Neutral Citation Number: [2019] EWHC 1310 (Fam)

Case No: FD19P00085

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2019

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between :

TY	**Applicant**
- and -	
HY	**Respondent**

- -
- -

Mr Mark Jarman (instructed by **Ellis Jones**) for the **Applicant**
Mr Alex Laing (instructed by **Dawson Cornwell**) for the **Respondent**

Hearing dates: 15 and 17 April 2019

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Approved Judgment

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

.....

THE HONOURABLE MR JUSTICE MACDONALD

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.

Mr Justice MacDonald:

INTRODUCTION

1. In this matter I am concerned with an application under the Child Abduction and Custody Act 1985 for an order requiring the summary return of NY, now aged 2 years old, to the jurisdiction of the State of Israel pursuant to Art 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (hereafter the 1980 Convention). That application is brought by NY's father, TY (hereafter, the father). It is resisted by NY's mother, HY (hereafter, the mother).

2. In resisting the application, the mother contends that immediately before the date on which the father alleges she wrongfully retained NY in the jurisdiction of England and Wales, NY was habitually resident in this jurisdiction, taking this matter outside the scope of the 1980 Convention. In the alternative, the mother contends that the father consented to NY being removed from the jurisdiction of the State of Israel for the purposes of Art 13 of the 1980 Convention, and also that to order the summary return of NY to the jurisdiction of the State of Israel would result in a grave risk of her being exposed to physical or psychological harm or otherwise placed in an intolerable situation for the purposes of Art 13(b) of the 1980 Convention. It is not disputed that at the relevant time the father had rights of custody under Israeli law and was exercising those custodial rights.

3. In considering this application, I have had the opportunity of reading the trial bundle in this matter, which bundle contains the statements of the father dated 26 February 2019 and 11 April 2019, the statement of the mother dated 29 March 2019 and a statement from a witness on behalf of the mother, Mr HR, dated 2 April 2019. I have also heard oral evidence from the mother, the father and Mr HR on the issue of consent. I have had the benefit of careful and considered written and oral submissions by Mr Mark Jarman of counsel on behalf of the father, and Mr Alex Laing of counsel on behalf of the mother.

4. It is important to note at the outset that I have significant concerns regarding the credibility of the mother's evidence in light of the contents of her text exchanges with Mr HR on 13 January 2019. In particular, the text exchange between the Mother and Mr HR, which both accepted had taken place (albeit Mr HR at points tried to suggest the record could have been altered), indicates the following:

    i) Mr HR advised the mother to "eavesdrop" on the father if the Police were there;

    ii) Mr HR advised the mother to dress modestly when seeking advice from others and to "Play the game now, there's nothing else to do in order to win". The mother appeared to have accepted that advice.

    iii) Mr HR advised the mother to ensure that she prevent the father from leaving England until she had arranged "the divorce and the *gett*".

    iv) Mr HR advised the mother to mislead staff at the Rabbinical Court in London, telling her, "in order that they treat you with respect, come dressed modestly, in a skirt etc. so they think that you're religious. There's no other way you

have to play the game now in your favour, If they ask you then say you are becoming more religious and are keeping Shabbat, just because of him you sometimes weren't able but now you are keeping Shabbat again. If they ask that's what you should say." The mother replied "Yes, I called".

v) Mr HR advised the mother to make allegations to the staff at the Rabbinical Court, telling her "Say its urgent, cry to her" and "Say that you're afraid that he'll kidnap the girl. A day after this conversation, on 14 January 2019, the mother alleged to the Police that the father would kidnap NY.

vi) Mr HR advised the mother to mislead the father in respect of the level of contact he would have with NY in order to obtain a *gett*, stating that, "You will play the game that you want to end this as pleasantly as possible. Tell him, if you want I'll send her to you on Passover, Hanukah, Sukkot. Say anything so that he'll give you a *gett* because HY, if he doesn't give you a *gett*, you'll be in a messy situation and he'll be able to drag it out. You have to get him to a situation here he'll give you the *gett*, after than you'll make an agreement in the rabbinical court about when he'll see the girl, once every two or three months".

5. Within this context, I cannot ignore the fact that the mother's statement to this court (which statement, in addition to dealing with her case on habitual residence and consent, makes serious allegations of physical and emotional abuse by the father and emotional abuse, isolation and manipulation by the father's family that were not raised in Israel and which are in some instances contradicted by other evidence before the court) postdates the foregoing text exchanges in which she was advised to mislead the Rabbinical Court and the father and did not appear to demur from such advice. I am satisfied that the mother's oral and written evidence falls to be evaluated in this context and must be treated with some caution as a result. Likewise, I am satisfied that the evidence of Mr HR must be treated with very considerable caution by this court.

6. Finally, on the other side of the evidential divide, the father seeks to rely on three letters exhibited to his second statement, the contents of which he submits are relevant to the question of the basis on which he says he consented to the removal of NY from the jurisdiction of the State of Israel. However, the originals are not before the court, the letters are not otherwise presented in their original form, appearing to be typed up versions, nor are they signed by their respective authors. Within this context, the court can place minimal evidential value upon them.

BACKGROUND AND EVIDENCE

7. Prior to their arrival in England with NY in November 2018, both parents had lived their lives in Israel, the mother having been born in October 1988 and now aged 30, and the father having been born in May 1990 and now aged 29. NY was born in November 2016 and likewise had lived in Israel prior to being brought to England by her parents. It is not disputed that NY benefited from a large extended family in Israel and that the mother and the father had a large group of friends. Both the mother and the father had secure employment and accommodation in Israel. NY's primary language is Hebrew although it is said she also speaks some French and some English. The mother speaks Hebrew and English. The father speaks only Hebrew.

8. The parties were married in 2013. The mother contends that the marriage was characterised by (a) physical and emotional abuse by the father towards her and, on two occasions, towards NY and (b) emotionally abusive, oppressive and isolating behaviour by the father's family towards her and NY. On the face of the evidence available to the court, there are however, some forensic difficulties with these assertions that the court cannot ignore for the reasons that I discuss further below when analysing the evidence before the court in the context of Art 13(b) of the Convention.

9. The mother makes extensive allegations of physical and emotional abuse by the father against herself and others. Whilst she describes no specific incidents or provides any detailed particulars of the same, the mother alleges the father would push and hit her every two or three weeks. She further alleges that on an unspecified date he held a gun to her head and threatened to kill her. Again on unspecified dates, she alleges that on twenty to thirty occasions the father threatened to crush her skull. In addition, the mother characterises the father as "dangerous and violent" and involved in violent incidents at work, including a violent assault on a 16-year-old boy that was reported in the press and for which a colleague took responsibility and was as a result dismissed. No further evidence is provided in respect of this allegation, whether by way of the production of the press reports or otherwise. None of these allegations were made in Israel.

10. As I have noted above, I must also have regard to the fact that these allegations are made at a point after the mother was advised by Mr HR to mislead the Rabbinical court, including making allegations of threatened kidnap against the father, one day after which the mother made precisely that allegation to the Police. Further, against the mother's characterisation of the father as a dangerous, violent and short tempered individual, the communications the mother has provided to the court that were sent by the father on the day the parents decided that their marriage was over in January 2019, are not unusual in such a context and do not depict the level of aggression the mother seeks to characterise the father as demonstrating in times of difficulty or emotional stress. Whilst the mother claims in her statement to have "many recordings" of the father being verbally abusive to her, no transcripts of *those* exchanges have been produced to the court.

11. The mother also alleges that the father has physically assaulted NY on two occasions. The mother alleges that in the Summer of 2018 the father removed NY from her cot in a drunken rage, shook her violently and shouted, "shut the fuck up". However, despite the mother asserting, correctly, that this action could have resulted in very serious injury to NY, the mother did not report his alleged assault to anyone, did not seek medical attention for NY, did not alert the police or social services to the risk presented by the father and did not alert any relatives to the same (if this event did occur, it is of significant concern to this court that the mother chose not to act to protect NY by seeking medical attention and alerting others to what had transpired).

12. The mother further alleges that the father physically assaulted NY whilst travelling on the London Underground on 30 November 2018. The mother alleges that the father shouted at NY after she sat down on the floor of the carriage and ordered her to get up and then grabbed her and dragged her with force. However, once again, the mother's reaction to this alleged assault was not to act to protect NY, or to seek help from others to do so, but rather to let the incident continue and to take a series of

photographs of it (once again, if this event did occur it is concerning that the mother appears to have taken no action to protect NY). In any event and accepting that they represent mere snapshots of an evolving situation, the photographs taken by the mother appear simply to show a parent seeking to persuade a toddler to get up off a dirty floor and struggling to be successful in that task.

13. The mother's allegation that the paternal family verbally abused the mother and sought to isolate her from her own family and usurp her role as NY's primary carer is also significantly problematic. The mother now makes allegations that she suffered emotional abuse at the hands of the paternal family and that they isolated her from her own parents for a period of 5 years. These allegations were not made in Israel. Indeed, they appear to be directly contradicted by some of the mother's own communications with the paternal grandmother. The father asserts that the Mother would be affectionate towards the paternal grandmother and documents before the court appear to support that assertion. In a Facebook message accompanied by a picture of the mother and the paternal grandmother together, the mother wrote:

> "My dear mother, you give so much and I hope you know how much I value you. I love you a lot and wish you all the happiness in the world, which is certainly your due".

Likewise, on a Mother's Day Card the contents of which the mother did not seek to dispute at this hearing, she wrote:

> "Since it is Mother's Day and I am a mother I wanted to set out what I think the characteristic features of a mother should be, just as a sort of definition. They include: Love, devotion, defence against the whole world, always being there whatever both in joy and sadness and even just to give a hug. The rhetorical question is this: who is the person in my life I can say this about? (you !! of course). And so I have chosen to bring you, or more correctly prepare for you, a gift. Something very personal which comes from me to you – with all the love that I feel for you. I want to thank you for everything that you have done and are still doing for me. The most important thing is that you have enabled me to see the nature of life and have re-instilled hope in my every time that I was losing it. With lots of love..."

14. On mother's own evidence, the paternal grandmother arrived in London in January 2019 saying, "that she wanted to talk to me and make things better after our argument". Indeed, that statement appears to have been caught by one of the recorded messages the father sent to the mother on in January 2019. Those sentiments are consistent with the picture the mother painted of the paternal grandmother in her cards and messages to her prior to coming to England (and prior to being advised by Mr HR to make false allegations to the Rabbinical court).

15. Within their statements, both parents make allegations that the other was mentally and emotionally unstable during the relationship by reason of their respective life experience. The mother alleges that the father's experiences in his employment have left him emotionally unstable and violent. In turn, the father alleges that the mother was the victim of sexual abuse and rape as a child which experience has led to her

attempting suicide, committing self-harm and to a suggestion that she suffers from Borderline Personality Disorder.

16. It is agreed by both parties that problems with marriage commenced at some point in 2018. The heart of the dispute between the parents is how they responded to that. The mother contends that the parties agreed a new start by permanently moving to the jurisdiction of England and Wales, which move was consistent with her long-held ambition to live in London. The father accepts that a move to England with NY was ultimately agreed but contends that it was a move expressly agreed by the parents to be temporary in nature and a situation that would come to an end if it did not succeed in rescuing the parents' marriage, with the parents and NY returning to Israel in that eventuality.

17. Insofar as it is necessary to resolve this dispute, I am satisfied that the evidence before the court tends to suggest that both parents agreed that difficulties in their marriage comprised at least part of the reason for their contemplating a move out of Israel. The father makes this clear in his statements to this court. Whilst stating that it was not *the* reason, the mother agreed in cross-examination that the move was "to start a new life and also work on our marriage" and that she had made clear to the father that she wanted to work at their marriage.

18. The evidence further tends to indicate that, within this context, both parents ultimately agreed to a move to England with NY having considered other options for leaving Israel. Within this context, it is of note that the mother makes clear in her statement that the final decision to move to England (as opposed to France) was not taken until August 2018, only some two months before the move took place, and that as at July 2018, "We hadn't decided exactly where we wanted to go at this stage, we just knew we wanted to leave Israel". In the circumstances, it is plain that the plan to move to England was not the only option that was considered. Further, whilst it may well have been a long-held dream of the mothers, I am satisfied that the move itself had not been finally decided upon until a date close to the parents' departure from Israel. In the circumstances, this was not a plan to relocate that had been many months or years in the making.

19. Within this context, the evidence before the court also tends to indicate that *both* parents contemplated the possibility that the move to England may not be successful and that a further move might be the result, *including* the possibility of a return to Israel. In this regard, I note the translation of the WhatsApp message sent by the mother to the father on 17 October 2018, during the period that they were planning their move, in which she stated:

> "That we will know if its will happened (*sic*). It is impossible to predict such things. Everything depends on us no matter what we will earn. If went back (meaning to Israel) at least we tried we had a significantly process (*sic*) in our marriage and in our life we have done a very brave step and we have proved that we are not coward and have dreams".

This stands in direct opposition to the claim in the mother's statement that "This move was *always* going to be permanent" (emphasis added) as does her statement in her letter to the father on 30 December 2018 that "If we see together that it is not suitable, I am with you <u>in any other direction</u>" (emphasis in the original). The mother's

statement also demonstrates elsewhere a tendency to be misleading on the issue of the permanence or otherwise of the move in an effort to persuade the court that there was a settled intention that the move would be permanent. Whilst the mother cites a response to the father's enquiry to a Facebook Group as evidence that the father intended the move be permanent, her statement is very selective in this respect. In fact, the response received by the father emphasised twice that a return to Israel remained a possibility if matters did not work out, a position consistent with that of the father.

20. It is likewise plain that the father kept open possibility of a return to Israel should matters not work out in England. Whilst the mother suggests that the father would not have left his job had the move to England been intended only to be temporary, the father is recorded in a document that I accept as accurate as telling his employer on 21 October 2018 that:

> "Due to complex personal reasons, I have to travel to England with my family. It is possible that in the near future, I will return to Israel and will seek a position in [description of job], since [it] provide values, along with personal and public fulfilment."

This statement is consistent with the content of the translated messages provided by the mother that the father sent to the mother on in January 2019, on the day the parents decided that their marriage was at an end:

> "We knew from the start that we will come to London, two things could happen. Either it will strengthen, or it would dismantle (break it). And there is nothing that can be done, It is not pleasant to hear, This is the truth and we knew it in advance. And at the moment to our regret it looks like it is going the second way (option) unless I will be succeed to overcome myself. I... I need here... there is nothing to do, I know that you are hurt and I am also hurt and I need to find within myself forgiveness and ignore what was and move on. That's it."

And later:

> "With all the difficulties of the move, plus the shitty reality, so we did take into consideration that this is a reality that would happen. That is what I am saying."

21. Within the foregoing context, the father further contends that there was an express agreement between the parents prior to their departure to England in November 2018 that if matters did not work out in England they would return with NY to Israel, saying in his first statement that he "agreed to move to England for a few months as a trial period only, on the basis that we would all return to Israel in the event that the move was not successful." The mother, as I have observed, denies such a condition was imposed by the father on his consent.

22. Insofar as it is necessary for me to determine the issue, in my judgment the evidence does not tend to support the existence of an express agreement in these terms as contended for by the father. Whilst it is clear that both parties contemplated the possibility that the move to England would not be successful and that a further move

or a return to Israel was a possibility, and whilst each party may well have further developed their intentions as to what would happen next as their marriage continued to deteriorate following their arrival in the United Kingdom, the evidence does not tend to support an express agreement to return to Israel in the event the move was not a success having been reached *prior* to their departure from Israel in November 2018.

23. In particular, I note that in the exchanges that took place between the father and the mother on in January 2019, on the date on which it was clear beyond peradventure that the move had not been successful, the father makes no mention of an express agreement by the parties to return to Israel in the event of failure, notwithstanding this would have been precisely the point to make reference to it. For example, on that date, the father stated as follows to the mother, making no reference at all to a prior and settled agreement:

> "You want to give me time to settle down and to forgive you fine, if not, do what you want.".

And later:

> "I have decided to do this and also after I decided to do this, you don't care about anyone's situation, you care only that we moved and that's what happened, so you can decide what you want, but I told you; you want to break up, we break up, we return home (to Israel) and do it properly. We are not doing any break up here, cause I am not staying here."

And later still:

> "Take into account, whatever you decide, simply we return to Israel and we will solve it there. It is clear to me that we won't solve it here, because I am not staying here. And there is a child involved. That's it."

24. At no point does the father state that they are "not doing a break up here" because we agreed to return to Israel if matters did not work out, or that "we won't solve it here" because they had agreed to solve it in Israel. Rather, the reason he gives for seeking to resolve matters in Israel is simply that he will not be in England.

25. Prior to the parties travelling to England in November 2018 each gave up their employment in Israel and NY having been removed from her nursery in that jurisdiction. The parties purchased one-way tickets to England. It does not appear to be disputed that prior to their departure the father sold car, couch, refrigerator and washing machine. Whilst there is a dispute as to the precise purposes of the party held in Jerusalem on 22 November 2018, both parties agree that, however it was constituted, the party represented an opportunity for them to say farewell to their families. It is clear that the parties took five suitcases and three pieces of hand luggage and that the mother had earlier taken three further suitcases. There was however no transfer to England of larger belongings by way of freight and certain items remained in storage in Israel. Prior to departure the parents signed a one-year tenancy in London and the father arranged employment at a restaurant.

26. Upon arrival in England, the parties opened a joint bank account and the father commenced his employment. NY started nursery on 6 December 2018. The father

asserts that she did not attend over the Christmas holiday. This would not appear to be a controversial assertion. The mother did not gain employment. Within this context, the parties looked into obtaining housing benefit and Universal Credit. They were assessed as being entitled to the latter. The mother contends that "almost every Friday" they went to the Rabbi's house (given the period that passed between their arrival and the date of their separation in January 2019 this means attendance at most on five occasions). The mother contends they quickly formed "close friendships" but the father asserts that he only, vaguely, knew two people in London. The mother talks in her statement of "friends through the nursery" but does not identify them or the "many other people in London" with whom she now claims in her statement to be "close". She mentions her friend Talia as being a "tremendous support" and being like an "aunt" to NY. There is no statement from Talia. Mr HR is described by the mother as a "good friend".

27. It is plain on the evidence before the court, that over the six and a half weeks in London between their arrival and their separation in January 2019 when they agreed to divorce that the parents' relationship continued its decline. In his first statement the father is clear that the parents had a number of disagreements after arriving in England. Both parents make clear in their respective evidence that they had not, by the time of their separation in January 2019, settled into a stable position in England. Indeed, the evidence demonstrates that *both* found it difficult to settle and attain a degree of stability in the context of their disintegrating relationship.

28. In her statement to this court the mother says "It is true that we have been having difficulties in our relationship. Although we loved London, we were sadly still having these difficulties." On 30 December 2018 the mother wrote a letter to the father making clear that "It is important to me that you should know that maybe it was my dream to come here , but I have still not managed to feel happy, not even for 5 minutes, until you feel it together with me". She continued that "Gradually we will find our place here and in a reasonable period of time after the move. If we see together that it is not suitable, I am with you <u>in any other direction</u>" (emphasis in the original). The communications from the father in January 2019 disclosed by the mother into these proceedings likewise indicate that he did not consider that they had yet found stability and contentment as a family, stating that "we need more time, need more time to settle down and that's it".

29. Within this context, and sadly, by the date of their separation in January 2019 it is plain that just six weeks into the move the family environment for NY in England comprised two people whose marriage had been further decaying over that short period, and who, as a result, ended up feeling like strangers to each other, the mother making clear in her statement to this court that "we were living like strangers in our flat at this point". In his messages to the mother in January 2010 the father acknowledged that the mother felt like they were "house mates". Up to this point, over the course of that six-week period, NY's social environment had included some three or four weeks at nursery from 6 December 2018 and prior to the Christmas holidays, some visits to the Jewish centre, a number of Friday evening meals and contact with individuals and attendance on playdates that are not further particularised in the mother's statement.

30. Following the decision of the parents in January 2019 to divorce, and as noted above, the mother makes clear in her statement that the father stated that he wished the

family to return to Israel to deal with the end of their marriage. As noted above, by 13 January 2019 Mr HR was advising the mother to mislead the Rabbinical court and others regarding her situation. The father became aware of these messages and drew from this, and the breakdown of the marriage, the conclusion that the mother had developed a relationship with Mr HR and had planned this as the outcome of their move to London from the outset. This was put to both the mother and Mr HR by Mr Jarman. However, whilst the mother and Mr HR met in Jerusalem without the father in May 2018, and whilst there is a suggestion in the text exchange that Mr HR may have entertained notions of a relationship (he at one point appearing to test the water by stating "She is a little girl, it doesn't cost so much and you'll be able to work please God, and start a new life with me or without me – just kidding"), there is insufficient evidence for this court to reach the conclusion that the mother had planned from the outset to obtain the father's agreement to the parents moving with NY to London in order then to leave the father and commence a relationship with Mr HR.

31. Upon the mother alleging to the Police on 14 January 2019 that the father presented a risk of kidnap towards NY, the Police advised the father to move out of the parents' rented flat. In circumstances where he had nowhere else to go, he returned to Israel. Whilst the mother alleges she thereafter received abusive phone calls from the father, which led her to call the Police, no effort has been made to obtain disclosure from the Police in that regard. The father commenced proceedings in the Rabbinical Court of Jerusalem for divorce and custody of NY. The mother has issued proceedings in the Rabbinical Court in London. The mother has also engaged lawyers in Israel in respect of the proceedings issued by the father in that jurisdiction.

32. The father issued his application under the 1980 Hague Convention on 6 February 2019. On 26 February 2019 the father discovered that the mother had moved addresses. The mother refused to confirm the whereabouts of herself and NY. On that date I made a without notice passport order and location order in circumstances where the mother had links with a third jurisdiction, namely France and a French passport. The location order was executed next day and the mother and NY's passports were seized by the Tipstaff.

33. Finally, within the context of the mother's reliance on Art 13(b) of the 1980 Convention, the father offers the following undertakings to the court to address the concerns raised by the mother as part of her argument under Art 13(b) and generally:

    i) Not to molest, pester or harass or interfere with, or use of threaten violence against the mother, or encourage anyone else to do so;

    ii) Not to support, whether by himself or through his lawyers, agents or any other person, any criminal or civil proceedings for the punishment of the mother arising out of the retention in England of NY;

    iii) Will seek to ensure that the warrant for the mother's arrest in Israel is discharged;

    iv) Not to separate or cause the separation of NY from her mother's care without an order of the Israeli court or agreement between the parties;

v) To pay the reasonable costs of the NY and the mother's flight back to Israel;

vi) Until order of the Israeli court to provide reasonable financial support to the mother and NY;

vii) To continue to pay NY's health insurance until she reaches the age of 18 years old;

viii) To continue to pay NY's nursery fees until order of the Israeli Court;

ix) To co-operate in any court proceedings in Israel regarding NY's care and support to ensure that an agreement or order can be made quickly and without undue delay.

THE LAW

34. The law in relation to habitual residence, and to the two exceptions relied on by the mother in this case, namely consent and harm, is well settled and can be stated shortly.

Habitual Residence

35. The term 'habitual residence' is not defined in the 1980 Convention or the 1985 Act. The Court of Justice of the European Union has however stated that habitual residence will be evidenced in each case by some degree of integration by the *child* in a social and family environment (see *Re A (Area of Freedom, Security and Justice)* [2009] 2 FLR 1).

36. 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. Within this context, the factual enquiry in this case must be centred throughout on the circumstances of the NY's life that are most likely to illuminate her habitual residence. 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.

37. The test articulated and illuminated by the Court of Justice of the European Union is the test that is applied by the domestic courts following the decision of the Supreme Court in *Re A (Jurisdiction: Return of Child)* [2014] 1 FLR 111). Whilst *Re A (Jurisdiction: Return of Child)* was not a case under the 1980 Convention, the Supreme Court made clear in *Re KL (A Child)* [2014] 1 FLR 772 that the same test is applicable in proceedings under that Convention. That decision, and the decisions of the Supreme Court subsequent to it in *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 have articulated the following principles of general application relevant to the case before this court:

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.

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.

38. With respect to the latter point, the parents' intention to settle permanently in the State, manifested by certain tangible steps, for example the lease of a residence, may constitute an indicator of the transfer or residence (*Case C-523/07)* [2010] Fam 42). However, 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 (*Re KL (Abduction: Habitual Residence: Inherent Jurisdiction)* [2013] UKSC 75).

39. 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). In *Re B (A Child)(Habitual Residence: Inherent Jurisdiction)* [2016] 1 FLR 561 (a case not under the 1980 Hague Convention) Lord Wilson noted as follows at [45]:

> "The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new state, up will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it."

40. Within this context, as noted above, 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 and there is no requirement that the child should have been resident in the country in question for a particular period of time. In this regard, I note that in *Re B (A Child)(Habitual Residence: Inherent Jurisdiction)* [2016] 1 FLR 561 Lord Wilson noted as follows at [46]:

> "One of the well-judged submissions of Mr Tyler QC on behalf of the respondent is that, were it minded to remove any gloss from the domestic concept of habitual residence (such as, I interpolate, Lord Brandon's third preliminary point in the J case), the court should strive not to introduce others. A gloss is a purported sub-rule which distorts application of the rule. The identification of a child's habitual residence is overarchingly a question of fact. In making the following three suggestions about the point at which habitual residence might be lost and gained, I offer not sub-rules but expectations which the fact-finder may well find to be unfulfilled in the case before him:

> (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."

41. Finally, Mr Laing submits that if the court is satisfied that NY was habitually resident in the jurisdiction of England and Wales at the relevant date "that is the end of F's application". That is not strictly correct having regard to the terms of Art 18 of the 1980 Convention. In *Re KL (A Child)* [2014] 1 FLR 772, the Supreme Court made clear that even where the court is satisfied that the child has acquired habitual residence in the United Kingdom, the court, applying the best interests test, can thereafter determine to make a return order under the inherent jurisdiction having struck a balance between whether it is in the child's best interests to remain in the United Kingdom so that the dispute between the parents can be dealt with in this jurisdiction or whether, given the child's connection with the country of her birth and her extended family, the length of time she had lived in the foreign country, it is in the child's best interest to return to the country with which they have the strongest and closest connection. At [28] Baroness Hale stated as follows:

> "[28] Article 18 of the Convention provides that its provisions on return of children "do not limit the power of a judicial or administrative authority to order the return of the child at any time". The High Court has power to exercise its inherent jurisdiction in relation to children by virtue of the child's habitual residence or presence here: Family Law Act 1986, ss 2(3) and 3(1). The welfare of the child is the court's paramount consideration: Children Act 1989, s 1(1). But this does not mean that the court is obliged in every case to conduct a full-blown welfare-based inquiry into where the child should live. Long before the Hague Convention was adopted, the inherent jurisdiction was used to secure the prompt return of a child who had been wrongfully removed from his home country: see *In re J (A Child) (Custody Rights: Jurisdiction)* [2005] UKHL 40, [2006] 1 AC 80, paras 26, 27, and the cases cited therein."

And at [32] as follows:

> "[32] That being the case, it is open to this court to ask itself the correct question: is it in K's best interests to remain in this country so that the dispute between his parents is decided here or to return to Texas so that the dispute can be decided there?"

Consent

42. Where the court to conclude that NY was not habitually resident in England and Wales at the relevant date, the exceptions to summary return relied on by the mother will fall to be considered. The law on consent is well settled. Once again, the question of whether consent was given is fact specific. In *P-J (Abduction: Habitual Residence: Consent), Re* [2009] 2 FLR 1051 Ward LJ stated as follows at [48] with regard to the governing principles:

> "[48] In my judgment the following principles should be deduced from these authorities:
>
> (1) Consent to the removal of the child must be clear and unequivocal.
>
> (2) Consent can be given to the removal at some future but unspecified time or upon the happening of some future event.
>
> (3) Such advance consent must, however, still be operative and in force at the time of the actual removal.
>
> (4) The happening of the future event must be reasonably capable of ascertainment. The condition must not have been expressed in terms which are too vague or uncertain for both parties to know whether the condition will be fulfilled. Fulfilment of the condition must not depend on the subjective determination of one party, for example, "Whatever you may think, I have concluded that the marriage has broken down and so I am free to leave with the child." The event must be objectively verifiable.
>
> (5) Consent, or the lack of it, must be viewed in the context of the realities of family life, or more precisely, in the context of the realities of the disintegration of family life. It is not to be viewed in the context of nor governed by the law of contract.
>
> (6) Consequently consent can be withdrawn at any time before actual removal. If it is, the proper course is for any dispute about removal to be resolved by the courts of the country of habitual residence before the child is removed.
>
> (7) The burden of proving the consent rests on him or her who asserts it.
>
> (8) The enquiry is inevitably fact specific and the facts and circumstances will vary infinitely from case to case.
>
> (9) The ultimate question is a simple one even if a multitude of facts bear upon the answer. It is simply this: had the other parent clearly and unequivocally consented to the removal?"

43. The consent required must be to more than the child's temporary removal or retention, but it does not have to be consent to the child's permanent removal (see Lowe, N. and Nicholls, M. *International Movement of Children* Family Law 2 Edtn. 2016 at 23.16 and the Dutch case cited in the footnote to the same). The consent must be operative at the time of the removal or retention. In *Re K (Abduction: Consent)* [1997] 2 FLR

212 at 218 Hale J (as she then was) made clear that once consent has been acted upon it cannot subsequently be withdrawn. In that case, Hale J was clear that where the mother had acted on the father's consent, that consent could not be taken away "by the father thinking better of it". In *VK v JV (Abduction: Consent)* [2013] 2 FLR 237 Moor J was clear that to be validly withdrawn, consent must be withdrawn prior to the other parent leaving. Consent obtained by fraud or deception is unlikely to be valid (see *Re F (Abduction: Consent)* [2014] EWHC 484).

44. As made clear in *P-J (Abduction: Habitual Residence: Consent)*, consent can be made conditional on the happening of some future event provided that the consent is still operative and in force at the time of that event and that the event in question is reasonably capable of ascertainment. In *BT v JRT (Abduction: Conditional Acquiescence and Consent)* [2008] 2 FLR 972) Sumner J made clear that consent can also be conditional on the performance of a future obligation or the occurrence of a future event (in that case future contact taking place):

> "If the parties reach agreement on this, and one wishes to make their consent conditional on the performance of what they have agreed, I consider that within The Hague Convention the court can and, in many cases should, give effect to it."

His Lordship was also clear however, that the terms of such conditions have to be clear, readily determined, and not obtained by fraud, misunderstanding, or deceit. In addition, Sumner J considered that such conditions must be intended by both parties to be binding on each other.

Harm

45. Art 13 of the 1980 Hague Convention provides as follows with respect to the exception relied on by the mother:

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:
>
> (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by

> the Central Authority or other competent authority of the child's habitual residence."

46. The law in respect of the defence of harm or intolerability under Art 13(b) was examined and clarified by the Supreme Court in *Re E (Children)(Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144. The applicable principles may be summarised as follows:

    i) There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.

    ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.

    iii) The risk to the child must be 'grave'. It is not enough for the risk to be 'real'. It must have reached such a level of seriousness that it can be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two.

    iv) The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'. 'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'.

    v) Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child's immediate future because the need for protection may persist.

    vi) Where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation would become intolerable the court will look very critically at such an assertion and will, among other things, ask if it can be dispelled. However, in principle, such anxieties can found the defence under Art 13(b).

47. The Supreme Court made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as grounding the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest on the evidence available to the court and then, *if* that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm are identified. It

follows that if, having considered the risk of harm at its highest on the available evidence, the court considers that it does not meet the imperatives of Art 13(b), the court is not obliged to go on to consider the question of protective measures.

Discretion

48. Establishing one of the exceptions under the 1980 Convention merely 'opens the door' to the exercise of a discretion whether or not to order the child's immediate return. Were this court to be satisfied that either or both of the exceptions under Art 13 are made out in this case, the court retains a discretion to order the summary return of the NY to the jurisdiction of her habitual residence notwithstanding that conclusion (see *Re M (Abduction: Rights of Custody)* [2008] 1 AC 1288).

49. The discretion is at large and it is wrong to import any notion of exceptionality with respect to the discretion. The court is entitled to have regard to the policy aims of the Hague Convention, namely that questions regarding the child's welfare should be determined in the country of their habitual residence. Other factors relevant to determining the question of whether the court should exercise its discretion to order a return will include (but will not be limited to) the child's degree of connection to each country (in the sense of with which country does the child have the closer connection in terms of his life, his first language, his race or ethnicity, his religion, his culture, and his education so far), the length of time the child has spent in the country and the effect of the decision on the child's primary carer. In the context of non-Hague cases, the Supreme Court has held that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there (*Re J (A Child)(Custody Rights: Jurisdiction)* [2006] 1 AC 80 at [32]).

50. It is the case that the authorities suggest that it will be rare to exercise the discretion to order return of the child where the court is satisfied that the consent exception is made out, as was made clear in *Re K (Abduction: Consent)* [1997] 2 FLR 212 at 220. However, it is important to consider the facts of that case. In *Re K (Abduction: Consent)* the father consented to an English mother returning home to England, her home country where her own parents lived, the mother having moved to the father's home country only after their marriage. There are also examples of the discretion to return being exercised notwithstanding the exception of consent being established. In *Re D (Abduction: Discretionary Return)* [2000] 1 FLR 24 Wilson J as he then was ordered the return of the children to France notwithstanding the mother's consent. Again, it is important to examine the facts of that case. Unlike *Re K (Abduction: Consent)*, *Re D (Abduction: Discretionary Return)* was not a case of one parent consenting to the children being removed to the country of the other parent's birth, where that parent had grown up and had family. Rather, in *Re D (Abduction: Discretionary Return)* the consent had been given by the mother to the children being removed to a country in which neither parent had any connections or family. Within this context, Wilson J exercised his discretion to return the children notwithstanding the mother's consent having been established in circumstances where:

> "These children lived in France throughout their lives until December 1998. Their first language is French. Their father is, of course, a French speaker. The mother speaks French much better than she speaks English. The family had no connection with England until, in about 1997, the father came from Scotland to live here. And, in the light of the interview with A, there is no

> difficulty about the children accepting an order that they should go back to France."

51. Finally on the subject of the law applicable in this case, as pointed out by Mostyn J in *B v B* [2014] EWHC 1804 it is always important to remember that a decision by the court to return a child under the terms of the Convention is, nor more and no less, a decision to return the child for a specific purpose and for a limited period of time pending the court of his or her habitual residence to deciding the long-term position.

DISCUSSION

52. Having considered the totality of the documentary and oral evidence in this matter, and the careful and comprehensive written and oral submissions of counsel, I have decided (a) that at the relevant date NY was *not* habitually resident in England and remained habitually resident in the State of Israel, (b) that the father consented to NY's removal from the jurisdiction of the State of Israel to the jurisdiction of England and Wales (c) that, assuming the grave risk of exposure to physical or psychological harm alleged by the mother at its highest, there are sufficient protective measures in place in the State of Israel to meet that risk and (d) that notwithstanding the father's consent, in this case the court should exercise its discretion to order the summary return of NY to the jurisdiction of Israel for the disputes concerning her welfare to be determined in the country of her habitual residence. I further make clear that had I been satisfied that NY was habitually resident in England and Wales at the relevant date, I would have nonetheless have concluded that it was in her best interests or an order to be made under the inherent jurisdiction of the High Court returning her to the jurisdiction of the State of Israel for decisions concerning her welfare to be made in that jurisdiction. My reasons for reaching these conclusions are as follows.

Habitual Residence

53. I am satisfied that NY was not habitually resident in England and Wales at the relevant date, but rather remained habitually resident in the State of Israel.

54. The Supreme Court has made clear that it is the stability of the child's situation, which in respect of an infant or a younger child will also be informed by the situation of the parents, rather than the duration or degree of permanence of that situation, that is important.

55. Within this context, I acknowledge that in this case there are factors that speak to NY have attained habitual residence in the jurisdiction of England and Wales in the little over six weeks between their arrival in England and the date of their separation in January 2019. Whilst I am satisfied that both parents admitted of the possibility that a further move may have to made, including the possibility of a return to Israel, and that the intention to move to England did not fully crystallise until August 2018, it is the case that both parents had an intention to come to England with NY for a significant period of time with a view to attempting to establish a stable life here. The parents' intention to remain in England for a significant period is evidenced by the fact that they gave up their employment and accommodation in Jerusalem, the plans they made ahead of their move, by the amount of their belongings they brought (although I note that there was no move of more substantial items and accept that a considerable amount of belongings remain in storage in Israel), by the father securing employment,

by their entering into a lease on a residence, by enrolling NY in nursery and registering NY with a general practitioner. In addition, whilst not particularised in any detail in the mother's statement, I accept that the parents had begun to form some relationships in London during, for example, the limited number of Mendi Levi dinners the parents attended prior to the relevant date. I likewise accept that, having been enrolled in nursery, NY would have started to form relationships over the short period of time she attended that nursery prior to January 2019. These facts, which circumscribe the world in which NY lived prior to that date support the mother's case in respect of habitual residence, as do the parents' attempts to obtain National Insurance numbers, benefits, and their opening of a joint bank account in this jurisdiction.

56. In my judgment however, there are powerful matters of fact in this case that speak *against* a transfer of habitual residence having taken place in this case between November 2018 and January 2019. In particular, I am satisfied that NY's situation in England between their arrival and their separation in January 2019 was far from a picture of stable integration into family and social life. Her parents' relationship was in the process of finally disintegrating over this period. Each parent concedes disputes and arguments that lead, by January 2019 to them effectively living like strangers under the same roof. The mother alleges that the father physically assaulted NY in public on one occasion. In the circumstances, wherever the fault lies and whoever is telling the truth, on the account of *both* parents, the six weeks in which NY was in England prior to the relevant date cannot be said on the evidence before the court to have been stable. In addition, during this period NY had no direct contact with other close family members in England, there being only distant relatives of whom the mother was unaware prior to her arrival.

57. As I observed in *SF v HL* [2015] EWHC 2891 (Fam), where the child's situation is unsettled in this manner, it will be harder to establish that the child has the requisite degree of integration in a social and family environment, particularly where the child has only been in that social and family environment for a short period of time. The unsettled and increasingly fractious nature of the parents' relationship during the very short period in which NY had been in this jurisdiction tends to militate against a conclusion that, during that short period, NY gained a degree of integration in a social and family environment commensurate with her losing habitual residence in Israel and attaining it here.

58. The mother is clear that the parents did not, understandably, explain to NY that she had moved to England for a significant period of time. Within this context, save that which she has drawn from her direct experience, NY will have little concept of what her parents intended (especially in circumstances where *they* cannot really agree what they intended). As to her direct experience, whilst, as I have acknowledged, the mother contends that NY went on 'playdates', these encounters are not in anyway particularised as to nature or extent. It is the case that NY attended nursery but that institution did not have staff who spoke NY's first language of Hebrew (although she could speak English and French) and she attended only from 6 December 2019. Any relationships she formed at the Jewish Centre had likewise been of short duration as at January 2019. Whilst the parents did have a good social contact in the form of Mr HR, by the end of the relevant period the mother was receiving advice from this friend that she states represented a key aspect of NY's social integration to mislead the

Rabbinical court in London with regard to NY's welfare. Beyond Mr HR and Talia, no other friendships are particularised in nature or extent by the mother. The father no friends in England beyond his acquaintance with Mr HR and Talia.

59. I must also have regard to the fact of NY's situation in Israel prior to the family's departure in November 2018. Prior to this date NY had lived all her life in Israel. She is an Israeli national and speaks Hebrew as her first language (as well as some French and English). All of her close extended family resided in that jurisdiction and continue to do so. She had a place at nursery in Jerusalem and all of her friends, including her cousins, were in that jurisdiction. Her routine centred on her family and social life in Israel, into which family and social environment she was closely integrated. The photographs that the mother has included in her statement show a large and loving family. NY looks happy and content. Within this context, NY's family, education, her social and cultural experiences and her sense of identity were, up to November 2018 and in stark contrast to the position in England, rooted entirely within the State of Israel, as were those of each of her parents. She had been raised by her mother and father in Israel. Each of her parents had stable accommodation and stable gainful employment. Within this context, the sparse list of factors that suggest integration in Israel contained in Mr Laing's Skeleton Argument is manifestly deficient.

60. Within the foregoing context, I am satisfied that it cannot be said that in the relevant period of a little over six weeks NY achieved a degree of integration in a social and family environment in England that resulted in her losing her habitual residence in the State of Israel and gaining habitual residence in the jurisdiction of England and Wales. Whilst I acknowledge that habitual residence can be obtained quickly, and that the intention of the parents is a factor to be taken into account, looking at the reality of NY's life over the six and a half weeks between her arrival and the date of the parents separation in January 2019, for the reasons I have given, I am not satisfied that NY attained a degree of integration in a social and family environment sufficient for her to become habitually resident in this jurisdiction.

Consent

61. I am satisfied that by agreeing with the mother to move with NY to England the father consented to the removal of NY from the jurisdiction of Israel for the purpose of Art 13 of the 1980 Convention. I am not however, satisfied on the evidence before the court that the consent on the part of the father was conditional on that move being successful.

62. In *BT v JRT (Abduction: Conditional Acquiescence and Consent)* Summer J made clear that such conditions must be clear, readily determined, not obtained by fraud, misunderstanding, or deceit and must be intended by both parties to be binding on each other. I am not satisfied that the evidence before the court demonstrates that this was the position in this case. In particular, and as I noted above, in circumstances where the mother denies that such a condition was agreed, it is significant that at the very point at which it was to become operative the father made no mention of the condition he now contends for in his remonstrations with the mother about returning to Israel. In these circumstances, there must be real doubt about whether such a condition ever existed. In any event, even if proposed, it cannot be said on the available evidence that *both* parties intended such a condition. Whilst the father may

have intended his consent to be conditional upon the marriage subsisting, I am not satisfied on the available evidence that this was ever the agreed intention of both the mother and the father. Further, there must be real questions as to whether a condition based on a given situation "not working" or "not being successful" could be said to be clear and capable of ready determination. In these circumstances, I am not prepared to find that the father's consent was conditional.

63. I am likewise not satisfied that the consent of the father was obtained by fraud or misrepresentation. Whilst I acknowledge the father has suspicions, for the reasons set out above, there is no cogent evidence to suggest that the mother elicited the father's consent to remove NY from the jurisdiction in order to pursue a relationship with Mr HR. I am further satisfied that having given his consent, and there being no condition to that consent being demonstrated on the evidence for the reasons set out in the foregoing paragraph, the father was not entitled to withdraw that consent after the mother had acted upon it (*Re K (Abduction: Consent)* [1997] 2 FLR 212 at 218).

64. Accordingly, in circumstances where I am satisfied that the father's consent was operative at the time the parents removed NY from the jurisdiction of the State of Israel, I am satisfied the mother has made out the consent exception under Art 13. Where the court is satisfied that it should exercise its resultant discretion in favour of *not* returning the child, it is not necessary to go on to consider any other defences raised. However, for the reasons set out below, that is not the position here. In the circumstances, it is important also to address Art 13(b), which I now do.

Harm

65. For the reasons set out above, I have significant forensic concerns with respect to the matters upon which the mother relies to satisfy the requirements of Art 13(b). As I have noted in another case recently, the methodology endorsed by the Supreme Court in *Re E* by which the court assumes the risk relied upon at its highest is not an exercise that is undertaken in the abstract. It must be based on an evaluation of the relevant admissible evidence that is before the court, albeit an evaluation that is undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention. The court does not simply assume, without more, the maximum level of risk contended for by the abducting parent. Rather, the court examines the information available to it and, having considered that information, arrives at a reasoned and reasonable assumption as to the maximum level of risk having regard to the available evidence. In these circumstances, the forensic difficulties I have identified in respect of the mother's allegations are not without significance and I have taken them into account.

66. On balance, having regard to the information currently before the court and considering the significant difficulties I have outlined above, I am prepared to assume in this case (without, I make clear, making *any* findings in this regard) that, at its highest, the risk to the mother comprises one of physical and verbal abuse from the father. I am not prepared on the evidence before the court to make that assumption in respect of NY, nor in respect of the father's family.

67. I am equally satisfied however that, subject to confirmation that the arrest warrant in respect of the mother has been discharged in the manner the father assured the court it can be, the protective measures offered by the father as set out above, and the matters

set out in the letter to this court from the Israeli Ministry of Defence, constitute sufficient protective measures in this case if the court orders the return of NY to the jurisdiction of the State of Israel, having regard to the level of risk assumed. I also bear in mind that the parents' relationship is now over and they will be living separately. In addition, the Rabbinical Court of Jerusalem is now seised of this matter and both parents have instructed lawyers within those proceedings. The matter will therefore quickly be the subject of judicial consideration in Israel.

Discretion

68. In this case, and contrary to the submission of Mr Laing, I am satisfied that, notwithstanding that the mother has made out the exception under Art 13 of the 1980 Convention in this case, I should exercise my discretion to order the return of NY to the jurisdiction of the State of Israel.

69. The discretion that arises upon an exception being made out permits the court to ensure that the exceptions under the 1980 Convention do not operate in a manner that is antithetical to the child's interests. Within this context, in respect of the consent exception, a distinction can be seen in the authorities between those cases, such as *Re K (Abduction: Consent)* [1997] 2 FLR 212, in which the consent of the left behind parent will result in the child remaining in the home country of the abducting parent, in which country the child has extended family connections, a common language and sometimes a common nationality, and those cases, such as *Re D (Abduction: Discretionary Return)* [2000] 1 FLR 24, where the consent of the left behind parent will result in the child remaining in a country in respect of which he or she (and often the abducting parent) has no prior knowledge, no links, no extended family and no common language, meaning that any welfare decision would fall to be taken in a vacuum, or least remote from the proper context for such decisions. In the former cases of consent, the exercise of the discretion in favour of return will be, understandably, rare. In the later cases of consent, the exercise of the discretion to return may be more readily granted.

70. NY is an Israeli child of Israeli parents with no practical connection to this jurisdiction and whose extended, family, identity, culture and history centre on the State of Israel. Whilst I accept that the father consented to NY being removed from the jurisdiction of Israel, in circumstances where the parents' marriage thereafter broke down the result of his consent is now to leave NY in a jurisdiction to which she has no connection, which is remote from the entirety of her close extended family and the country of her nationality and her first language. It is also remote from the jurisdiction in which the genesis of the dispute between the parents as to NY's welfare arose and the jurisdiction in which the vast majority of the evidence to determine that dispute is located. This in circumstances where there remain a number of judicial decisions to be made in respect of NY's welfare.

71. The rules of jurisdiction in the 1980 Convention are, to adopt a characterisation from the jurisprudence in respect of BIIa, shaped in the light of the best interests of the child, in particular on the criterion of proximity. Proximity in this context being the practical connection between the child and the country concerned. In particular, at the heart of the policy considerations driving the 1980 Convention is the recognition that it is of manifest benefit to a child to have decisions regarding their welfare taken in the jurisdiction of their habitual residence.

72. Within the foregoing context, whilst I accept that it is relatively unusual for court to exercise discretion in favour of return where the consent exception has been found to be established, in this case I am satisfied that the court should exercise its discretion to order the return of NY to country of her habitual residence. Having regard to the matters set out above, and in circumstances where I am satisfied that the protective measures I have summarised are sufficient to meet the assumed risk for the purposes of Art 13(b), it is in my judgment of manifest benefit to NY to have properly informed decisions taken regarding her welfare in the jurisdiction of her habitual residence rather than in a jurisdiction to which she has no prior connection and which is remote from nearly all of the things that bear on the decision save the company of her mother. In my judgment, that benefit greatly outweighs, in this case, the temporary disruption that will result from an order for return of NY after a short period spent in this jurisdiction. I am likewise satisfied that this benefit to NY outweighs the impact on the mother of an order for return, which impact I do not underestimate.

73. As I have made clear above, I am satisfied that had I concluded that NY was habitually resident in this country, I would have reached the same decision under the inherent jurisdiction pursuant to the principles set out by the Supreme Court in *Re KL* on the particular facts of this case.

CONCLUSIONS

74. In conclusion, having determined that the consent exception is made out in this case, having determined that, subject to confirmation that the arrest warrant in respect of the mother has been discharged, the protective measures offered by the father as set out above, and the matters set out in the letter to this court from the Israeli Ministry of Defence, constitute sufficient protective measures in this case, and having determined that the court should exercise its discretion in favour of returning NY to the jurisdiction of the State of Israel, I make the following declarations and orders:

    i) As at the relevant date in January 2019 NY was not habitually resident in the jurisdiction of England and Wales for the purposes of Art 3 of the 1980 Convention;

    ii) As at the relevant date in January 2019 NY remained habitually resident in Israel for the purposes of Art 3 of the 1980 Convention;

    iii) NY shall be returned to the jurisdiction of the State of Israel pursuant to Art 12 of the 1980 Convention.

75. That is my judgment.