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Case No: FD19P00110

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 4 October 2019

B e f o r e:

MR ROBERT PEEL QC

Sitting as a Deputy High Court Judge

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Between:

C	**Applicant**
- and -	
B	**Respondent**

- -
- -

Maggie Jones (instructed by Ben Hoare Bell LLP Solicitors) for the Applicant
Anita Guha (instructed by Dawson Cornwell Solicitors) for the Respondent

Hearing dates: 16 and 17 September 2019

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JUDGMENT APPROVED

Mr Robert Peel QC:

Introduction

1. Article 1 of The Hague Convention states that its objects are:

> "(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

2. Article 3 prescribes that the removal of a child is to be considered wrongful where:

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

3. Article 12 requires a wrongfully removed child, who has been in the country to which he or she has been abducted for less than 1 year, to be returned to his or her home country 'forthwith'. That mandatory requirement applies unless a defence to a return is available under Article 13.

4. Article 13 provides:

> "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.

5. In **Re D (A Child) (Abduction: Rights of Custody) [2006] UKHL 51**, Baroness Hale of Richmond observed at para.48 that:

> "The whole object of the Convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their 'home', but also so that any dispute about where they should live in the future can be decided in the courts of their home country, according to the laws of their home country and in accordance with the evidence which will mostly be there rather than in the country to which they have been removed."

6. Before me is an application under the Child Abduction and Custody Act 1985 and the Hague Convention 1980 for the summary return of 3 children aged 13 (a boy), 11 and 8 (two girls) to the Federal Republic of Germany. In late March 2018 the Mother ("M") removed them from the jurisdiction of Germany, where they were habitually resident and had lived their entire lives, without the knowledge or consent of the Father("F"). M kept their whereabouts secret from F, the German courts and other German authorities. It was not until December 2018 that F learned they were now living in this jurisdiction. He applied through the Central Authorities for return of the children to Germany. The matter came before me for final determination on 16 and 17 September 2019, some 9 months after issue, and 18 months after the children's removal from the jurisdiction of their habitual residence. It seems to me that the objective of achieving swift determination and, if appropriate, return has been found wanting in this case.

7. M resists the application. I remind myself that the burden lies on her to oppose the return and that the civil standard of proof applies, namely the balance of probabilities. At the start of the case M raised 3 defences:
   (i) The removal was not in breach of F's rights of custody;
   (ii) There is a grave risk that a return would expose the children to physical or psychological harm, or would otherwise place them in an intolerable situation;
   (iii) The children object to a return, and it is appropriate to take account of their views.

   By the conclusion of the case, she was no longer pursuing the first of those defences.

8. In addition, M's Counsel's opening skeleton argument flagged up the possibility of an Article 12 settlement defence based on some uncertainty as to the date of issue of proceedings. Once the precise date had been established, M sensibly did not pursue the point.

9. During cross examination of the Cafcass Officer by M's counsel after lunch on the first day, the court was informed that M had, over the lunch adjournment, given instructions to her counsel that, in the event of an order for return of the children to Germany, she would not accompany them; she would, instead, remain in this country. This had never been suggested, flagged up or hinted at throughout the course of the proceedings whether in statements, at court hearings or otherwise. It came as a very considerable surprise to everyone, including myself. I suggested that, given the

unexpected turn of events, M should give oral evidence on that particular subject; counsel agreed.

The evidence

10. I have read the entire contents of the bundle which includes:
    (i) A 2-page statement from F;
    (ii) A very long, 67-page statement from M plus attached exhibits;
    (iii) A 10-page statement from F in reply;
    (iv) A German Family Psychologist report dated December 2017;
    (v) The Cafcass Officer's report.

11. I heard oral evidence from the Cafcass Officer and from M. In M's case, the evidence was limited to matters arising out of her new instructions.

12. I also met all 3 children in the presence of the Cafcass Officer and a note taker, and in so doing was mindful of the Guidance for Judges Meeting Children who are subject to Family Proceedings (April 2010).

13. For completeness, I add that F was present throughout the proceedings before me.

Contact during the hearing

14. I am told that the two younger children had contact with F at some point during the 2 days of these proceedings. They had not seen F for some 18 months. Happily, it was positive and beneficial.

Background and facts

15. M is 43, years old, F is 44. They are German nationals and have always lived in Germany, as have their children. They met in about 2000, married in 2005 and divorced in about 2012. Thereafter, in 2014 M remarried but is now separated from her second husband ("Mr A").

16. The picture of the family arrangements as between M, F and the children after the divorce of M and F in 2012 is not completely clear but sufficiently so for these purposes. Under German law (to which I will return) both M and F had joint custody of the children who lived with M as their primary carer but had regular contact (including staying contact) with F.

17. It appears that after M met and married Mr A, difficulties with contact developed. M, who became less comfortable with contact arrangements to the point where she opposed contact completely, was apparently told by the children that they had been shown pornographic films while in F's care. In addition, she viewed F as unreliable over contact, irresponsible and neglectful when the children were in his care (for

example leaving the oldest child by the side of a road). F denied all the concerns raised.

18. In about 2014 German social services became involved and thereafter the family was firmly on the radar of the relevant German authorities. I do not have any material from the German social services before me, but it appears that their involvement has been extensive over a sustained period of time. There are, for example, numerous references throughout the psychologist report to regular "youth welfare officer" visits.

19. In November 2014 F signed a document under which he made clear that he intended to fulfil his duties as a father according to the rules of joint custody under German law, but he acknowledged that M was to be the primary carer of the children. This seems to have been a document between M and F rather than one prepared at the behest of the German social services or courts.

20. From 2014 to 2017 the frequency and nature of contact was the subject of much dispute between the parties. Contact took place on occasions, but it does not seem to have acquired any degree of regularity or permanence; in particular F did not see or hear from the children for the whole of the summer of 2016, although M says that is explained at least in part by a bereavement in her wider family which caused her and the children to be absent for a while.

21. At some point in this period (probably in late 2016) F applied for contact in the German District Court. There is very little material before me as to the German court proceedings, but it is clear that a number of hearings took place, various documents were filed and directions were made. The German court was fully seised of the issue. M firmly opposed the re-instatement of contact, relying on the matters referred to above and asserting that the children did not want to see F. Towards the end of 2016 a "Contact Guardian", Mrs S, was appointed.

22. In January 2017, according to M, the court ordered supervised contact. Thereafter, as related in the psychologist's report, the Contact Guardian reported that the first contact was "bad", but the subsequent 2 contact visits were viewed positively. The third visit went particularly well for the oldest child and was described in glowing terms. M appears to have disagreed with the Contact Guardian's assessment, and cancelled the further contact which was due to take place in February 2017.

23. In March 2017 the paternal grandmother applied for contact. That, too, was opposed by M.

24. It is not clear what further contact took place thereafter although the papers show that there was undoubtedly one contact session in September 2017 between the children, F and the paternal grandmother which was reported as having been positive. I am told that the German court made a number of orders during the year although they are not before me. What is clear is that both the courts and the social services were actively involved in the lives of the family members over a period measured in years.

25. Pursuant to orders made by the German court, a family psychologist report was prepared with the instruction to address (i) contact (including unsupervised contact) and (ii) the parental capacity of M "especially from the point of view of bonding tolerance, and any negative influence of the children in relation to the child's father".

26. The report is dated 20 December 2017. It runs to 180 pages. The author met all relevant persons, including the children, and was provided with significant documentary material. It is a conspicuously thorough analysis. In summary the report concludes:
    (i) M resolutely opposes contact;
    (ii) Engagement with F induces stress in M who would benefit from therapeutic input;
    (iii) M believes F is planning the targeted abuse of the children;
    (iv) The children say that they do not want to see F although this is likely to be on M's "instructions";
    (v) F is able to parent the children;
    (vi) There is no evidence to justify the fears expressed by M about F posing a risk to the children;
    (vii) The children have a very close, "intense" relationship with F's mother, their paternal grandmother;
    (viii) The separation of the oldest child from F and the paternal grandmother is a considerable burden on the eldest child;
    (ix) The eldest child has exhibited challenging behaviour;
    (x) Unaccompanied contact, including overnight contact, should resume and be backed up by appropriate and robust measures.

27. It is self-evident that by this time the German court was fully seized of the matter and addressing itself to welfare considerations and the needs of the children.

28. On or about 23/3/2018 M removed the children from Germany permanently to, as it subsequently transpired, the United Kingdom. She says in her statement that she was in fear of her life from Mr A. On her case, he had said that he would kill her rather than accept a separation; she was terrified for her life. Whilst that may have played a part in her actions, I consider it likely that she was also motivated by the knowledge that (i) the psychologist's report would be read by the German court which was due to hold a hearing the following month, and (ii) its recommendations might be accepted by the court and (iii) accordingly, direct contact might be re-introduced against her firm wishes.

29. M did not tell F that she intended to leave. Nor did she contact him after she had left. F discovered from Mr A that she and the children had gone missing and their whereabouts were unknown. M did not at any time attempt to contact F to inform him what had happened to her and, more importantly, their children. All this was, of

course, at a time when she knew that F wanted to see the children and was pursuing his application through the German courts.

30. F immediately reported their disappearance to the German authorities, and to the German police. For a long period of time there was no indication of where they were; there was no trail. She had effected a very successful, clandestine departure. She went so far as to change her name.

31. Shortly after M and the children disappeared, the German court on 18 April 2018 made an order transferring residence of the children to F. M did not attend the hearing, nor was she represented. I am not aware of any orders having been made in Germany since that date. I enquired of counsel whether any application had been made for recognition of that order under Article 21 of Council Regulation (EC) No 2201/2003. I was told that no such application had been made. Accordingly, I cannot determine whether the German order should be so recognised and, in particular, whether any of the exceptions to recognition listed at Article 23 apply. It seems to me that I must proceed on the basis of the Hague Convention alone.

32. The trail lay cold until in August 2018 the German police collected information suggesting that M's German benefits were being withdrawn from ATMs in the United Kingdom. I assume they contacted British police to follow up the lead. In December 2018, British police established that M and the children were living in the United Kingdom, although the precise address seems even then not to have been known.

33. Promptly thereafter, F made his application pursuant to the Hague Convention. Disclosure orders mere made on 5 March 2019 against various government departments and M's address with the children was finally established. Passport Orders and Prohibited Steps Orders against M have been made to ensure a holding position until this hearing.

34. Piecing together M's arrival in the United Kingdom and movements thereafter, she arrived by ferry in the United Kingdom and settled, after some brief stays in different parts of the country, in a hostel for several months. The clear impression I have formed on reading the papers is that the children's lives were somewhat chaotic, peripatetic and far from happy in those early months, unsurprisingly so given the considerable upheavals. The oldest child, for example, is recorded by the Cafcass Officer as describing the accommodation in the United Kingdom as "bad" and his school was rated by him as only "5 out of 10".

35. During this period, social services were engaged. M declined to give consent to them to contact external agencies in Germany. Social services recorded that there was no evidence to substantiate the allegations of domestic abuse or the reasons for departing Germany; nor is it clear whether they were aware that the allegations were principally addressed towards Mr A, not F.

36. On 9 May 2019 M attended court in England for the first time. Directions were given in conventional form. Notably, the court ordered that M must not remove the children from the specific address where they were living.

37. In fact, almost immediately after the 9 May hearing and contrary to the explicit order of that date, M moved with the children to another address where they are still resident. On M's case, which I have no reason to doubt, the family are happier and more settled than they were, not least because of the presence of a welcoming and supportive Muslim community. Of some concern is that the oldest child has not been in mainstream education since the move although I understand he now has a place at a secondary school starting in 10 days' time.

38. The final hearing was originally due to take place over 2 days in August 2019. It was adjourned to enable the parties to obtain a full translation of the German psychologist report.

Application for an adjournment

39. At the outset of the hearing M applied for an adjournment on 3 grounds:
    (i) To enable an expert psychological report to be prepared with a view to analysing her mental state and the impact upon her of any return to Germany;
    (ii) To allow the children to be separately represented;
    (iii) To allow for expert evidence on German law as to whether F had custody rights at the time of removal.

40. I rejected the application. As an overarching point, this case has already been the subject of much delay. An adjournment, and procuring additional expert evidence, would undoubtedly have led to further significant delay which in my judgment is inimical to the interests of all concerned, including the children, and is contrary to the purpose and intent of the summary nature of Hague Convention proceedings.

41. Specifically:
    (i) I did not consider it "necessary" (the Part 25 test) to direct an expert psychological report. I have a very detailed statement from M, together with a German psychological report which, although dated December 2017, points to circumstances and issues which M herself relies on today. I must look at the totality of the evidence. Wherever welfare issues are decided in the future, whether in Germany or in England and Wales, it may well be that further expert evidence will be commissioned. But that is not the stage we are at now, when considering a return to the jurisdiction of habitual residence.
    (ii) The children's views have been clearly presented through the report and oral evidence of the very experienced Cafcass officer. M has also set out what their views are. Their objections to a return to Germany coincide with M's objections. I considered that nothing would be gained by separate representation.
    (iii) I deal with the rights of custody below.

42. With the benefit of hindsight, and having heard submissions, the oral evidence of the Cafcass Officer, and limited oral evidence from M, I am quite satisfied that I was right to reject the application. No injustice has been done to M.

Oral evidence

43. The Cafcass Officer gave oral evidence. Her remit was to consider the children's ages, maturity and objections rather than make an overall return analysis. She was clear, measured and sensitive in her evidence. She confirmed and enlarged upon her report. The oldest child, she told me, has unhappy memories of Germany, particularly schooling there, and has a clear objection to returning. The girls, by contrast, see things more in terms of their relationship with their mother. The Cafcass Officer felt that clear explanations and preparation before any return would be reassuring. She felt that there is an element of M influencing the children but was not prepared to be drawn any further than that. She confirmed that the children oppose contact with F although, as I have already remarked, the 2 girls did see F later.

44. M gave oral evidence, limited to the new matter which she had raised namely that in the event of an order for return to Germany, she would not accompany the children. I found her to be strong willed and determined in her presentation to me, a trait which was also noted by the German psychologist report. Her views were expressed in forthright and robust manner. She reiterated that she would not return to Germany, said that the children should not see F and that she is utterly terrified of Mr A, from whom she believes she cannot be protected.

45. She said that she would respect the order of this court and, in general terms, has little faith in the German court system.

46. She was unable satisfactorily to explain why she had had apparently changed her mind during the hearing and would refuse to return to Germany with the children even if I were to make an order for their return to that jurisdiction. She said to me that she told her lawyers of this some time ago and it should be in her statement. But the plain fact is that it appears nowhere in her very long narrative evidence. A matter of such importance would surely have appeared prominently in her written evidence.

47. In similar vein she denied having told the German psychologist that Mr A was "virtually perfect across all domains" and that they had had a "beautiful family life", even though the report clearly records her speaking in such terms.

48. I formed the view that her determination to get her own way led her to be willing to tailor her evidence to an extent, the above being two examples thereof. I am satisfied that her stated refusal to return to Germany with the children, if I so order, was put forward impulsively, believing that it would assist her case.

49. I asked her why she moved after the order of 9 May 2019 when the said order prohibited her from doing so. She told me that she knew nothing about that part of the order. Without a transcript of what was said at the hearing, and bearing in mind that she was at that stage acting in person, I acquit her of any wrongdoing.

Meeting the children

50. At the request of the children, I met them in my private room with the Cafcass Officer and a note taker present. The children said nothing which might be termed evidence and the discussions were principally about my role. The children were delightful, engaging and polite.

Article 3: Wrongful Removal

51. Although this was abandoned by M by the end of the case, in my judgment I should nevertheless address the original submission made. I must be satisfied that a breach of F's custody rights arose before I can go on to consider the other matters canvassed before me.

52. On 19 December 2018 F made his request for a return to the German Central Authority. In a supporting statement attached to the application he states: "After our divorce in 2012, I shared child custody with M and saw my children 1-2 times a week and they spent nearly every weekend with me…".

53. The German Central Authority formally transmitted the application to this jurisdiction on 7 February 2019. The requesting document states that "The parents have been married during the birth of their three children. Although they got divorced in 2012, they have still joint custody according to sections 1626 and 1627 of the German Civil Code". Copies of the sections were attached. The application was received by the Central Authority in this country on 14 February 2019. On 19 February 2019 solicitors were appointed to act for F and public funding was granted on 5 March 2019. Form C67 is dated 5 March 2019 and was issued on 7 March 2019.

54. M submitted at the start of the case that F may not have had rights of custody at the time of the removal of the children.

55. I reject that submission:
    (i) The German Central Authority specifically refers to joint rights of custody post-divorce and a plain reading of the relevant provisions of the German Civil Code, to my mind, clearly attributes joint custody to both parents;
    (ii) The high point of M's submission is the "consent document" dated 24 November 2014 to which I have already referred. She contends that by this document F forfeited his rights of custody. In it, F acknowledges that the children should be brought up by M and her husband and that M will exercise and have full responsibility for all the principal issues that relate to the children giving as examples choice of school, choice of doctor and how the

children will spend their holidays. The document also records that "I will also fulfil my duties that I have as a father according to German law (that is related to joint custody)". To my mind that last sentence is clear evidence that F did not purport to forfeit his custody rights; on the contrary he was expressly reserving them, albeit acknowledging M's primacy on the upbringing of the children.

(i) Had F been deprived of custody rights by German court order or otherwise by operation of German law, M would surely have produced evidence thereof, particularly in circumstances where there were German proceedings for a period of years before the children's removal.

56. I am satisfied that the removal was wrongful in that it breached F's rights of custody.

Article 13(b)

57. The leading authority is **Re E (Children) (Abduction: Custody Appeal) [2011] 2 FLR 758, SC**. I gratefully adopt the distillation by Macdonald J at para 67 of **Uhd v McKay [2019] EWHC 1239** of the applicable principles therein, namely:

> "(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.
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> (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.
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> (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, in principle, such anxieties can found the defence under Art 13(b)."

58. It is rare for oral evidence to be taken from the parties to determine the veracity or otherwise of the allegations relied upon although, as indicated above, I heard limited evidence from M. A full fact-finding exercise would defeat the purpose of the summary jurisdiction. The court should assume the risk of harm at its highest and then go on to consider whether protective measures are sufficient to mitigate the identified harm. As Macdonald J pointed out in Uhd v McKay, the evidence cannot be viewed entirely in the abstract. The court is entitled to weigh all the evidence and make an assessment about the credibility and substance of the allegations. He referred to dicta from Moylan LJ in **Re C (Children) (Abduction: Article 13(b) [2018] EWCA Civ 2834** and said this at paras 70-72:

> "70.In the circumstances, the methodology articulated in *Re E* forms part of the court's general process of reasoning in its appraisal of the exception under Art 13(b) (see *Re S (A Child)(Abduction: Rights of Custody)* [2012] 2 WLR 721), which process will include evaluation of the evidence before the court in a manner commensurate with the summary nature of the proceedings. Within this context, the assumptions made with respect to the maximum level of risk must be reasoned and reasonable assumptions based on an evaluation that includes consideration 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.
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> 71.That the analytical process described in *Re E* includes consideration of any relevant objective evidence with respect to risk is further made clear in the approach articulated by Lord Wilson in *Re S* to cases in which it is alleged, as it is in this case, that the subjective anxieties of a respondent regarding a return with the child are, whatever the objective level of risk, nevertheless of such intensity as to be likely, in the event of a return, to destabilise the respondent's parenting of the child to a point where the child's situation would become intolerable. As noted above, in *Re E* the Supreme Court made clear that such subjective anxieties are, in principle, capable of founding the exception under Art 13 (b). However, it is also clear from the decisions of the Supreme Court in *Re E* and in *Re S* that there are three important caveats with respect to this principle.
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> 72. First, the court will look very critically at an assertion of intense anxieties not based upon objective risk (see *Re S (A Child) (Abduction: Rights of Custody)* at [27]). Second, the court will need to consider any evidence demonstrating the extent to which there will, objectively, be good cause for the respondent to be anxious on return, which evidence will remain relevant to the court's assessment of the respondent's mental state if the child is returned (see *Re S (A Child)(Abduction: Rights of Custody)* at [34] and see also *Re G (Child Abduction: Psychological Harm* [1995] 1 FLR 64 and *Re F (Abduction: Art 13(b): Psychiatric Assessment)* [2014] 2 FLR 1115). Third, where the court considers that the anxieties of a respondent about a return with the child are not based upon objective risk to the respondent but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise the respondent's parenting of the child to a point where the child's situation would become intolerable, the court will still ask if those anxieties can be dispelled, i.e. whether protective measures sufficient to mitigate harm can be identified (see *Re E*

(Children)(Abduction: Custody Appeal at [49]). Within this context, in *Re S* Lord Wilson observed at [34] as follows:

> "The critical question is what will happen if, with the mother, the child is returned. If the court concludes that, on return, the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned. It matters not whether the mother's anxieties will be reasonable or unreasonable. The extent to which there will, objectively, be good cause for the mother to be anxious on return will nevertheless be relevant to the courts mental state if the child is returned".

59. In considering the Article 13(b) defence, the court is duty bound to consider what protective measures can be put in place. Article 11(4) of Council Regulation 2201/2003 is as follows:

> "A court cannot refuse to return a child on the basis of Article 13(b) of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return".

60. Williams J summarised the use of protective measures thus in **A (A Child) (Hague Abduction: Art 13(b) Protective Measures [2019] EWHC 649**:

> "23. Article 11(4) of BIIA rules out a non-return where it is established that adequate protective measures are available. The Practice Guide makes clear that this is intended to address the situation where authorities have made or are prepared to make such arrangements. The Court of Appeal has recently confirmed that protective measures include all steps that can be taken, including housing, financial support, as well as more traditional measures such as non-molestation injunctions (see *Re C* [2018] EWCA Civ 2834).
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> 24. Protective measures may include undertakings, and undertakings accepted by this court or orders made by this court pursuant to Article 11 of the 1996 Hague Child Protection Convention are automatically recognised by operation of Article 23 in another Convention state (see *Re Y (A Child) (Abduction: Undertakings Given for Return of Child*). To be enforceable they must be declared enforceable pursuant to Article 26. The 1996 Hague Convention Practical Operation handbook provides examples of measures which might be covered by Article 11. European Regulation 606/2013 on the Mutual Recognition of Protection Measures in Civil Matters sets up a mechanism allowing for direct recognition of protection orders issued as a civil law measure between member states, thus a civil law protection order such as a non-molestation order or undertaking issued in one member state, can be invoked directly in another member state without the need for a declaration of enforceability but simply by producing a copy of the protection measure, an Article 5 certificate and where necessary a transliteration or translation.
>
> 25.A protection measure within that is defined as any decision, whatever it is called, ordered by an issuing authority of the member state of origin. It includes an obligation imposed to protect another person from physical or psychological harm. Our domestic law provides this court can accept an undertaking where the court has the power to make

a non-molestation order. Thus, it seems that a non-molestation undertaking given to this court could qualify as a protection measure within the European Regulation on protection measures. “

61. I have also considered authorities relevant to what has been described as the “coach and four” defence, arising here from M’s stated refusal to return to Germany with the children. Plainly the abducting parent cannot avoid the provisions of the Hague Convention by a manipulated, contrived situation which purports to create a defence where there is none. Equally, the abducting parent cannot be deprived of relying upon a defence if his or her reaction is authentic and a direct consequence of the perceived risk upon return i.e. if it is a symptom of the circumstances giving rise to the defence.

62. The “coach and four” expression derives from the judgment of Butler-Sloss LJ in **C v C (Abduction: Rights of Custody) [1989] 1 FLR 403 at 410D-F** where the actions of the mother herself created the possibility of risk to the child:

> "The grave risk of harm arises not from the return of the child, but from the refusal of the mother to accompany him. The Convention does not require the court in this country to consider the welfare of the child as paramount, but only to be satisfied as to the grave risk of harm. I am not satisfied that the child would be placed in an intolerable situation, if the mother refused to go back. In weighing up the various factors, I must place in the balance and as of the greatest importance the effect of the court refusing the application under the Convention because of the refusal of the mother to return for her own reasons, not for the sake of the child. Is a parent to create the psychological situation, and then rely upon it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four through the Convention, at least in respect of applications relating to young children. I, for my part, cannot believe that this is in the interests of international relations. Nor should the mother, by her own actions, succeed in preventing the return of a child who should be living in his own country and deny him contact with his other parent."

Thorpe LJ, agreeing with that judgment, added at 487G-488B

> "In many cases a balanced analysis of the assertion that an order for return would expose the child to a risk of grave psychological harm leads to the conclusion that the respondent is in reality relying upon her own wrong-doing in order to build up the statutory defence. In testing the validity of an Art. 13(b) defence, trial judges should usefully ask themselves what were the intolerable features of the child's family life immediately prior to the wrongful abduction? If the answer be scant or non-existent, then the circumstances in which an Art. 13(b) defence would be upheld are difficult to hypothesise. In my opinion Art. 13 (b) is given its proper construction if ordinarily confined to meet the case where the mother's motivation for flight is to remove the child from a family situation that is damaging to the child's development. "

63. In **TB v JB (Abduction, Grave Risk of Harm) [2001] 2 FLR** 515 at [42] Hale LJ (as she then was), suggested that the approach adopted in C v C should not be taken too far:

> "It is not an addition to the statutory test. It is merely guidance on what is more likely to surmount the high hurdle presented by Article 13(b). It is a useful way of distinguishing those cases where the abduction has caused the problems feared from those cases where it has not".

64. Sir Mark Potter P in **S v B [2005] 2 FLR 878 at [49]** sounded a similar note of caution:

> "The principle that it would be wrong to allow the abducting parent to rely upon adverse conditions brought about by a situation which she has herself created by her own conduct is born of the proposition that it would drive a coach and horses through the 1985 Act if that were not accepted as the broad and instinctive approach to a defence raised under Article 13(b) of the Convention. However, it is not a principle articulated in the Convention or the Act and should not be applied to the effective exclusion of the very defence itself, which is in terms directed to the question of risk of harm to the child and not the wrongful conduct of the abducting parent. By reason of the provisions of Articles 3 and 12, such wrongful conduct is a 'given' in the context of which the defence is nonetheless made available if its constituents can be established".

65. I have also been referred to **Re W [2018] EWCA Civ 664**, in particular paragraphs 47 and 57 thereof, although the issue facing the court there was an unexpected bar to the mother's return because of her inability to obtain a visa. That is different from the situation here where M has a choice to return but articulates a refusal to do so. I accept, however, that the court must consider the impact on the children if in fact the abducting parent does not return with them.

66. Finally on this topic I note Williams J's analysis in **Re Q and V [2019] EWHC 490** (Fam) at para 48 (vi) when faced with a similar situation to the one facing me:

> "The source of the risk is irrelevant. I do not agree with Ms Papazian's assertion that a self-created risk (i.e. a mother refusing to return with the children or conflict created by the mother) cannot form the foundation of an Article 13(b) defence. The "coach and four doctrine" deriving from C v C (Abduction: Rights of Custody) [1989] 1 WLR 654 has bene substantially ameliorated following the judgment of Hale LJ in TB v JB (Abduction, Grave Risk of Harm) [2001] 2 FLR 515 (supra) and Potter P in S v B [2005] 2 FLR 878 and the Supreme Court decisions in Re E and Re S. Of course the court will evaluate carefully any assertion that a primary carer cannot return or any other alleged risk to the children arising out of some matter control over which is in the hands of the Respondent but ultimately the court must consider whether the grave risk of harm exists or not, whatever the source."

67. It is all a matter of judicial evaluation. Is the Article 13(b) defence made out or is it not? Is M's refusal a <u>consequence</u> of the facts and matters which justify a finding that the defence is made out? Or is it, alternatively, a creature of M's own making designed to supplement the other matters relied upon by her in order to establish the defence?

68. Should one of the exceptions be established, that is not the end of the matter. The court is required to go on to consider whether, notwithstanding the availability of the defence, the child should nevertheless be returned. This is an exercise of discretion.

Macdonald J put it thus in **TY v HY (Return Order) (Rev 1) [2019] EWHC 1310** at paras 48-49:

> "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]). "

69. M's case can be summarised as follows:

(i) That she suffered physical abuse at the hands of F. The allegations are made in general form although she makes reference to one specific occasion when he hit her during pregnancy, and another occasion when he smashed a glass pane in front of children.

(ii) That she suffered psychological abuse at the hands of F, feeling restricted, controlled and isolated by him. He described her negatively to family members and called her a "whore" She describes one humiliating episode (the date is unclear) when he attempted to persuade her to have sex with a family friend, which she refused.

(iii) That F exposed the children to pornographic material and neglected them during contact.

(iv) That she suffered physical and psychological abuse at the hands of Mr A, witnessed by the children (and an allegation that Mr A hit one daughter with a slipper). She lists a number of incidents including two alleged attempts to kill her (an attempted strangulation and striking her with glass bottles), regularly beating her, threatening her and sexually abusing her.

(v) That she believes she cannot be protected from Mr A and fears that he will attempt to kill her.

(vi) That she has previously been diagnosed with an anxiety disorder, and suffers from mental health issues.

(vii) That the children do not want to see F, and any requirement for them to do so would be likely to cause the children emotional abuse which would have a devastating effect on them.

(viii) That she is, as a consequence, terrified of returning to Germany and believes that she and the children are at real risk of significant physical, emotional and psychological harm. Her vulnerabilities are so acute that being forced to return

would trigger a deterioration in mental health such as to affect her ability to care for the children.

(ix) That having fled Germany because she feared for her life, and being now settled, a return to Germany would remove her from a safe and protective environment to one which is dangerous and threatening.

(x) So great is her fear of return that she would not accompany the children were I to order their return.

70. Having considered all the evidence and submissions very carefully, I have come to the clear conclusion that M has not established the Article 13(b) defence for the following reasons:

(i) In respect of the allegations against F, at paragraph 45 of her statement M says "I did not leave Germany in the urgent manner in which I did because of F. I left Germany because of the extreme domestic violence which I was suffering at the hands of Mr A, my husband."

(ii) In my judgment, it follows that if she was not driven to leave Germany through fear of F's behaviour, objectively she would not likely be exposed to the high level of risk required by the Convention upon returning to Germany as a consequence of F and his conduct Subjectively, she may well have experienced a negative and controlling relationship, but that was not sufficient to cause her to leave and would not be sufficient to prevent her from returning.

(iii) Further, the relationship between M and F ended by 2012. The principal allegations of physical and psychological abuse relate to the period of their relationship many years ago. For 6 years thereafter she was able to manage the situation with no marked detrimental effect on her ability to care for the children.

(iv) For some years after 2012 the children were able to maintain a relationship with F and regular levels of contact. The report of the psychologist referring to the intense bond developed between the children, in particular the eldest child, with F and the paternal grandmother is telling. It is objectively improbable that such a bond would have developed if the children felt in danger from him. The separation of the eldest child from F is described by the German psychologist as an extreme burden on the child.

(v) All of the allegations were canvassed before the German court at length. Notwithstanding, the court made orders for contact. I am told that no findings against F of the sort alleged by M have been made, although I am unclear whether they have been the subject of a full fact-finding hearing.

(vi) I also bear in mind that there is no independent corroboration of the allegations against F, for example in medical records. Nor have I been told of any application by M to the German authorities for the equivalent of a non-molestation order against F or other protective orders. I conclude that the historic concerns were not such to leave her or the children at real risk of physical harm.

(vii) I detect an element of exaggeration in M's claims of abuse at the hands of Mr A. I have no doubt that she was subject to incidents of violence and coercion, but in late 2017, 3 years after their marriage, she told the psychologist that her husband was "virtually perfect across all domains" and they had a "beautiful family life".

(viii) It seems inescapable to me that part of the motivation for leaving was a clear desire to prevent the children having any contact, direct or indirect, with F. She fled after receiving the expert report and shortly before the next court hearing.

(ix) Although M subjectively fears Mr A, there is no evidence that since she left him, he has sought to find her, track her down and cause her harm.

(x) Nor is there any evidence that he has sought to locate the children who, of course are not his but F's. Further, M told me in the witness box that Mr A was definitely a better father than F; I did not pick up from her any substantial concern about Mr A's behaviour towards the children in the future, as opposed to her strongly held belief that she herself is in great danger from Mr. A.

(xi) It is reasonable to assume, as I do, that the German police, courts and safeguarding agencies have a variety of tools in their legal toolbox to ensure the protection of M and the children. Both the courts and the social services are likely to be fully alive to any protective needs.

(xii) I assume also that M would take all reasonable steps to protect herself and the children in the event that I order a return to Germany. Now separated from Mr A, she will no doubt consider her options carefully when contemplating where she lives, cooperating with social services and engaging with the courts.

(xiii) Her concern that the children do not want to have contact with F, and should not be placed in his care is, in my view one for the German courts to decide. Further, their resistance may be less entrenched than M submits; certainly, the contact between F and the younger 2 children during this hearing appears to have been successful.

(xiv) Protective measure can and should be put in place to mitigate the impact of the return on M and the children. F has agreed to the following in principle, although I anticipate that refinement will be required at the hearing listed for handing down this judgment:

(a) Until the German court orders otherwise, the children shall live with M. The German order of 18 April 2018 will need to be discharged or amended;

(b) Until the German court orders otherwise, there should be no contact between the children and F unless agreed otherwise;

(c) F should give a non-molestation undertaking;

(d) F should undertake not to inform Mr A of M's whereabouts;

(e) F should undertake not to support or pursue any criminal or civil proceedings in Germany arising out of the abduction. I bear in mind that generally the risk of criminal proceedings being brought is not sufficient to establish an Article 13(b) defence (see for example **Re L (Abduction: Pending Criminal Proceedings) (1999) 1 FLR 433**). I am told by F (but have no corroboration at this stage) that M would not in fact be arrested, but plainly a protective measure along these lines will provide reassurance.

(f) The children's passports need to be held independently in Germany pending further order of the German court.

71. I have given careful consideration to M's refusal to return with the children if I so order. Having heard her give evidence I conclude that it is not a consequence of a defence which is fully made out; it is intended to be causative as part of her attempt to establish the defence. I suspect she hopes that the court will have no alternative but to

accede to her wishes and refuse to order a return. In my judgment there is an element of tactical game playing on her part.

72. I am confident that she would not in fact refuse to accompany the children, although it cannot be completely ruled out. I find that:
    (i) In March 2018 she deliberately sought to avoid the likely outcome of a court hearing the following month by fleeing Germany;
    (ii) Throughout 2018 she did not disclose her whereabouts to F or the German authorities so as to avoid the inevitable legal consequences;
    (iii) Her change of heart during the hearing was probably prompted by my refusal to accede to her application for a psychologist report and consequential application for an adjournment;
    (iv) She has in the past ignored or refused to comply with orders for contact;
    (v) If she is, as I am quite sure is the case, devoted to her children then she is likely to want to accompany them back to Germany rather than see them committed to the care of F or such other person(s) as a German court may decide;
    (vi) Her change of case was sudden and not foreshadowed in any way. I have my doubts that this was carefully thought through and considered. Rather, in my view, it was impetuous and borne of instant frustration;
    (vii) I am in any event satisfied that any risk to M (and thereby to the children) can be ameliorated to an acceptable degree by the protective measures outlined above;
    (viii) If M in fact does not return with the children, I have carefully considered what would be the consequences. It will then be a matter for the German authorities, and the court, to decide. I am told that a court date in Germany can be arranged in a matter of days by F's German lawyer. Any court order would no doubt be based on appropriate welfare considerations. It may be that the German court will decide that they should live with F while full welfare decisions are being made. I note that German court made just such an order in April 2018 and can therefore be assumed to have considered such an arrangement appropriate at that time even though M did not attend: after all, the court had the psychologist report and no doubt a welter of additional material obtained over a lengthy period. Other options may be looked at by the German court.

73. The consequence of my finding on Article 13(b) is a mandatory return to Germany.

74. I should add that even if I had been persuaded of the Article 13(b) defence by M, I would, in the exercise of my discretion, have decided to order a return. The children, like the parents, are German. They lived all their lives in Germany until March 2018. Their extended families are in Germany. Their first language is German. They had no connection with the United Kingdom before their arrival here. Their lives here have been unsettled with a number of moves and no consistency of accommodation or schooling. The courts in Germany were seised of the case for well over a year before M and the family came to the United Kingdom. They are far better placed to deal with the welfare issues than the courts of this jurisdiction; those welfare issues may include where the children live, contact and perhaps also whether M should be permitted to relocate with the children from Germany to the United Kingdom. The German social services were engaged with the family for a period measured in years and a family

psychologist report was prepared in Germany. The authorities (legal and non-legal) in Germany are likely to have a much better understanding of this case than their counterparts in this jurisdiction, and undoubtedly are better positioned to resolve factual and welfare issues.

75. I also consider it possible that were I not to order a return, the relationship between the children and F, as well as the relationship between the children and their paternal grandmother, may be difficult to re-establish. It is hard to see how F, and the paternal grandmother, could achieve a successful reintroduction of contact from the distance of Germany in circumstances where M is resolutely opposed to contact. Difficulty in pursuing legal proceedings from afar, together with difficulty in implementing and enforcing welfare decisions, may prove too much for F.

Children's objections

76. The law is conveniently summarised by Macdonald J in **B v P [2017] EWHC 3577**, at paragraphs 60 -61:

> "60. The law on the 'child's objection' defence under Art 13 of the Convention is comprehensively set out in the judgment of Black LJ in *Re M (Republic of Ireland)(Child's Objections)(Joinder of Children as Parties to Appeal)* [2015] 2 FLR 1074 (and endorsed by the Court of Appeal in ***Re F (Child's Objections)*** **[2015] EWCA Civ 1022**) and I have regard to the clear guidance given in that case. In summary, the position is as follows:
>
> i) The gateway stage should be confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in 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 his or her views.
>
> ii) Whether a child objects is a question of fact. The child's views have to amount to an objection before Art 13 will be satisfied. An objection in this context is to be contrasted with a preference or wish.
>
> iii) The objections of the child are not determinative of the outcome but rather give rise to a discretion. Once that discretion arises, the discretion is at large. The child's views are one factor to take into account at the discretion stage.
>
> iv) There is a relatively low threshold requirement in relation to the objections defence, the obligation on the court is to 'take account' of the child's views, nothing more.
>
> v) At the discretion stage there is no exhaustive list of factors to be considered. The court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available. The court must give weight to Convention considerations and at all times bear in mind that the Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly.
>
> 61. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are authentically the child's own or the product of the influence of the abducting parent, the extent to

which they coincide or at odds with other considerations which are relevant to the child's welfare, as well as the general Convention considerations (*Re M* [2007] 1 AC 619).

77. The Cafcass Officer has met the children. Her conclusion, which I accept, is that all 3 children are of an age and maturity where it is appropriate to take account of their views. All the children express opposition to returning to Germany. In the case of the oldest child, he has unhappy memories of Germany both in respect of home and school life; he feels far happier in his current location where there is a supportive Muslim community. He scores life in England as "7-8" out of 10 as opposed to life in Germany which he rates as "2". It also appears that the oldest child was aware of the reason for leaving Germany, namely the behaviour of Mr A, whereas the younger children have no knowledge or recollection of the reasons behind the move. The middle child similarly described accommodation and schooling in their previous location in negative terms and life in England as "10 out of 10". She became sad at the prospect of returning to Germany and said that she would wish her mother to be with them. The youngest child struggled to remember much about Germany, did not want to return to Germany and rated living in England at 100 out of 100.

78. The opinion of the Cafcass Officer, which I accept, is that the younger two children's views in particular are primarily bound up with being with their mother.

79. I have concluded that even though the children's views should be taken into account, they are outweighed by all the matters to which I have referred in the previous paragraphs of this judgment (particularly paragraphs 69-75) and which I do not propose to repeat. They are not of an age where their views are determinative. And their views are, so it seems to me, in part a product of their mother's antipathy towards F and resistance to any idea of contact. These are issues best dealt with in Germany for all the reasons previously given.

Conclusion

80. Subject to putting in place the protective measures referred to above, and considering some of the practical consequences of a return to Germany, I make the order sought.

81. Further consideration of practicalities and protective measures shall take place at the hearing listed for handing down this judgment. The order for return will not be finalised or take effect until I am satisfied with the arrangements.