was no stability in either Fred or Alex’s residence in America. The children were integrated into life with their parents but their parents’ life together was disintegrating: they were in conflict with each other from the first day and were barely speaking, when they did the conversation ended in an argument, the mother felt wretched throughout, the father came and went as he wished, after about ten days he left Miami for around five days without prior notice, on his return the mother canvassed separation, she was in tears all the time and speaking to lawyers about her immigration status, parental rights on so on, and the parties separated finally on 7 June.
94. Fred had some but insufficient integration into a social life in that he went to the beach and the playground with his father and the area was familiar to him. Alex had no integration into a social environment. He barely left the apartment and was almost always with the mother when awake. Though the move to America was intentional and planned, the mother went unwillingly and wanted to leave almost as soon as she arrived.

The situation was financially precarious and the father's ability to fund their life in America long term was uncertain.

95. As to the two months in Italy that preceded the four weeks in America, both parties agree, for different reasons, that Fred was not habitually resident there. They think it doubtful that Alex was. The oral evidence of the mother and Mrs X was illuminating. It provided a vivid picture of what, from the point of view of each child, was an idyllic time. Fred had endured flight from a war zone, ten days encamped in a hospital basement, and a tense and epic days' long car journey across Europe. That instability ended with arrival at a luxurious mansion with gardens and a playground, abundant adult attention, and for much of his time there a child of his age to play with. He had family days out with his parents who were more relaxed and happy than he will have experienced them being in America.
96. Alex was born in Italy and welcomed by the Italian state and the Italian people who came into contact with him. It is significant in my judgment that his parents chose to have him baptised in Italy not in America: they knew that there was in Italy the integration into a social and wider family environment that they could not provide for Alex in America. Neither parent was habitually resident in Italy and neither intended for the stay in that country to be anything other than a stop-gap. But the habitual residence test is not determined by parental intention, is focussed on stability not permanence and requires that the viewpoint is that of the child, not the adults. Further it is the quality and not the quantity of time spent in the country that is important. From the children's perspective, this was a period of stability and one in which they had the requisite degree of integration into both a family and a social environment.
97. Looking further back, from Fred's perspective, I find that at the time he left Ukraine, he was habitually resident there. In my judgment he lost that habitual residence during the car journey across Europe. Therefore, the alternative to finding that both children became habitually resident in Italy during their time there (two months for Fred, six weeks for Alex) was that they had no country of habitual residence. The application of the legal test to the relevant facts about their time in Italy does reasonably yield the conclusion that they were habitually resident there, and that finding accords with their best interests. The departure from Italy was definitive and they lost their habitual residence there when they arrived in America.
98. Contrary to my finding about their time in Italy, I do consider that in the four months between leaving that country in May 2022 and arriving in England in September 2022, each child lacked a country of habitual residence. I accept that such a finding is exceptional and not in the best interests of either child. However, these were exceptional months in the life of each child. The carefully laid plans for an integrated, stable family life in Miami, fell to pieces on arrival there. After a month the situation was so intolerable for the mother, and in her view injurious to the children's welfare, that she removed the boys to Europe. For the next three months they had a nomadic existence, living out of suitcases, and travelling between countries to which the mother had no geographic, family or social connection searching for a place where they could drop anchor and put down roots. Their arrival in England on 2 September 2022 pursuant to the Homes for Ukraine scheme, which provides three year visas, achieved reunification of the boys with all of their Ukrainian family save for their great-grandparents, and marked the start of a period of stability and significant integration into a social life.
99. Within this exceptional context of fleeing a war zone, the breakdown of the parents' relationship, the parents' separation, and the taking parent's homelessness because her

country was at war, I consider that, in the words of Cobb J, my inability to conclude that they had a country of habitual residence in this period is reflective of a material level of rootlessness in the lives of Fred and Alex. There was also interference with their emotional welfare because their parents' relationship was reaching a desperately unhappy end following which they were taken away from their father.

Art13(b)

100. Art 13(b) of the 1980 Convention says:

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

...

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.”

101. After careful thought, I have come to the conclusion that I am unable fairly to determine the issue of whether the mother has made out her Art 13(b) defence to a summary return. My finding on habitual residence makes it unnecessary for me to do so but leaving this issue undetermined, after a five day hearing is less than satisfactory. Therefore I explain the difficulty that prevents me from reaching a conclusion.
102. The mother's Art 13(b) defence has two main bases: the father's abuse of her, and the potential for her to be separated from the boys if she travels to America with them. (The mother also argues financial uncertainty and difficulties in America given she does not know where the father lives. None of this reaches the Art 13(b) threshold in my view. Further, travel to America could be made conditional on the father first providing adequate funds, and practical matters could be satisfactorily resolved by lawyers.)
103. I am not persuaded that the risk of future abuse or molestation, taking the allegations of past abusive behaviour at their highest, puts the children in an intolerable position or at risk of grave harm. It is difficult to see that there is a real risk that the mother and father would find themselves together in a situation where the father had an opportunity to threaten, alarm, harass or lay hands on the mother in a way that would affect the children directly or indirectly. The mother's address could be kept confidential and any handover of the children would occur at a third party venue: either a contact centre or a lawyer's office. Even if the father did find out where the mother was staying, she would not grant him entry and could move. She could also complain of any abusive conduct by the father to both sets of lawyers and, if necessary, to the police.
104. The key risk is the potential for separation. This was said to arise in two ways. First, the mother might not gain entry to America for immigration reasons. That concern was comprehensively allayed by Mr Heller's expert evidence and was not a live concern at the time of the November hearing. Second, the risk that the father would seek to have her prosecuted for child abduction or fraud and that any such complaint might result in the mother's separation from the children. A particular concern is that the father might

make a complaint to the police unbeknownst to the mother, causing her to be arrested at the airport.

105. On 28 February 2023, Judd J made an order directing the mother to outline “any protective measures (including orders that may be subject to registration under article 11 of the 1996 Hague Convention or, where appropriate, undertakings)” she sought in the event of a return order being made. She also directed the father to serve a statement in response with “any protective measures he is willing to propose”.
106. Pursuant to that order, in her March 2023 statement the mother set out eight requested undertakings. These included: “I would need to have in writing a document from the American authorities that there is no warrant out for my arrest for the removal of the children from America in June 2022”. In his April 2023 statement, the father offered what were expressed as “undertakings” to provide the mother with “a soft landing” on return to America. They were not expressed as protective measures. They included an undertaking “not to prosecute the mother for the offence of child abduction”.
107. In their written submissions on his behalf dated 9 November 2023, the father’s leading and junior counsel specifically addressed the distinction between protective measures and practical arrangements. The submissions then say this:

“The protective measures offered by the father clearly ameliorate any risks that the mother advances (to which the father denies). The protective measures, operate as a soft landing and enable the mother to return to an environment with the children where she will have no direct contact with the father, will have accommodation and receive maintenance from him, until the US courts can hear the matter. The court can compare the father’s undertakings with what the mother initially sought with there being very little difference.” (emphasis added)

108. The father’s submissions do not separately address the risk of separation in the event of the US authorities acting on a complaint of child abduction. They also do not address the difference between the mother’s request for a written document from the American authorities confirming the absence of a warrant for her arrest for child abduction, and the father’s offered undertaking not to prosecute her. However, they do conclude with by saying that further instructions will be taken from the father and his position will be further advanced in closing submissions. The mother’s written submissions dated 10 November 2023 contend that the father has failed to produce evidence as to the efficacy of what are referred to as “*the proposed protective measures.*”
109. I am unable to conclude that there is no risk of arrest and separation from the children occurring in the event that the mother returns to America. Therefore, in accordance with *Re C (Children) (Abduction: Article 13(b))* [2019] 1 FLR 1045 paragraphs 40 to 45, I need to consider how compliance with the father’s undertaking that he will not seek to have the mother prosecuted for child abduction could be enforced. It should be noted that I have no expert evidence on whether undertakings in a foreign court are enforceable in the state of Florida.

110. I have the benefit of the guidance about protective measures found in the Court of Appeal’s decision in *Re T (Abduction: Protective Measures: Agreement to Return)* [2023] EWCA Civ 1415 (“*Re T*”) which, being dated 1 December 2023, was not available at the hearing. Paragraph 44 of *Re T* refers to guidance documents including Practice Guidance Case Management and Mediation of International Child Abduction Proceedings issued by the President of the Family Division dated 1 March 2023 (“Practice Guidance: PFD: 2023”). That updated the preceding 2018 Practice Guidance which was current when Judd J made her case management order of 28 February 2023.
111. At paragraphs 46 and 47 of *Re T*, the Court of Appeal quotes paragraphs 2.9 (b) and (e) of Practice Guidance: PFD: 2023 emphasising the need for the parties’ evidence to describe not only the protective measures they seek but also “*the extent to which any undertakings offered and accepted in this jurisdiction are capable of enforcement in the requesting jurisdiction.*” These words are an addition to the corresponding subparagraph of the 2018 Guidance.
112. Paragraph 56 of *Re T* says this:
- “(v) Protective measures and “soft landing” provisions. Protective measures are those which address the issues of grave risk or intolerability raised by the asserted article 13(b) exception; they are to be distinguished from what have commonly become known as “soft landing” provisions, which are directed more towards facilitating and/or rendering more comfortable a child’s return. A degree of discipline is required to ensure that these provisions are considered and treated separately; it is not helpful if the terms are used interchangeably....”.* (emphasis added)
113. It does seem, looking at the paragraph of the father’s submissions quoted above, that there may have been some conflation of protective measures and soft landing provisions. Had the father been legally represented or present at the time I came to hear oral submissions, I would have wanted to explore with counsel or with him whether he would have been prepared to obtain from the American authorities the written document sought by the mother. For reasons already explained, I had no opportunity to do so. The father could be said to have been the author of his own misfortune in that regard but even if he was, that does not lessen my obligation to provide him with a fair trial. For the reasons given, not only is it not necessary for me to determine the Art 13(b) defence but I do not consider that I can do so fairly.