Neutral Citation Number: [2023] EWHC 469 (Fam)

Case No: FD22P00598

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/03/2023

Before :

MRS JUSTICE THEIS DBE

- -

Between :

	W	**Applicant**
	- and -	
	Z	**Respondent**

- -
- -

Ms Jacqueline Renton (instructed by **Dawson Cornwell**) for the **Applicant**
Mr Michael Gration K.C. (instructed by **Bindmans**) for the **Respondent**

Hearing date: 1st March 2023
Judgment: 3rd March 2023

- -

Approved Judgment

This judgment was handed down remotely at 12.00 noon on 3rd March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MRS JUSTICE THEIS DBE

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

Mrs Justice Theis DBE :

Introduction

1. This matter concerns the mother's application under the Child Abduction and Custody Act 1985 (incorporating, by Schedule 1, the 1980 Hague Convention on the Civil Aspects of International Child Abduction; the '1980 Hague Convention') for the return of two children, X age 8 and Y age 3, to the USA. That application is opposed by the father, who defends the application on the basis that the children were not habitually resident in the USA at the time of their removal from the USA on 5 May 2022. If he is wrong about that, the father relies on the defence of grave risk of harm under Article 13 (b), including the inadequacy of the protective measures offered by the mother.

2. The mother has also issued proceedings under the inherent jurisdiction seeking an order for the children's return. The mother accepts this hearing is listed to determine the 1980 Hague application. In the event that is unsuccessful, directions will need to be made on the application under the inherent jurisdiction.

3. It is the mother's case that this is a clear case of child abduction and a separation of the children from their primary carer. It is not in dispute that the father unilaterally removed the children from the USA on 5 May 2022 during a pre-arranged visit that was due to last a day, with them being returned to their mother's care that evening. Unbeknown to the mother, the father boarded a plane with the children and brought them to the UK, where they remain. The father says he took that action as he was so concerned for the children's welfare as a result of what he alleges is the mother's emotionally and physically abusive care towards the children. In the email to the mother on 5 May 2022 informing her of what he had done he describes the trip to the UK as a *'visit'* to their grandparents and invited the mother to join them. The children have remained with the father in the UK.

4. The mother remained in the USA until last weekend, when she came over for this hearing. At the pre-trial review last week arrangements were put in place to enable the mother to spend significant unsupervised time with the children in their home. That is the first time she has spent time with them since May 2022, although she has had indirect video contact with the children.

5. Both parents are members of the Orthodox Jewish religion and community. After the children had been brought to the UK the parties agreed to arbitrate with the Bais HaVaad Rabbinical Court ('Bais HaVaad') in the USA. The Bais HaVaad made a number of determinations in May and June 2022 which, for various reasons, were not fully complied with.

6. On 6 September 2022 the mother made her application for the return of the children under the 1980 Hague Convention, directions were made on 29 September 2022 and the final hearing originally listed on 14 December 2022. That hearing was adjourned on 15 December 2022 to enable a joint instruction of a child and adolescent psychiatrist to prepare a report in relation to both parents mental health and expert evidence regarding the immigration position of the father in the USA.

7. This hearing has taken place on submissions only. The court is grateful to Ms Renton and Mr Gration K.C. on behalf of the parents for their very full written skeleton arguments and focussed oral submissions. There is no significant issue regarding the legal framework. The court has had the opportunity of reading the extensive trial bundle, now exceeding 1,100 pages.

8. Before turning to consider the background, I want to take this opportunity to remind practitioners of the General Guidance on electronic court bundles dated 29 November 2021, which applies to these cases. Paragraph 2 specifically provides that the numbering should start at page 1 for the first page of the bundle (whether or not that is part of an index). This is for the very obvious reason so that the pagination matches the pdf numbering. That did not happen in this case, with the result that each page reference during the hearing required two page number references, which was frustrating for the court and counsel. It simply should not happen. This Guidance has been in place for over a year and compliance with it should now be standard practice.

Relevant background

9. The father, who is 44 years of age, was born in the UK. The mother, who is 40 years of age, was born in the USA. The parties met in 2013 and two months after they met got engaged. They married in the USA in late 2013, followed by a wedding in London when the mother moved to London. The mother has indefinite leave to remain here and has an outstanding application for British Citizenship.

10. X was born in August 2014 and Y in June 2019.

11. X started school in 2019. In late 2019 the school made a referral to the local authority. A child and family assessment was recommended due to the concerns regarding the parents level of anxiety regarding X's health and the mother's day to day care of X.

12. X's attendance at school reduced. In early 2020 the father emailed the school withdrawing X from the school and thereafter she was home educated by the mother.

13. In February 2020 X diagnosed with an olfactory disorder called parosmia. This was a private diagnosis and the disorder was described as a disordered sense of taste and smell, which impacts on X's desire and ability to eat.

14. Local authority concerns continued in early 2020 regarding the medical investigations being undertaken regarding X. In March 2020 the local authority social services closed their case, noting that medical investigations were ongoing and they recommended a multi-disciplinary team oversee the investigation as regards X's health.

15. In October 2020 there was a further referral to social services from the hospital regarding X. The local authority undertook two home visits and then closed the case, noting there was no evidence to suggest factitious illness or other safeguarding concerns.

16. In March 2021 X was diagnosed with gastroparesis (delayed gastric emptying) by a paediatric gastroenterologist.

17. In May 2021 a medical update regarding X stated she had about 50% oral intake and the rest is breastfeeding, some regular eating is taking place and recommendations were made.

18. In late May 2021 there was a further referral to social services by another hospital.

19. In July 2021 the local authority escalated their involvement to undertake a child and family assessment, including a home visit on 12 August 2021.

20. On 19 August 2021 the mother and children travel to the USA.

21. The father met with social services on 3 September 2021.

22. On 17 September 2021 the father travels to USA to join the mother and the children.

23. On 22 September 2021 the local authority closed the case on the completion of the child and family assessment.

24. In the USA, the mother initially stays with her sister in Chicago and then at various free temporary accommodation in the Chicago area.

25. On 25 October 2021 the parents and children moved to a rented property in Chicago and stay there until 9 December 2021. There were difficulties with this property caused by inadequate plumbing.

26. The father returns to the UK on 3 November 2021. He sets out in his statement that he realised the mother was not returning to the UK and exchanged the return tickets for a future travel voucher.

27. The father returned to the USA on 5 December 2021.

28. In early December 2021 there was a family trip to New York as the father had a job interview. The family stayed with a friend in Brooklyn and then went on what the mother describes as a family holiday to New Jersey.

29. In January 2022 the family moved to New Jersey, with a trip back to Chicago to get their belongings and en-route had what the mother describes as a family holiday in Pennsylvania, Indiana and Illinois.

30. The parents rented a flat in New Jersey from 16 February 2022, the rental agreement lasted until 30 June 2022.

31. The father returned to the UK on 3 March 2022, returning back to the USA on 15 March 2022.

32. On 14 March 2022 the mother triggered her prenuptial agreement informing the father she wished to have six months of therapy prior to divorce. According to the mother, when the father returned to the USA he agreed to look for a suitable therapist.

33. Between 18 to 24 April 2022 the family went to New York to celebrate Passover and then returned to New Jersey.

34. On 4 May 2022 the mother informed the father she wished to have a religious divorce, a Get. The father disputes the mother said that although he has confirmed in his written statement in these proceedings that he is prepared to grant the mother a Get, subject to a hearing in a Beth Din.

35. On 5 May 2022 the father had the children for a pre-arranged day visit, with the arrangement being he would return them that evening. He informed the mother by email later that day that he had taken the children to the UK *'for a visit with their grandparents'*.

36. On 25 May 2022 the parties entered into a written agreement to arbitrate with Bais HaVaad in New Jersey. It has made the following rulings:

    (1) 31 May 2022 – the father to return the children to the USA within 10 days of the mother providing a signed consent for the father to travel with the children to the UK, and for them to remain living with the father in the interim with an interim contact schedule with the mother. The mother provided the consent form (as referred to in the ruling dated 10 June 2022).

    (2) 10 June 2022 – the ruling on 31 May 2022 was suspended due to immigration issues regarding the father's ability to enter the USA. The father informed this court on 2 March 2023 he had made the tourist visa application on 4 July 2022, the first available interview was on 30 January 2023.

    (3) 23 June 2022 – the ruling required the father to pay for the mother to receive an evaluation, required the father to apply for a visa and provided for the father to pay $2,250 pm to the mother (which the father said he did from June to September inclusive).

    (4) 7 August 2022 – the ruling required the children to be brought to the USA by the father for the remainder of the summer holidays, return to UK for start of school and then return to USA for Yom Tov (Jewish holiday) and final determination to be made before the end of Yom Tovim. The father says he did not comply with this as the mother did not provide the agreement, including the above terms and the date the children will return to the UK for school.

    (5) 7 November 2022 – an email communication to the parties about the extent of the issues to be considered by the Bais HaVaad.

37. The mother moved to a friend's house on 30 June 2022, as the lease on their previous rented property had come to an end. She is currently in two bed rented property and is working to financially support herself. She says she has not received financial support from the father, the father informed this court he made the payment referred to above with no payments being made after September 2022 to the mother.

38. According to the mother, she had almost daily video contact with the children from May to early August 2022, following that the mother alleges her contact with the children was restricted, which she said was related to the children saying they wanted to return to her care. The father disputes this.

39. The mother issued the 1980 Hague Convention application on 6 September 2022. Peel J made case management directions on 21 September 2022, which included provision for indirect unsupervised daily video calls six days a week, directions for the filing of evidence and a Cafcass report on X's wishes and feelings.

40. On 29 September 2022 the mother issued the inherent jurisdiction application and on the same day directions were made by Mr Dias KC (sitting as a DHCJ) including directing inherent jurisdiction application not to be determined at the same time as the Hague application.

41. 15 December 2022 the final hearing was adjourned to enable expert evidence regarding mental health of both parents and the immigration visa options regarding any return to the USA by the father.

42. At the pre trial review on 22 February 2023 the directions included the arrangements for the mother to spend time with the children unsupervised, following her arrival in this jurisdiction on 26 February 2023 and the financial arrangements for the father to pay for her travel and accommodation costs.

Legal framework

43. The law governing habitual residence is now settled and well established, in particular as set out in *Re B (A Child) (Habitual Residence: Inherent Jurisdiction)* [2016] AC 606. It is essentially a question of fact in each case.

44. In his judgment in *H v R (Habitual Residence in Pakistan)* [2021] EWHC 2024 (Fam), Mr Justice MacDonald summarised the current legal principles in a helpful way as follows at paragraphs 17 - 19:

> *"17. For habitual residence to be established the residence of the child must reflect some degree of integration in a social and family environment (Area of Freedom, Security and Justice) (C-532/01) [2009] 2 FLR 1 and Re A (Jurisdiction: Return of Child) [2014] 1 AC 1). Whether there is some degree of integration by the child in a social and family environment is a question of fact to be determined by the national court, taking into account all the circumstances specific to the individual case. Habitual residence must be established on the basis of all the circumstances specific to the individual case (Case C-523/07 [2010] Fam 42). With respect to those circumstances, in Re A (Area of Freedom, Security and Justice) and Mercredi v Chaffe [2011] 2 FLR 515, the Court of Justice of the European Union identified the following, non-exhaustive, list of circumstances that might be relevant in a given case:*
>
> *i) Duration, regularity and conditions for the stay in the country in question.*
>
> *ii) Reasons for the parents move to and the stay in the jurisdiction in question.*
>
> *iii) The child's nationality.*
>
> *iv) The place and conditions of attendance at school.*
>
> *v) The child's linguistic knowledge.*

vi) The family and social relationships the child has.

vii) Whether possessions were brought, whether there is a right of abode and whether there are durable ties with the country of residence or intended residence.

18. In a series of decisions, namely Re KL (A Child) [2014] 1 FLR 772, Re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening) [2014] 1 FLR 772, Re LC (Children) (Reunite International Child Abduction Centre intervening) [2014] 1 FLR 1486, Re R (Children) (Reunite International Child Abduction Centre and others intervening) [2015] 2 FLR 503 and Re B (A child) (Habitual Residence: Inherent Jurisdiction) [2016] 1 FLR 561 the Supreme Court has articulated the following principles of general application with respect to the question of habitual residence:

i) It is the child's habitual residence which is in question and hence the child's level of integration in a social and family environment which is under consideration by the court determining the question of habitual residence.

ii) In common with the other rules of jurisdiction, the meaning of habitual residence is shaped in the light of the best interests of the child, in particular on the criterion of proximity. Proximity in this context means the practical connection between the child and the country concerned.

iii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must also weigh up the degree of connection which the child had with the state in which he resided before the move.

iv) The relevant question is whether a child has achieved some degree of integration in social and family environment. It is not necessary for a child to be fully integrated before becoming habitually resident.

v) It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there.

vi) In circumstances where the social and family environment of an infant or young child is shared with those on whom she is dependent, it is necessary to assess the integration of that person or persons (usually the parent or parents) in the social and family environment of the country concerned.

vii) In respect of a pre-school child, the circumstances to be considered will include the geographic and family origins of the parents who effected the move.

viii) The requisite degree of integration can, in certain circumstances, develop quite quickly. It is possible to acquire a new habitual residence in a single day. There is no requirement that the child

should have been resident in the country in question for a particular period of time. The deeper the child's integration in the old state, probably the less fast his or her achievement of the requisite degree of integration in the new state. Likewise, the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his or her achievement of that requisite degree. In circumstances where all of the central members of the child's life in the old state to have moved with him or her, probably the faster his or her achievement of habitual residence. Conversely, were any of the central family members have remained behind and thus represent for the child a continuing link with the old state, probably the less fast his or her achievement of habitual residence.

ix) A child will usually, but not necessarily, have the same habitual residence as the parent(s) who care for her. The younger the child the more likely that proposition but this is not to eclipse the fact that the investigation is child focused.

x) Parental intention is relevant to the assessment, but not determinative. There is no requirement that there be an intention on the part of one or both parents to reside in the country in question permanently or indefinitely. Parental intent is only one factor, along with all other relevant factors, that must be taken into account when determining the issue of habitual residence.

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

45. In relation to Article 13 b) again the legal framework is well settled. In *Re E [2011] UKSC 27* the Supreme Court set out at paragraphs [31 – 35] the relevant principles.

46. In his skeleton argument Mr Gration set out a helpful analysis based on the latest Guide to Good Practice under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Part IV, Article 13(1)(b) has also assisted in the proper understanding of the Article 13(b) defence.

47. He sets out that the defence must now be approached in accordance with the Practice Guide and with existing authority of the courts in this jurisdiction in the following way:

i. Article 13(b) contains three different types of risk:

a. A grave risk that the return would expose the child to physical harm;

b. A grave risk that the return would expose the child to psychological harm; or

c. A grave risk that the return would otherwise place the child in an intolerable situation.[1]

[1] Part IV of the Practice Guide at p. 25§30

ii. *The three different types of risk set out above can be raised independently, or employed together[2];*

iii. *Article 13(b) does not require that the child be the direct or primary victim of harm if there is sufficient evidence that, because of a risk of harm directed to a taking parent, there is a grave risk to the child[3];*

iv. *The term 'grave' qualifies the risk and not the harm to the child. The risk must be real and reach such a level of seriousness to be characterised as grave[4];*

v. *The level of harm must be such as to amount to an "intolerable situation", which is a situation that an individual child should not be expected to tolerate.[5] In Re D (Abduction: Rights of Custody) [2006] UKHL 51, Baroness Hale held that the word, 'intolerable' used in this context, must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate";*

vi. *The Article 13(b) defence focuses upon the circumstances of the child upon return. It should not, therefore, be confined to an analysis of the circumstances that existed prior to or at the time of the removal or retention, but instead requires consideration of the circumstances as they would be if the child were to be returned forthwith[6];*

vii. *The forward-looking nature of the exception does not, however, mean that past behaviour and incidents cannot be relevant to the assessment of a grave risk upon return – 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[7];*

viii. *All assertions of risk are to be evaluated on the same standard or threshold and step-by-step analysis:*

a. *As a first step, the court should consider whether the assertions are of such a nature and of sufficient detail and substance, that they could constitute a grave risk;*

b. *If it proceeds to the second step, the court determines whether it is satisfied that the grave risk exception to the child's return has been established by examining and evaluating the evidence presented by the person opposing the child's return / information gathered, and by taking into account the evidence / information pertaining to protective measures available in the State of habitual residence[8];*

---

[2] Ibid. at §31
[3] Ibid. at p. 26§33
[4] Ibid. at §34, drawn from the decision of the Supreme Court in *Re E* (*supra*) at §33 thereof
[5] Ibid.
[6] Ibid. at p. 27§36
[7] Ibid. at §37
[8] Ibid. at p. 31§§39 - 41

ix. *The exercise of evaluating the evidence that is said to give rise to a grave risk is not one that is to be undertaken in the abstract. The court must consider all of the relevant evidence before it. In Re C, Moylan LJ held at §39 that:*

> *""[39] In my view, in adopting this proposed solution, it was not being suggested that no evaluative assessment of the allegations could or should be undertaken by the court. Of course a judge has to be careful when conducting a paper evaluation but this does not mean that there should be no assessment at all about the credibility or substance of the allegations…"*

x. *Any consideration of protective measures must be undertaken in the light of the decisions of the Court of Appeal in Re S (A Child) (Hague Convention 1980: Return to Third State) [2019] EWCA Civ 352, [2019] 2 FLR 194, [2019] Fam Law 1006 at §§54 – 56, Re C (Children) (Abduction: Article 13 (b)) [2018] EWCA Civ 2834, [2019] 1 FLR 1045 at §§40 – 45 and In Re P [2017] EWCA Civ 1677, [2018] 1 FLR 892 at §§59 – 61. Particularly:*

   a. *The efficacy of any proposed protective measures must be addressed with care, with "the more weight placed by the court on the protective nature of the measures when determining the application, the greater the scrutiny required in respect of their efficacy" (Re S);*

   b. *Protective measures may "include general features of the home state such as access to courts and other state services" (Re C at §40);*

   c. *When considering the efficacy of undertakings, the court must, when deciding what weight can be placed on them, "take into account the extent to which they are likely to be effective" which "applies both in terms of compliance and in terms of consequences, including remedies, in the absence of compliance" (Re C at §43);*

   d. *The judge must "examine in concrete terms" the situation that would actually face a returning parent upon their return to the home state. To apply the questions asked in Re P to a more general situation: What would happen when the parent and child stepped off the plane? Would the abducting parent be arrested? Where would they go, and what would they live on? (Re P at §61)*

xi. *Once that evaluation is made:*

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

   b. *Where the court is satisfied that the evidence presented / information gathered, including in respect of protective measures, establishes a grave risk, it is not bound to order the return of the child*[9].

[9] Ibid. at p. 32§42

48. In the event that the defence is established, the court is then required to exercise its discretion whether to order a return in accordance with the principles in *Re M (Abduction: Zimbabwe) [2007] UKHL 55.*

Evidence and submissions

49. Both parents have filed three written statements setting out the background to this matter. In addition, the court has extensive disclosure of the records from the local authority (running to over 500 pages), the report from Ms Julian the Cafcass officer who met the children and the parents in November 2022, the expert report regarding the father's immigration options to travel to the USA and Dr Van Velsen's psychiatric report regarding the mental health of both parents.

50. It was accepted, and I agreed, that no oral evidence was necessary in what is essentially a summary process regarding the 1980 Hague Convention application. The court was informed at this hearing the father had been granted a B visa in January 2023, which is valid for 10 years and enables the father to enter the USA multiple times for up to six months at a time.

51. Dr Van Velsen's report confirmed that neither parent was currently suffering from any mental ill health. In relation to the mother she stated she *'did not show signs of a major mental illness…However, her history and presentation are quite complex.'*. In relation to the father she stated *'I could find no evidence of a major mental illness… However, there is a history of 4 episodes of depression and anxiety, in the past, linked to external distress. These have been helped by counselling and CBT'.* Dr Van Velsen observes that the two parents ended up resonating with each other's difficulties leading to a crisis and break down in the marriage, she considered that any *'symptoms may have abated as they are no longer together'.*

52. Ms Julian's detailed and comprehensive report concluded that X could not choose which country she wished to live in. Ms Julian was left in no doubt that X loves both parents and it was not unusual for a child not to wish to choose in these circumstances.

53. The burden of establishing that the children were habitually resident in the USA at the time they were removed by the father on 5 May 2022 rests with the mother.

54. In her submissions, Ms Renton outlines her position as follows in relation to habitual residence. She submits when you draw these threads together it is clear that when the father removed the children on 5 May 2022 their habitual residence was in the USA:

    (1) The mother and children moved to the USA with the agreement of the father, it was a family decision and the mother stayed with her sister initially.

    (2) The children were happy in the USA, living a life similar to the one they had here. The mother was their primary carer, they were part of the Orthodox Jewish community and X was home schooled, as she had been when she lived here. Ms Renton relies on what was said in an email from the father to the mother's sister on 22 August 2021, prior to the litigation, where he refers to the mother and children having a *'wonderful time'.*

(3) The family were attending religious events each week, had playdates for the children and were living what Ms Renton described as an *'ordinary life in the USA'*. On 6 November 2021 the mother sent an email to the father (who had just returned to the UK) which included the following '*…The upstairs neighbours are all so nice and the next door neighbours too. Ppl are still bringing us baked goods and welcome cards. [Her sister] came with their kids on Friday for a visit and we all went to the park together and had lunch together…'* the email continues describing what they have been doing. This provides, Ms Renton submits, an important window into the lives they were leading at that time.

(4) The children continued to be home schooled, as they had been in the UK. Although the mother had taken the lead about education matters Ms Renton referred to the fact that it was an email from the father then removed X from school in January 2020 and had not taken issue with these arrangements during the marriage.

(5) The children undertook many other activities such as horse-riding, visiting the dentist, had the benefit of a nanny from March 2022, their mother had the use of a car from January 2022 and their day to day life very much reflected what their life had been in the UK in the full time care of the mother which had readily transferred to the USA.

(6) Ms Renton relies on the fact that there were many emails from the mother, that the father was copied into, after they arrived in the USA where the mother made it clear her wish to remain in the USA with the children. At no stage did the father respond to challenge what the mother was saying, although there is some reference in the emails by the mother to her still needing to bring the father round to some matters, such as sale of the property in the UK.

(7) Ms Renton acknowledges there were a number of moves in the USA but submits when properly analysed demonstrate that in reality they were much more limited than the father suggests. Following their initial stay with her sister and a period in other short term accommodation they rented a property on 25 October 2021 until 9 December 2021. They left that property then to travel to New York connected to work the father may be able to secure. In any event, the mother stated there were plumbing difficulties in the flat they had rented. Between 9 December and 16 February 2022 they were either travelling to and from New York or staying with friends or longer periods in short term accommodation in New York or New Jersey arranged through the Jewish community ('chesed' apartments). On 16 February 2022 they rented a house in New Jersey until 30 June 2022, which they would have remained living in had the father not unilaterally removed the children on 5 May 2022. Even during the periods they were in rented accommodation they went to stay with friends for periods of 2 – 3 days. What the mother describes is reflected in what X said to Ms Julian in November 2022 when she reports X saying *'they moved from her cousin's house to a flat and then to a house in 'Piccadilly Drive'. I was told they 'only lived in those three places and one more place in New York',* when X describes a property the parents looked at in New York. Ms Renton submits that even though there had been the moves the children had the continuity of care from the mother and the father and the family actively engaged with the Jewish community wherever they were.

(8) As regards parental intention Ms Renton submits the mother does not have to demonstrate a permanent move, the focus is on the degree of stability with an eye to the children's lives. Both parents agreed that there should be a move to the USA to remove themselves from the situation in the UK, they each have a different emphasis in their evidence. Ms Renton submits that does not matter as the parents agree they were going to the USA to evaluate their options. She submits there is an element of the father seeking to re-write history, the trip was not fixed for three months it was more complicated and nuanced than that. There is evidence the father was looking for employment (for example, the trip to New York), emails about what to do with the property in the UK regarding renting and/or selling and the parents were returning accommodation for periods of up to four months.

(9) Ms Renton submits when the court stands back and views the evidence it is clear by May 2022 the children had been in the USA for nine months, in the full time care of their mother, with the father actively or not objecting to many of the decisions they took and from the children's perspectives they were integrated into life there.

55. In response, Mr Gration takes issue with the description by the mother of their life in the USA as being continued normality for the children. On the contrary, he submits, the children's stay in the USA was something that was profoundly difficult for the children. He relies on the details in Ms Julian's report from the schools about X's limited educational progress, that she was behind in her educational attainment and the description by X's teacher about the different houses she had live in and *'each time [X] made a friend, she lost a friend'*. Mr Gration submits that is a telling description which provides a window into the reality from the children's perspective of what he described as being *'repeatedly uprooted'*. The home schooling undertaken by the mother had a negative impact on X, as described in Ms Julian's report. The school reported the additional support they have had to put in since X started there in May 2022.

56. Mr Gration took the court to the emails from the mother prior to her departure in August 2021, describing the way she felt she and the children had been treated by the authorities here and how she wanted to make a fresh start in the USA. In his written statement the father sets out his wish to co-operate with the authorities here. In August 2021 there had been a further referral to the local authority, they visited on 12 August 2021, undertook a children and family assessment and saw the father on 3 September 2021. At no stage did either parents inform the local authority of any plans to travel to the USA. Mr Gration referred to the conclusions of the August 2021 children and family assessment in the way it describes how the children were settled and well-integrated into the community in the UK.

57. Mr Gration submits it is in this context that the court should view the mother and children's departure. The father's account that it was only for three months is supported by the return air tickets and the return date that tied in with the parents' wedding anniversary. He submits when you look at the emails around the time of the mother's departure this was not a pre-planned trip, the children did not take all their possessions and the emails demonstrate the development of the mother's thinking and approach culminating in her email to her father in law on 3 October 2021, copying in the father, when she stated she was not returning to the UK. Mr Gration submits why

the father did not engage in what the mother says he because he was committed to the Jewish religious ethical principle of *'Shalom bayis'* (peace in the house). Mr Gration submits this resulted in the mother putting increasing pressure on the father to take steps, such as selling the property in the UK. This, he submits, in supported by the mother referring in an email on 17 October 2021 to slowly bringing the father round to selling the property.

58. What Mr Gration submits is this was not a process of considered discussion, it was being driven by the mother's unilateral actions without consideration of what the father wants. He was trying to keep the peace and help facilitate the help the mother said she wanted. There was no settled intention as a permanent or even a semi-permanent basis, it remained, Mr Gration submits, still up in the air when the father removed the children. Mr Gration relies heavily on how the lack of planning is played out by the number of moves the family made in the USA. The father submits there were 28 moves over the 9 month period. The children did not have a settled home with their things, there was never the move of their possessions from the UK. Apart from the fact the children were in their care of their mother the children's lives during this period did not have the other stabilising factors such as school, their belongings and consistency that would aid their integration.

59. When contrasted with the situation in the UK, as summarised in the children and family assessment dated September 2021, the contrast, submits Mr Gration, could not be greater. From the children's lived experience in the USA there was limited, if any, wider social integration.

60. Turning to the issue of Article 13 (b) Mr Gration accepts the burden rests on the father. He relies on the grave risk of psychological harm to the children if they returned and/or that a return would place the children in an intolerable situation. He submits the level of risk is such that no package of undertakings given by the mother could ameliorate them.

61. The father relies on two main issues.

62. First, the long history of involvement and investigation undertaken by the local authority. There have been a number of referrals to the local authority by the school and by three hospitals due to the level of concern about the mother's approach to the care of X, in particular regarding her health and education. That history, and the events since X has been back in the UK, raises real concerns about why X did not eat consistently in her mother's case and was still breastfed.

63. Second, the issues that manifested themselves in the UK continued whilst the mother and children were in the USA. In her statement the mother refers to still needing to breastfeed, she referred to X still having difficulties eating in an email to the father in March 2022 and she accepts she was still breastfeeding X when the father removed the children in May 2022. The father's evidence is that since her return X has had no difficulty in eating, either in the home or at school. Mr Gration stated it was revealing when the mother informed Ms Julian in November 2022 that she considered a *'multidisciplinary feeding assessment and olfactory testing'* was required. That reveals, he submits, no recognition by the mother of improvements X has made. This raises a real risk of what the mother will do once X is back in her care, and what the impact on X will be. As regards X's education, Mr Gration submits the mother's

actions in home schooling have harmed the children, in particular X, as evidenced by the reports of the measures that have had to be taken by the school.

64. Mr Gration submits the reports from the schools demonstrate the children are well settled here.

65. Mr Gration submits the risk is readily established by the evidence, it is a grave risk and the protective measures proposed are insufficient to ameliorate the risk, as they are not enforceable in the USA and the mother shows no understanding of the risks (for example what she said to Ms Julian about further assessment of X). This, in turn, impacts on the confidence the court can have of the mother abiding by the undertakings.

66. Mr Gration accepts that the father can go to the USA. The visa B granted in January 2023 enables him to travel to the USA for repeated periods of up to six months over the next 10 years. The father can't work and can only be present in the USA as a tourist. That results in the father not being able to be a full time protective presence for the children.

67. Mr Gration submits the mother's application should be dismissed and a full welfare enquiry should be undertaken in this jurisdiction, this is the best jurisdiction to undertake such an enquiry as most of the historical evidence is available here.

68. Mr Gration accepts what Dr Van Velsen states about the mother's mental health but relies on those conclusions as making the risks higher as the care the mother provided to the children, which he submits was harmful, was not due to any mental health difficulties suffered by the mother.

69. In response to the Article 13 (b) submissions Ms Renton submits the threshold is not even reached.

70. She submits it is telling that up until May 2022 the father did not voice any concerns as to the way the mother cared for the children. He was part of the household where the mother continued to breastfeed the children and where the children were home-schooled. The court, she submits, should view what the father now says through that prism. It is of note that when the father emailed the mother on 5 May 2022 to inform her he had removed the children to the UK he invited her to come and stay, to join them with no restrictions. If the mother's application is permitted the children will be returning to the USA where they lived for nine months and to the care of their mother, who has been their primary career during the majority of their life.

71. By his actions, Ms Renton submits, the father has engineered a situation where the children have been separated from their mother for the first time. She relies on a number of actions taken by the father which illustrate the steps he has taken to marginalise her as a parent with parental responsibility such as registering the children in school without her knowledge, limiting contact between the mother and the children, not informing the mother about meetings at the children's school, not providing contact details for the mother to the school. Since he has had the care of the children he has done little to actively promote the children's relationship with the mother, or recognise her role as a parent with parental responsibility.

72. Ms Renton recognises that in considering the Article 13 (b) defence the court, due to the summary nature of these proceedings, should take what the father alleges at its highest. That does not mean, where appropriate, the court cannot undertake some evaluation. First, she submits a main plank of the father's case was the level of concerns he had about the mother's mental health. She submits that is no longer sustainable in the light of the conclusions reached by Dr Van Velsen. Second, the court should be slow to go behind the conclusions reached by the local authority following each of the referrals made to them, in particular the last one. To do anything else would amount to speculation.

73. When the evidence is looked at the reality, she submits, is that the father was unconcerned regarding the mother's care. He left the children on three occasions in the mother's care in the USA, when he removed the children from the mother's care he invited the mother to the UK to join them without reservations and the reliance on the email in March 2022 about concerns about X's eating do not say X isn't eating.

74. When properly analysed Ms Renton submits the threshold of grave risk is simply not met.

75. If she is wrong, Ms Renton submits the protective measures proposed by the mother can be relied upon. The mother's bona fides are not really in issue and the package of measures proposed by her means the housing, schooling and medical issues are covered in the context where both parties agree the matter is likely to be restored back to the Bais HaVaad within a very short period of time. The risk of any return to breastfeeding is non-existent, due to the long gap the mother's milk has dried up.

Discussion and decision

76. There is no issue between the parties regarding the legal framework for the court to consider the issue of habitual residence, although they each place particular emphasis on certain features.

77. Ms Renton focusses on the lack of any real change in the day to day lives of the children after the move to the USA. Their mother remained the primary carer, their father was present for most of the time, home schooling was undertaken, they played a full part in the Orthodox Jewish community and saw family and friends. Whilst she acknowledges there were a number of moves, it really amounted to three main moves over the nine month period, with stays in short term accommodation due to travel or visits related to the possibility of work for the father or related to the Jewish community. It is of note that this is how it was viewed by X in her meeting with Ms Julian. Ms Renton does not suggest there was a clear plan when they left, other than the shared goal to leave the UK for a period of time and evaluate the options. As the mother became firmer in her views, the father did not take any steps to challenge that and as a consequence the children became more integrated in a social and family environment in the USA.

78. Mr Gration submits the uncertainty that was there at the start remained during the whole period they were in the USA, illustrated by the number of moves, the negative impact on the children of their time in the USA demonstrated by the additional support put in by the school here, and the lack of any evidence of social integration by the children illustrated by what X reports to her teacher about losing friends.

79. As regards Article 13 (b) Mr Gration relies on the history to demonstrate the level of risk to the children by the mother's behaviour, submitting the court can view the local authority records with a wider lens and that, in reality, nothing has changed. The mother's views regarding further medical assessment of X is revealing and Dr Van Velsen's report, confirming the mother does not have any signs of mental illness, heightens the risk, he submits. The lack of enforceability of the safeguards, coupled with the lack of any real change by the mother means that the risks cannot be ameliorated by any protective measures. The children are well settled here and as a consequence the court should exercise its discretion and refuse the mother's application.

80. In the light of Dr Van Velsen's conclusions, Ms Renton submits a major part of the father's Article 13 (b) defence falls away. The local authority assessments and decisions to close the case on three occasions is revealing. The last assessment in August 2021 confirms the strong relationship the children have with the mother and the other positive welfare matters referred to in the report. The concerns the father now relies upon regarding the mother's care were not seriously voiced by him previously, he sent the email to the school in January 2020, he agreed to the children spending periods of time in the USA in the sole care of their mother and in May 2022 he invited the mother to come and join them after he removed the children to the UK. None of this, she submits, is consistent with a parent who considers that the mother will cause the children a grave risk of exposing the children of psychological harm or place them in an intolerable situation. Most recently, the mother arrived from the USA last weekend and has had extensive unsupervised time with the children with no issues being raised. In any event, the protective measures proposed will ameliorate any risk the court may find that exists.

81. Although this case has a difficult and complex background it is important when considering the issue of habitual residence to not only consider each of the matters the court is required to consider, but also to stand back and view the wider canvas of the case.

82. Prior to May 2022 the mother was the children's primary carer, although the parents operated largely as one household in caring for and making decisions about the children over many years.

83. Prior to August 2021 the children had only lived in the UK where they were born. The children and family assessment undertaken in August 2021 sets out the high level of integration the children had in the social and family environment here. That was in the context of the children being cared for by their mother, the father being a part of the household, being home schooled and socialising largely within the Orthodox Jewish community and with wider paternal family members, who lived nearby.

84. The decision to go the USA in August 2021 was a joint decision of the parents, although each parents may have a different emphasis regarding the timescales; the father that it was limited to three months, whereas the mother considered it was more open ended. What did become clear is the stay became longer, with the mother making clear her position in emails the father was copied into, the return tickets being changed to travel vouchers, the father looking for job opportunities and the parties renting accommodation for longer periods of time. The most recent rental was for four months, from February to June 2022. As time went on the father took no steps that

indicated the stay in the USA was time limited and supported the increasing social and family integration of the children in the USA, for example by considering schools in the USA.

85. The children's lives during this period did not stand still; their level of integration increased. They visited friends and family, for example as described by the mother in her email to the father on 6 November 2021. The children did outside activities, such as horse riding, and went for their first dental appointment. The children retained the stability of having their mother as their primary carer, the father spending most of the time with them and taking a full and active part in the Orthodox Jewish community.

86. Whilst it is right there were a number of moves during their time in the USA, I accept Ms Renton's submissions. The reality was they had a limited number of longer term rentals, for example between 25 October to 9 December 2021 and from 16 February to 30 June 2022, with much shorter stays of only between one – three nights in accommodation that was connected with travel, staying with friends or accommodation provided by the Jewish community. X's perception of their accommodation to Ms Julian accords with this. Whilst it is right their belongings from the UK were not shipped over to the USA and their property in the UK was not put on the market for sale, those matters were being actively discussed and do not prevent the children, on the facts of this case, being integrated in a social and family environment in the USA.

87. It is necessary to consider the qualitative rather that quantitative nature of the stability of a child's residence. In this case the children had the continuity of being cared for by their parents, of being home schooled, continuing to be an active part of the local Jewish community and engage with friends and the wider family with their parents.

88. Standing back to consider the evidence, on the particular facts of this case, I am satisfied that at the time of the children's removal on 5 May 2022, the children's habitual residence was in the USA. Drawing on the analysis above the reasons for that conclusion can be summarised as follows:

(1) This was a move that was agreed by the parents, albeit they place a different emphasis as to how long it was to be for. It became clear after the return tickets were converted to travel vouchers that there was no time limit advocated by either parent. The mother's position became increasingly clear that she wished to remain in the USA and the father did little, if anything, to challenge that, even though he knew the mother's position.

(2) From the children's perspective following the move they had the continuity and stability of their mother remaining their primary carer, with the father being present for the majority of the time, being home schooled and taking an active part in the local Jewish community as well as visiting family and friends. Whilst it is right there were some moves, X's perception as described to Ms Julian is right. Whilst it did involve changes for X as she describes regarding the loss of friends when they moved, when looked at in the context of the other evidence that did not detract from the qualitative stability of the children's residence in the widest sense.

(3) Whilst it is right not all the children's possessions were sent to the USA and the family home was not put up for sale. Those matters were under active discussion between the parties and when viewed in the context of the other circumstances in this case do not mean that habitual residence had not been established at the time of the children's removal.

89. Turning now to consider the question of Article 13 (b). Mr Gration relies on the evidence to establish a return would expose the children to a grave risk of psychological harm and/or otherwise place the child in an intolerable situation.

90. His focus is on the long history of local authority involvement, coupled with the fact that the same issues continued whilst the children were in the USA that had a detrimental impact on their welfare, demonstrated by the measures the school had to put in place to support X's education. He submits the risks remain as the mother informed Ms Julian that X requires a further multi-disciplinary assessment.

91. Ms Renton takes issue with that analysis in the context when the father was part of the same household that made the decisions regarding the children's care and education over many years. The issues he raises now were not raised by him at the time, including at the time of the children's removal. Ms Renton submits it is the father who has behaved in a way that is detrimental to the children since May 2022, in the way he removed them from their primary carer and has refused to properly engage with the mother as a parent who shares parental responsibility for the children since then.

92. It is right there has been a long history of involvement with the local authority as a result of referrals that have been made by the school and then by three hospitals. It is also right that each time the local authority undertook investigations following those referrals, they ended up taking no further action and closed the case. The concerns centred on the issues of the parents mental health, X being removed from school and over medicalising issues relating to X's eating habits.

93. The most recent referral was in July 2021, which resulted in the children and family assessment dated 20 September 2021. The assessment notes the social worker visited the family home and spoke to both parents and saw the children just days before they went to the USA. It is of note that there is no reference in the assessment by either parent of the plans in relation to the USA and there is nothing in the assessment that indicates any decisions about the children's care or education were other than joint decisions of the parents.

94. Those care arrangements for the children continued when they went to the USA, with the father remaining an active part of the family household during that time. At no stage did the father raise issues or concerns about the care or arrangements for the children. He only did so in the context of his statements filed in these proceedings or in the context of the parents' engagement with the Bais HaVaad, when their relationship had broken down and after he had unilaterally removed the children from the mother's care. It is important to bare this context in mind when considering the way the father puts the basis of the risk of grave harm.

95. The father's reliance on what support has had to be put in for X at school is not as simple as he seeks to suggest. X had been out of school since January 2020, the parents had looked at and considered schooling option in the USA and so X's position

needs to be considered in that wider context. Whilst it is clear that additional support has been required for X, the school reports in glowing terms about X describing her as being *'absolutely delightful'* in school.

96. Whilst I recognise there is a risk, bearing in mind the background to this case, I do not characterise it as grave in the situation that exists now and looking forward. The report from Dr Van Velsen confirms the mother does not currently suffer from any mental ill health. Whilst the mother's mental ill health had been a part of the father's case previously it is now suggested that Dr Van Velsen's report now makes the risk more serious as the mother's previous actions were not partly attributable to mental ill health. That, in my judgment, fails to give proper weight to Dr Van Velsen's conclusions regarding the mother's mental health going forward, and the important safeguard that evidence provides and the different circumstances now the parents are separated. The evidence demonstrates that the father was part of the household that made the previous decisions regarding the care of the children which he did not take issue with until after May 2022, when the parties had separated and he needed to justify his unilateral decision to remove the children from their mother's care in the way that he did.

97. As set out above, it is right that additional support has had to be put in for X at school but that is more likely to be attributable to decisions during the time when both parents were living together and needs to be balanced with the positive evidence about how X is viewed by the school. The parents had discussed putting X into school in the USA, and that is what is proposed by the mother.

98. As regards the medical issues and X's eating, whilst it is right the mother made the comments she did to Ms Julian those need to be seen in context. Breastfeeding is no longer an option, the evidence is that there were no concerns at the time of the August 2021 assessment where X is described as being a *'healthy height and weight'* and the email from the mother in March 2022 describes X as eating some things although there were still some issues about that.

99. Having stood back and considered the evidence, I have reached the conclusion that the father has not established the Article 13 (b) defence. In the circumstances of this case now, and looking forward, I do not consider the return of the children to the USA would result in a grave risk of psychological harm and/or place either child in an intolerable position. The children will be returning to the care of their primary carer. The parties are agreed that the arbitration should continue before the Bais HaVaad, they agree to make a joint referral back to that Beth Din which looks like it will be considered without any significant delay. Since the children have been in the father's care, he has shown a disregard of the mother's parental responsibility, he has not consulted her or kept her updated about a number of steps he has taken regarding the children as set out in Ms Renton's skeleton, including not informing the mother about attendance at meetings regarding X's education and not informing the mother about play therapy that has been undertaken. I am satisfied he can spend significant periods of time in the USA, for repeated periods of up to six months, so will effectively be able to engage with the Bais HaVaad and spend time with the children. I recognise he will not be able to work in the USA under his current visa but will have the opportunity to return to the UK for work and/or explore what work options would be open to him in the USA in the longer term.

100. Even if I am wrong about whether the grave risk of harm threshold has been met, I am entirely satisfied the list of protective measures proposed by the mother are sufficient to ameliorate any risk. There is no evidence on which to base any suggestion the mother will not comply with them. Her reasons for approaching other Rabbinical Courts, she says, are related to the fact that the father has refused to give her a Get. The recent email from Bais HaVaad sets out that they consider they are dealing with all matters. There may be an issue between the parties as to the extent to which the Bais HaVaad deals with non-welfare related matters, but the one thing the parties agree is that the Bais HaVaad is dealing with welfare matters relating to the children, in accordance with the arbitration agreement entered into between the parties on 25 May 2022. The mother's protective measures include arrangements in relation to the children's school and recognises the need to consult with the father regarding any medical related issues concerning the children.

101. For the avoidance of doubt, I am satisfied that the children can return to the USA in the care of their mother.

102. Therefore, the mother's application under the 1980 Hague Convention for the return of the children to the USA is granted. The parties should now liaise and seek to agree the terms of the order.

103. I very much hope that now this court has resolved this matter the parties will fully engage with the arbitration process to bring about agreement regarding the future arrangements for the care of the children and for the father to grant the mother the Get she seeks.