Neutral Citation Number: [2021] EWHC 2643 (Fam)

Case No: FD21P00209

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

IN THE MATTER OF BS (A CHILD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/09/2021

Before :

MR TEERTHA GUPTA QC

- -

Between :

GS	**Applicant Father ('F')**
- and –	
MDS	**Respondent Mother ('M')**

- -
- -

Hearing date: 7 July 2021

- -

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.

.....

MR TEERTHA GUPTA QC

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 Teertha Gupta QC :

1. I have been greatly assisted by the written and oral submissions (on 7.7.21) of junior counsel in this matter, both of whom specialise in international children cases amongst other disciplines. Edward Bennett represented the applicant father and Michael Edwards represented the respondent mother. This matter appears before me as an application under the Child Abduction Custody Act 1985 for the summary return of BS to the jurisdiction of Italy pursuant to the 1980 Hague Convention. She was removed to this country on 28.2.21 by her mother, having lived in Italy all of her life before then, save for a one month period in the summer of last year, about which I shall address later on in this judgment. The father had the assistance of an Italian interpreter at this hearing, while the mother had the assistance of a Portuguese interpreter. Neither parent speaks English.

2. The accepted facts of the matter are as follows. The parties met in in Brazil in 2000 and by 26.4.00 were married in Italy and have lived near Rome since then, the father says as a couple until 28.2.21, the mother's case is that they separated but lived as neighbours in the same block for the last three or four years, with her looking after B, who was born 6 years ago on 21.10.14. She accepts the father and his family played a major role in looking after BS (e.g. C50: *"B was spending a lot of time with her grandmother*…"). She says the father moved to live with his parents in the flat below hers some time ago and that their relationship has deteriorated and become very strained partly because (she alleges) of the pernicious involvement of her mother-in-law, who has called her a '*curse'* a '*prostitute'* and made her feel like a '*slave'*. The father is an Italian national, the mother is, like her daughter, B a dual Italian-Brazilian national. B was brought to England by her mother on 28 February 2021 with her father raising this with the Italian authorities later that day. The Italian court is seised of live private law proceedings which are currently stayed pending the outcome of these proceedings. The question for me is a simple one: should this child be returned summarily to Italy? Mr Edwards has asked for a 7 day period of grace for the mother to confirm whether she would accompany B, or whether she seeks the father to do so, <u>if</u> I do order such a return.

3. I have read the trial bundle and the position statements/ skeleton arguments of the parties and heard the oral submissions of counsel. I was not asked to hear oral evidence and no cafcass report has been prepared pursuant to an order of Mr Goodwin QC dated 30.4.21 on account of B's age. In any event, the mother accepts that her child's views on return are 'ambivalent' and so there is no reason for this young girl to be troubled by a cafcass inquiry. I can therefore say at the outset that the defence of 'child's objections' is therefore not made out.

4. In his position statement, Mr Edwards asserts :

"M seeks to defend these proceedings in reliance upon:

"a. Article 3: habitual residence;

b. Article 13a: consent/acquiescence;

c. Article 13b: grave risk/intolerability;

> d. Article 13: child's objections." (which I have dealt with above)"

5. However I am grateful to Mr Edwards for his pragmatic approach in his oral submissions. Although the mother has raised those defences, he focused on two specific ones, accepting that the evidence did not help him sustain his arguments in relation to the defences of B not having Italian habitual residence at the material time and the defence of 'acquiescence' . What Mr Edwards to my mind rightly focused on in his oral submissions was the issue of *consent* on the Article 13 A of the Hague Convention and the issue of *intolerability* under article 13 B of the convention.

6. A little time was spent this morning allowing the mother to speak with her legal team to consider her position. She maintains her two defences and so it falls to me to determine them.

Consent

7. The family came over to England, as I mentioned above on 31st July of last year (2020) and 4 days later the father returned to Italy. BS returned to Italy with her mother on 1st September 2020 whereupon she started school in Italy. At C42-3 (translated) is a short certificate of attendance from B's Italian 'school manager' it states that B is registered at that school and attended year 1 until the Friday before she was unilaterally removed by her mother on Sunday 28.2.21. Which was, I add during the Italian school term. It is accepted by the mother that the father did not know of her removal of B to England on 28.2.21, however her case is that he had nevertheless consented to the removal.

8. The mother's case is that the father himself suggested that the family relocate to England back in 2018/9 because mainly of the racism B would suffer growing up in Italy and because his own brother (B's paternal uncle) lives in England.

9. The mother states at C55-6:

> "The decision for our family to live in England was a mutual one. We decided to move to Brixton for a couple of weeks and try to get to know the country. We arrived in England on 31 July at Gatwick Airport. At first we stayed in a hotel called Belgravia Hotel until 4 August 2020, when GS returned to Italy. GS paid for our stay in this hotel by his card. Then my friends helped me with accommodation and offered us that we could stay at his place. On 4 August 2020 J picked us up from the hotel and took as by his car to his place. During my stay in England we were looking for a place to rent, school for BS and GP. BS was going to start school on 7 September 2020. However due to the Covid-19 pandemic it was difficult to make plans as we would find that we were unable to get concrete answers to our queries. To avoid any confusion, I want to underline that GS travelled with us and agreed for our relocation. However due to the fact that he had to return to work he stayed with us only until 4 August 2020. He would not have left us in England if he did not agree BS staying in England….

> Unfortunately, on 3 September 2020 GS's mother was due to have an eye surgery so my husband asked me to travel back to Italy for 3 months and help him to look after her. We stayed in Brixton during that time and returned to Italy on 1 September 2020. My plan was always to return to England and Gs was aware of it. The main purpose of our travel was to help his mother to get better and return to England as soon as possible to secure our life there."

10. The mother states further that the Father borrowed €3,000, they purchased flight tickets and F had BS's birth certificate translated into English to help her to register at school. She also produces a document which she says was signed by the father (he contests this) which states as follows:

30-7-2020
I MDS.
Born in the district (**). In agreement with my husband, GS. I am moving to live and my daughter studies, BS - in England, United Kingdom.

11. The father's case on this is that he did not agree to a relocation in the months and days leading up to the trip to England in July 2020 and that even if he had it did not subsist 5 months later on 28.2.21. The 3,000 Euros was merely for a holiday and would never have been enough for a relocation of the family. I add that no luggage was left behind by the mother in England in September 2020 and the father points to the reason given by the mother in her statement that triggered the actual removal:

> "The second time we came to England was on 28 February 2021. This move was triggered by GS's behaviour. One week before Christmas he told me to leave his parent's property. The reason for that was our argument between us when I told him about BS's behaviour. On that date when BS was passing me a tea bag which she intentionally had destroyed as she was told to do it by her grandmother. According to BS it was a funny joke, and she did not understand that this kind of behaviour towards me was not appropriate… Therefore, since that day I started preparing for our return to England."

12. This 'tea bag incident' seemed to give the mother the impetus to leave the home and the country with the child on the very same day- (actually 'in the middle of the night'). By 28.4.21 the mother had unilaterally enrolled B in a primary school (C100). She says that the father knew when he asked her to leave that she had nowhere else to go and *ergo*-he was continuing to consent to the move to England. But if that is the case, I ask: why was she attending the school in Italy and why did she leave in such a clandestine fashion? The father's original complaint of child abduction to the carabinieri states (C122)

> "Yesterday afternoon, my daughter stayed with me at my parents' house and I helped her with her homework., and around 8.30 pm my wife joined us for dinner. At about 9.30pm my wife and daughter went home, while I stayed with my parents for the night. This morning around 9.30am, I noticed that strangely

> enough the shutters of the house were still closed, then around 10.00am I went up to see why they had not yet came down. When I entered the house I was amazed to find that my daughter and my wife were no longer inside. I checked all the rooms of the house noting that the double bed where they slept was unmade, the refrigerator in the kitchen was off, with the doors open and completely emptied. …
>
> So far my wife and I have never had a big fight, just normal disagreements. She complained that she was no longer happy and suggested that she might go to England, but I tried to dissuade her by telling her that I would consider it in the future… My wife doesn't have many friends so I don't know who could have taken them to the airport."

13. As part of a 'consent defence', one has to see what the post removal conduct was, to provide some context. One can see why the defence of "Acquiescence' was not pursued by the mother, because when realising that B and her mother had gone, the father immediately contacted the Italian police (**C122**). The Italian police are currently investigating whether M has committed a criminal offence (**C118** § 25). And on 12.3.21, he signed his application with the Italian central authority, with the first hearing in court taking place on 31.3.21. This is a 'hot pursuit' case. This conduct is obviously not consistent with the father consenting to a move on or prior to 28.2.21.

14. Interestingly on 2.3.21 the mother spoke to the Italian police and rather than saying that the father consented to the move, indicated that she could not return to Italy because of the pandemic, but that *"…she intended to bring her daughter back to Italy…"*(**C148**). Mr Edwards asks that I discount this piece of evidence as "double hearsay" but I have to say that I find the provenance of this information reliable: namely the wording of a sealed order from the Juvenile Court of Rome, which is summarising what the Carabinieri told it about what the mother 'informed them' . The fact that she did not say that this was all consented to by the father is quite telling. The mother arrived here with no job lined up, no long term, planned accommodation, little to no English speaking skills and no immediate school place for B.

The Law

15. Article 1 of the 1980 Hague Child Abduction Convention makes clear that one of the objects of the Convention is:

> "to secure the prompt return of children wrongfully removed to or retained in any Contracting State."

16. The wrongfulness of a removal or retention is governed by Article 3:

> "The removal or the retention of a child is to be considered wrongful where –

> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, or 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.
>
> "The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

17. The substantive obligation to return is provided for by Article 12:

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

18. There are limited exceptions to the obligation to return. These are set out at Article 13, which 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. 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."

19. Regarding the defence of 'Consent' the leading authority is ***Re P-J (Abduction: Habitual Residence: Consent)*** [2009] 2 FLR 1051. At [48], Ward LJ summarised the current position thus:

> "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?

20. I find the dicta of Wilson LJ (as was) quite apposite to this particular case:

> "55. There is no dispute in this case that an effective consent to removal can be given in advance and thus can in principle be given in June to a removal in October. I am clear however that the consent has to subsist at the time of removal. I am full of

admiration for the analysis of 'advance consent' offered by Bodey J in [29], [30], [32] and [41] of his decision in *Re L (Abduction: Future Consent)* [2007] EWHC 2181, [2008] 1 FLR 914, quoted by my Lord at [47] above; and I adopt the analysis of Bodey J as my starting-point. In argument to us Mr Newton suggested that Bodey J was wrong to imply, at [30], that consent could always be withdrawn prior to removal. He submitted that whether an advance consent could be withdrawn depended upon the way in which it was expressed and/or the circumstances in which it was given and/or whether in the interim the other parent had acted upon it to her disadvantage. In some ways it was an attractive submission but I reject it. That the consent has to subsist at the time of removal (or retention) seems to me also to have been recognised by Hale J in *Re K (Abduction: Consent)* [1997] 2 FLR 212, in which the father's withdrawal of consent came too late in that it was responsive to the mother's communication to him of the retention. Once we allow arguments to the effect that, although the left-behind parent had, prior to removal, clearly purported to withdraw an earlier consent, he was not entitled to do so, legal concepts crowd in upon the straightforward enquiry; and the stance taken by parents on the ground becomes rewritten as the stance which the law deems them to have taken. Decisions about children are best taken without such artifice."

56. Although, however, we should accept that, prior to removal, a refusal to consent may replace an earlier consent and, conversely, that a consent may replace an earlier refusal to consent, we must confront the consequential difficulties. They arise in particular because, when intimate human relationships break down, our emotions lead us – whether in anger, jealousy, pain or a wish to wound – to say things which we do not mean and/or which are entirely inconsistent even from one hour to the next. Take a father who has clearly consented to a removal of the children with the mother to England. Is he to be taken to have withdrawn his consent because he rushes to the airport and there shouts "You can't go"? Of course not. Or take a father who has clearly not consented to a removal to England. Is he to be taken to have consented because, when the mother is piling the children into the taxi which will take them to the airport, he unexpectedly returns home and, in his shocked distress, tells her, in his vernacular, that she can take them wherever she pleases? Of course not. So the task of the judge in weighing a defence that an advance consent subsisted can prove difficult; and he will need to call upon his understanding of how, with all our imperfections, we human beings operate. Thus if, as here, the defendant asserts the other's advance consent to a removal, the judge has to persuaded that in reality it subsisted at the time of removal.

> 57. It seems to me that the most obvious (albeit not always decisive) indication of whether in reality an advance consent subsisted at the time of removal is whether the removal was clandestine. I accept that a consent to the removal of children within Article 13 does not have to include a consent to their removal on the particular day, or by the particular means or more generally in the particular circumstances, on, by or in which the other parent elects to remove them. Nevertheless a clandestine removal will usually be indicative of the absence in reality of subsistence of the consent; see, for example, the judgment of my Lord in this court in *P v. P (Abduction: Acquiescence)* [1998] 2 FLR 835 at 836H – 837A.

21. The Court of Appeal has recently provided further helpful clarification of the law on consent, in the case of Re G (Abduction: Consent / Discretion) [2021] EWCA Civ 139. Peter Jackson LJ summarises the law as follows:

> "25. The position can be summarised in this way:
>
> (1) The removing parent must prove consent to the civil standard. The inquiry is fact-specific and the ultimate question is: had the remaining parent clearly and unequivocally consented to the removal?
>
> (2) The presence or absence of consent must be viewed in the context of the common sense realities of family life and family breakdown, and not in the context of the law of contract. The court will focus on the reality of the family's situation and consider all the circumstances in making its assessment. A primary focus is likely to be on the words and actions of the remaining parent. The words and actions of the removing parent may also be a significant indicator of whether that parent genuinely believed that consent had been given, and consequently an indicator of whether consent had in fact been given.
>
> (3) Consent must be clear and unequivocal but it does not have to be given in writing or in any particular terms. It may be manifested by words and/or inferred from conduct.
>
> (4) A person may consent with the gravest reservations, but that does not render the consent invalid if the evidence is otherwise sufficient to establish it.
>
> (5) Consent must be real in the sense that it relates to a removal in circumstances that are broadly within the contemplation of both parties.
>
> (6) Consent that would not have been given but for some material deception or misrepresentation on the part of the removing parent will not be valid.

> (7) Consent must be given before removal. Advance consent may be given to removal at some future but unspecified time or upon the happening of an event that can be objectively verified by both parties. To be valid, such consent must still be operative at the time of the removal.
>
> (8) Consent can be withdrawn at any time before the actual removal. The question will be whether, in the light of the words and/or conduct of the remaining parent, the previous consent remained operative or not.
>
> (9) The giving or withdrawing of consent by a remaining parent must have been made known by words and/or conduct to the removing parent. A consent or withdrawal of consent of which a removing parent is unaware cannot be effective."

22. Consent obtained by fraud or misunderstanding will not be considered valid.

23. Once the gateway is open which is by the fact establishing 'consent', my discretion is at large.

24. Mr Edwards valiantly tells me that this case is 'more complicated' than simply saying that a clandestine removal amounts to a lack of parental consent. I profoundly and respectfully disagree. Having set out the law above I have come to the firm conclusion that the 'gateway defence' of 'consent' defence, simply is not made out. I say this for the following main evidential reasons:

a) The letter of consent dated 30.7.20 (the signature to which is contested) is not clear enough for such a momentous thing as relocating a child to England, it is not dated 28.2.21 in any event and so can hardly be said to be proof of a clear and unequivocal consent by the father 7 months later after the child had attended Italian school, having lived all of her life in Italy;

b) There is no other evidence that the father clearly and unequivocally consented to BS's move to England in February 2021;

c) The child attending Italian school and being removed mid-term and the other factors identified by me in paragraph 14 above point to a hurried , unplanned departure, which in turn indicates a non-consensual one;

d) The clandestine removal;

e) The stated trigger for the departure- it simply did not amount to a consent to international relocation : although I add here that upon further inquiry from me, Mr Edwards confirms that the mother took BS to have pre-travel covid tests on the 24th February (4 days prior to departure and obviously without the father's knowledge and consent- this means that this was indeed a clandestine, pre-planned unilateral removal, and at first blush, with scant regard for the child's welfare (e.g. schooling) and her relationship with her father and Italian family- but this latter point is a matter for the Italian Juvenile Court to look into at the welfare stage in the months to come);

f) What the mother told the carabinieri as mentioned above (i.e. not mentioning anything about consent);

g) The father's conduct post the removal in no way indicates a continuing consent, quite the opposite;

h) The child's own ambivalence in staying in England- had this been a consensual move, she would have been prepared months in advance: and

i) The gap in time between July 2020 and 28 February 2021 in itself would vitiate any consent if there had been one, which I find there clearly was not. One is reminded of Wilson LJ as was and his more extreme example in Re PJ cited above and repeated here:

> *"Or take a father who has clearly not consented to a removal to England. Is he to be taken to have consented because, when the mother is piling the children into the taxi which will take them to the airport, he unexpectedly returns home and, in his shocked distress, tells her, in his vernacular, that she can take them wherever she pleases? Of course not."*

Article 13(b)

25. And so I move on to the second and final defence that the mother raises. There are contested allegations of historic domestic abuse and there are an number of practical complaints such as accommodation and funding travel but more importantly and rightly promoted as the main point by her counsel is that the mother is concerned that B will be placed in an 'intolerable' position, by being separated from her mother on or after their arrival back in Italy. I must evaluate this. Mr Edwards pithy written submissions read as follows:

> "M is also likely to be arrested if she returns to Italy (see confirmation of criminal complaint at **[C137]**). F makes clear in his first statement that his complaint to the Carabinieri is still open **[C118-119]**. F has also applied to the court in Rome for an order for suspension of M's parental rights **[C119; C147]**. M is very likely to be separated from BS, one way or another, even if she does return to Italy."

26. However it is clear from C147 The Juvenile Court of Rome thus far (namely on 31.3.21) has "*refused'* to 'suspend the mother from parental responsibility (as applied for by the Public Prosecutor and has instructed Social Services to carry out a 'socio-environmental survey' of the family unit . In other words this makes such a separation of mother and child *unlikely*.

27. The father has offered not to support any criminal prosecution if the child returns (rather than if she does not) and with a weather eye on the English Court of Appeal authority concerning how we ourselves treat those convicted of child abduction, R v Solliman and *Kayani* [2011] EWCA Crim 2871, [2012] 1 WLR 1927 it is difficult to see the relevance of the criminal complaint.

28. The relevant case Law that I have considered on Article 13(b) is as follows (I have taken this summary and amended it from the mother's counsel's submissions):

> "In *Re E (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 A.C. 144 (which I have re-read) Lady Hale and Lord Wilson JJSC held that the following approach should be undertaken when considering whether the Art. 13(b) exception is made out:"
>
> a. First: the burden of proof lies with the "*person, institution or other body*" which opposes the child's return. It is for them to produce evidence to substantiate one of the exceptions to the civil standard of proof (§32);
>
> b. Second, the risk to the child must have reached such a level of seriousness as to be characterised as "*grave*" (§33); and
>
> c. Third:
>
> "*the words "physical or psychological harm" are not qualified. However, they 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'". Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate*" (§34); and
>
> d. Fourth, article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country (§35).

29. Added to this is the recent Guide to Good Practice produced by the Hague conference which provides a step by step analysis and a useful flowchart from para 40 onwards

> "40. As a first step, the court should consider whether the assertions are of such a nature, and of sufficient detail and substance, that they could constitute a grave risk. Broad or general assertions are very unlikely to be sufficient. (The allegations of racism in Italy for example I place in this category, the issue is: whether the child is likely to be separated from her mother on return and whether that situation would be intolerable to BS).
>
> 41. If it proceeds to the second step, the court determines whether it is satisfied that the grave risk exception to the child's return has been established by examining and evaluating the evidence presented by the person opposing the child's return / information

> gathered, and by taking into account the evidence / information pertaining to protective measures available in the State of habitual residence. This means that even where the court determines that there is sufficient evidence or information demonstrating elements of potential harm or of an intolerable situation, it must nevertheless duly consider the circumstances as a whole, including whether adequate measures of protection are available or might need to be put in place to protect the child from the grave risk of such harm or intolerable situation, when evaluating whether the grave risk exception has been established.
>
> 42. Once this evaluation is made:
>
> – where the court is not satisfied that the evidence presented / information gathered, including in respect of protective measures, establishes a grave risk, it orders the return of the child;
>
> – where the court is satisfied that the evidence presented / information gathered, including in respect of protective measures, establishes a grave risk, it is not bound to order the return of the child, which means that it is within the court's discretion to order return of the child nonetheless."

30. In *Re W* [2018] EWCA Civ 664 the Court of Appeal (Moylan and Peter Jackson LJJ) clarified that the Supreme Court in *Re E* had not intended to introduce a 2-stage test, namely (1) taking the allegations at their highest, is the Article 13(b) threshold met? And (2) if so can sufficient safeguards be put in place in the home country to ameliorate the risk? The court should instead consider the allegations and protective measures in the round, per Moylan LJ: "*The question of whether Article 13(b) has been established requires a consideration of all the relevant matters, including protective measures*". (§48).

31. I also have to consider the actual effectiveness of the protective measures being offered. In *Re C (Children) (Abduction: Article 13(b))* [2019] 1 FLR 1045, Moylan LJ said:

> **"[43]** First, in respect of Ms Cooper's submissions about the efficacy of undertakings given to the English court, it is clear that, in deciding what weight can be placed on them, the court has to take into account the extent to which they are likely to be effective. This applies both in terms of compliance and in terms of consequences, including remedies, in the absence of compliance. The issue is their effectiveness which is not confined to their enforceability: see, for example, H v K and Others (Abduction: Undertakings) [2017] EWHC 1141 (Fam), [2018] 1 FLR 700, at para [61]. In saying this, because I acknowledge the concerns that have been expressed about the court's perhaps giving insufficient weight to the point made by Ms Cooper and the need for caution when relying on undertakings, I make clear that I am not saying that

> enforceability is not an issue, only that it forms one element of the court's assessment."

32. The father offers the following undertakings:

i. To pay a minimum of €300 per month to the Respondent Mother for her to meet her day to day expenses and for any payment to be made prior to the return for the first month. I can do this for a maximum of 3 months.

ii. To provide a property which I own for the Respondent Mother and the child B to live in. I would provide details and pictures of the properties.

iii. To pay for flights from the UK to Italy for the Respondent Mother and child B and to pay for any covid testing requirement that is still in place

iv. Not to remove the child B from the Respondent Mother.

v. Not to use or threaten violence against the Respondent Mother

vi. Not to intimidate, harass or pester the Respondent Mother.

vii. Not to communicate with the Respondent other than for the purposes of communicating with the child B or for contact.

viii. Not to support any criminal prosecution of the Respondent arising out of these proceedings and removal of the child.

ix. Not to issue any without notice applications or to have a hearing on these matters within 14 days of the Respondent's return to Italy

x. I would agree to lodge the return Order and Undertakings with the Italian Court prior to return. I also agree to provide English translations.

xi. I will enrol my daughter in school upon her return. I would intend to do this in the locality.

I will comply with these undertakings for 3 months or until a Court or Tribunal in Italy makes an Order to the contrary.

These undertakings are given without prejudice and are not to be seen as an admission of factual matters that remain in dispute between the parties.

33. Through his counsel, the father adds that the father's Italian lawyer is confident that the mother would meet the criteria for legal aid in Italy in family proceedings concerning BS, including the civil case before the Juvenile Court in Rome. His lawyer has sent through (primarily for the mother's benefit), the relevant information and application form. As such, he does not consider it necessary to fund legal representation for her. I agree.

34. The property that the father has offered to fund has been shown to me, it is described as a ' *Two-room apartment 100 meters from the lakefront with private garden '* with what I can see from the photgraphs provided, is a separate bathroom and kitchen.

35. Furthermore, from 6-20 August 2021, at the mother's invitation and without prejudice to his case on summary return, the father spent 14 days staying with her and B at the mother's English accommodation. In other words any claim that the father is a risk to either the mother or BS cannot realistically be asserted. As regards any physical and emotional abuse by the father and the paternal family towards the mother these have not been evidenced in any objective form and by the mother's conduct in allowing the father to stay at her place in England. I simply cannot do anything about assessing or protecting against the mother's claims of racism in Italy against B, and any financial difficulties on a return are covered in my view and in the short term by the father's undertakings.

36. I have to say that on a taking all the relevant matters into context, 'stress-testing' the undertakings (for example by ensuring that this order and the undertakings are formally lodged with the relevant Italian court prior to the return of BS) they more than amply cover the concerns of the mother. They are practical, effective and purposeful and I find it highly unlikely that the mother will be separated from BS on or after arrival back in Italy (if she chooses to accompany her). Furthermore, because of the role the father has played in the child's life to date, even in the unlikely event that the mother was separated from the child, this would not amount to an intolerable situation.

37. Therefore the Defence under Article 13(b) is also not made out and as per the aforementioned guide to Good Practice and the relevant case law, I hereby order the summary return of the child BS to Italy. The mother shall return or cause the return, of BS, who may have to enter some quarantine period in Italy upon her return but that is a matter for the Italian authorities.

38. I add that if the mother has not indicated within 7 days of receipt of this judgment that she is returning to Italy with BS, the father can make arrangements to come over and accompany her back. There is no reason that has been put before me as to why this cannot happen, the father was (as were his parents) involved fully in the day to day care of BS, when she was in Italy and no doubt will be on return. As I have mentioned the father even stayed with the mother and BS in England a few weeks ago. If he can meet the child airside in England (maybe by use of the Tipstaff's involvement) he might possibly avoid quarantining in England (which I note he did at the mother's home in any event in August).

39. This is my judgment.

14.9.21 approved on 26.9.21