Neutral Citation Number: [2022] EWHC 1145 (Fam)

Case No: FD22P00217

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 May 2022

Before :

Mr Geoffrey Kingscote QC
(sitting as a Deputy High Court Judge)

- -

TS

Applicant

- and –

DMM

Respondent

- -
- -

Jonathan Rustin (instructed by **Anthony Louca solicitors** for the **Applicant (father)**
Indu Kumar (instructed **by Oliver Fisher solicitors** for the **Respondent (mother)**

Hearing dates: 10 and 11 May 2022

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Approved Judgment

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MR GEOFFREY KINGSCOTE QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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

Geoffrey Kingscote QC sitting as a Deputy Judge of the High Court :

A Introduction

1. This is an application by the father, for the summary return of a child, C, now 22 months old, to Poland, pursuant to the Child Abduction and Custody Act 1985 (incorporating the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention 1980").

2. The application is opposed by the respondent mother.

3. For reasons of anonymity and clarity I will refer to the child who is the subject of the application as C and the non-subject older half-brother of C as P.

4. The mother's defences to the application are the following:

    i) Under Art 3 that C was not habitually resident in Poland immediately before his removal from Poland on 25 January 2022 but remained habitually resident in England

    ii) That there is a grave risk that a return to Poland would expose him to physical or psychological harm or otherwise place him in an intolerable situation.

    iii) As will be seen the issue under (i) is a question of fact and the issue under (ii) is a mixed question of fact and discretion

B Preliminary applications

5. The case was listed before me for 2 days. I read a bundle of 290 pages and received oral and written submissions from the parties' counsel.

6. The parties were very ably represented by Mr Rustin for the father and Ms Kumar for the mother and I extend my thanks to both. The parties both had the benefit of separate Polish interpreters.

7. There were two preliminary issues:

    i) An application for oral evidence in relation to the question of habitual residence made on behalf of the father to address, in particular, the parties' intentions in relation whether or not the move to Poland in July 2021 was intended to be permanent, or dependent upon the success of the venture. It was neither opposed nor supported by the mother.

    ii) An application by the mother for CAFCASS to speak to a non-subject child in this case, P, C's 10 year old half-brother, in relation to the impact of him on a return to Poland in circumstances where it was the mother's position that the father was physical abusive to him, that P had been traumatised by the behaviour towards him and that he did not wish to return to Poland.

8. I did not accede to either application.

9. As to the first, I remind myself that these are summary proceedings. The father, who has been represented throughout, had the ability to respond to the mother's case in his detailed and lengthy second statement. The husband's position statement advertised a request for oral evidence only in relation to a possible Art 13 (a) defence of consent, a defence which the mother did not, in fact, pursue. An oral application was made extending the enquiry to issues as to Art 3 that morning. As Mostyn J makes clear in the authority of *ES v LS* [2021] EWHC 2758 the relief under the Hague Convention 1980 is of an interim, procedural nature. The proceedings are summary and oral evidence is very much the exception, rather than the rule. I did not consider this case met any test of exceptionality.

10. In relation to the second application, the mother's case, as advertised in the skeleton argument, was for the joinder of P following the authority of *Re S (Child Abduction – Joinder of Sibling – Child's Objections)* [2016] EWHC 1227. That application was not pursued at the hearing and, instead, the mother sought a brief adjournment for CAFCASS to canvass the views of P. Following the principle of *Re S,* I held that the voice of P was capable of being represented by his mother.

C Background

11. The parties are both Polish nationals and both were born in Poland. The mother is 39 and the father 37. They have known each other since childhood in Poland: the father is a friend of the mother's brother and the parties' parents live close to each other in Poland.

12. The parties are not married

13. The mother moved to England in 2006 and lived here permanently from 2006 until the parties and their two children moved to Poland in July 2021. It is the effect of that move that is one of the core disputes in the case.

14. The father arrived here in 2016 to look for work and remained until the move to Poland.

15. The mother was previously married to DM, a Polish gentleman living in England. That marriage produced a son, P, who is 10 and will turn 11 in September 2022. P was born in London and lived in England all his life until the move to Poland in July 2021. P spends time with his father once a week but does not stay overnight with him.

16. The mother and DM divorced in 2014.

17. In 2014 the mother was granted a council tenancy in a town in the Midlands (T); she has occupied that property from 2014 onwards.

18. The parties met in 2016. The mother's brother also lived in T together with his wife and children and the parties met through him. The parties' relationship began in Summer 2019 and they cohabited from that year.

19. The mother became pregnant with C in 2019. The parties discussed a possible move to Poland either when the mother was pregnant with C, according to the father, or after he was born, according to the mother. The mother says she was attracted to that idea of a move as her parents remained there but was cautious about a move because of P.

20. C was born on July 2020 in England.

21. P attended school in England. The father's unchallenged evidence was that P was having difficulties at school.

22. It is the mother's position that the parties had difficulties after July 2020 and she noted three incidents of abusive behaviour by the father to her and P:

    i) Grabbing P and dragging him to his (P's room)

    ii) Grabbing P, and his mother, by the cheek, allegedly causing bruising

    iii) Slapping P on his bare bottom.

23. The father says that, in fact, P was being very rude to him, spurred on by DM and denies being violent to P. He says he treated him like his own. It is clear, though, that the relationship between P and the father was difficult and there was a difference in treatment between P and C.

24. Notwithstanding those difficulties the parties made two important decisions in 2021.

25. First, the parties took advantage of the mother's Right to Buy discount in relation to her property and purchased it in joint names with a joint mortgage. The purchase price was c £175,000 but after discount it cost £108,000 paid by way of largely exhausting the mortgage capacities of both parties. The father was working as a lorry driver. They purchased the property in July 2021.

26. Also in July 2021, after further discussion between them, they decided to move to Poland. The parties disagree as to the basis of the move: the mother says that it was intended to be for a trial period only; that they had frequent discussions in which she said that she wished to return in the event that P did not settle and the move did not work out well. She says that she was particularly worried about what she described as the father's violent behaviour to P. The father says that there was no discussion about it being for a trial period and that it was intended to be a permanent move.

27. I return to that difficult issue in my analysis,

28. The property was rented out. The terms of the right to buy discount forbade the purchasers from renting out the property so it was done on an informal basis and one of M's friends, JP, rented it informally.

29. The parties left England on 12 July 2021 and, after a brief holiday at the seaside in Poland they moved into the father's parents' property in a village in Poland. It was a large property that could accommodate both the parties, their children and the father's parents.

30. The father's brother lives next door to his parents with his wife and two children aged 12 and 10. The father's sister lives 1.5 km away. The mother's parents also live close by.

31. The father did some renovation and decoration on the property.

32. P started school in September 2021, the same school as attended by the father's nephew and niece, the niece being in the same class.

33. The parties' relationship deteriorated rapidly. The mother states that her in laws were unpleasant to her; that she had limited autonomy and that the father was still unpleasant and abusive to P.

34. The parties separated on 28 September 2021 with the mother writing a note to the father setting out her reasons for leaving.

35. The mother, P and C moved to the mother's parents. The mother reported the father to the police in September and December 2021 but he was exonerated

36. The mother did not work and relied on state benefits. She says that she was not provided with sufficient financial assistance by the father and that he refused to pay the mortgage on the English property.

37. The father continued to work as a lorry driver but earned a fraction of what he earned in England. He worked nights.

38. From September 2021 until January 2022 the father saw C frequently at his parents' home. He says it happened 4 to 5 times a week for 5 to 6 hours and on Sunday for an extended period. The mother says the visits were shorter: two to three times a week and an extended period on Sunday.

39. On 16 January 2022 the informal tenant of the property gave the mother one month's notice of the end of her tenancy. The mother removed P and C to England on 24 January 2022 and returned to the property on 15 February 2022.

40. The mother issued an application in T County Court dated 14 February 2022 for a Child Arrangements Order and a Prohibited Steps order under the Children Act 1989. In the application form the mother was highly critical of the father accusing the father of sadism and cruelty to P and having psychopathic and sociopathic behaviour. The complaints in the documents in these proceedings were not as extreme. She suggested in her Children Act 1989 application form that contact could only be supervised if direct.

41. Prior to leaving Poland in January 2022 the mother accepts that, in fact, the father had unsupervised contact at least 3 or 4 times a week. Just prior to the final hearing in this matter the father had unsupervised contact with C in England.

42. The application under the Hague Convention is dated 10 March 2022. During these proceedings the mother was, initially, in person. Directions were made by HHJ Jakens sitting as a Deputy High Court Judge on 6 April 2022 including daily video contact.

43. Both parties have filed statements with the benefit of legal advice.

44. Prior to the final hearing the father set out a list of proposed protective measures

D The law: essential principles

45. The application is to be determined by reference to the provisions of the Hague Convention (1980)

46. Article 1 of the Convention has, as one of its objects

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

46. The wrongfulness of a removal or retention is governed by Article 3, which provides that:

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

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; 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."

47. In this case both parents have rights of custody in relation to C.

48. The substantive obligation to return is provided for by Article 12 of the Convention. This provides that

"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."

49. If I get to that stage I have to consider the defence that the mother raises in relation to the obligation to return namely under Art 13 (b) which provides

Art 13

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

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

E The law: Art 3

50. As I have stated above habitual residence is a pure issue of fact.

51. There are numerous authorities that attempt to summarise the approach. The summary of Hayden J in *Re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174 (Fam); [2016] 4 WLR 156 at [17] was subsequently approved, with one qualification, by the Court of Appeal in *Re M (Children)(Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105; [2020] 4 WLR 137. It consists of twelve points (the Court of Appeal in *Re M* having concluded that point (viii) of the thirteen points originally identified by Hayden J should be omitted). The points are as follows:

i) The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (*A v A*, adopting the European test).

ii) The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual inquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (*A v A, In re L*).

iii) In common with the other rules of jurisdiction in Council Regulation (EC) No 2201/2003 ("Brussels IIA") its meaning is "shaped in the light of the best interests of the child, in particular on the criterion of proximity". Proximity in this context means "the practical connection between the child and the country concerned": *A v A*, para 80(ii); *In re B*, para 42, applying *Mercredi v Chaffe* (Case C-497/10PPU) EU:C:2010:829; [2012] Fam 22, para 46.

iv) It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (*In re R*).

v) A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (*In re LC*). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration.

vi) Parental intention is relevant to the assessment, but not determinative (*In re L*, *In re R* and *In re B*).

vii) It will be highly unusual for a child to have no habitual residence. Usually a child lose a pre-existing habitual residence at the same time as gaining a new one (*In re B*).

viii) [Omitted]

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

x) The relevant question is whether a child has achieved *some degree* of integration in social and family environment; it is not necessary for a child to be *fully* integrated before becoming habitually resident (*In re R*) (emphasis added).

xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (article 9 of Brussels IIA envisages within three months). It is possible to acquire a new habitual residence in a single day (*A v A*; *In re B*). In the latter case Lord Wilson JSC referred (para 45) to those "*first roots*" which represent the requisite degree of integration and which a child will "*probably*" put down "*quite quickly*" following a move.

xii) Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (*In re R*).

xiii) The structure of Brussels IIA, and particularly recital (12) to the Regulation, demonstrates that it is in a child's best interests to have an habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence; As such, "if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former" (*In re B* supra)."

52. The focus of the enquiry remains, always, the habitual residence of the child. In *Re B (A Child) (Custody Rights: Habitual Residence)* Hayden J stated

> "[18] If there is one clear message emerging both from the European case law and from the Supreme Court, it is that the child is at the centre of the exercise when evaluating his or her habitual residence. This will involve a real and detailed consideration of (inter alia): the child's day to day life and experiences; family environment; interests and hobbies; friends etc and an appreciation of which adults are most important to the child. The approach must always be child driven. I emphasise this because all too frequently and this case is no exception, the statements filed focus predominantly on the adult parties. It is all too common for the court to have to drill deep for information about the child's life and routine. This should have been mined to the surface in the preparation of the case and regarded as the primary objective of the statements. I am bound to say that if the lawyers follow this approach more assiduously, I consider that the very discipline of the preparation is most likely to clarify where the child is habitually resident. I must also say that this exercise, if properly engaged with, should lead to a reduction in these inquiries in the courtroom. Habitual residence is essentially a factual issue, it ought therefore, in the overwhelming majority of cases, to be readily capable of identification by the parties."

53. Full integration into the environment of the new state is not required as the first point in Hayden J's list emphasises. That is clear from the words of Moylan LJ in In *Re B (A Child) (International Centre for Family Law, Policy and Practice intervening)* [2020] EWCA Civ 1187; [2020] 4 WLR 149.

54. In order to decide the question of habitual residence I have to conduct a balancing exercise weighing the extent of the connection between C and both the competing jurisdictions: England and Poland, adopting the approach of Black LJ in *Re J (A Child) (Finland) (Habitual Residence)* [2017] 2 FCR 542 at [62] as endorsed by Moylan LJ in *Re B (A Child) (International Centre for Family Law, Policy and Practice intervening)* [2020] EWCA Civ 1187; [2020] 4 WLR 149 at [88]:

"[62] In endorsing certain of Mr Turner's criticisms of Judge Cushing's judgment, I do not wish to be taken as suggesting that there is only one way in which to approach the making of a finding of fact about habitual residence. Habitual residence is a question of fact and the scope of the enquiry depends entirely on the particular facts of the case. What is important is that the judge demonstrates sufficiently that he or she has had in mind the factors in the old and new lives of the child, and the family, which might have a bearing on this particular child's habitual residence. The court's review of all of the relevant evidence about habitual residence cannot be allowed to become an unworkable obstacle course, through which the judge must pick his or her way by a prescribed route or risk being said to have made an unsustainable finding. In some cases it will be necessary to carry out quite a detailed analysis of the situation that the child has left; in other cases, less detail of that will be required and the judge will be able to explain shortly why that is and focus more on the circumstances in the new country."

Article 13 (b)

55. The Supreme Court examined the law in respect of the defence of harm or intolerability in *Re E (Children) (Abduction: Custody Appeal)* [2011] 2 FLR 758 at [31] – [35] inclusive. In *MB v TB (Article 13: Alleged Risk of Oppressive Litigation)* [2019] 2 FLR 866 MacDonald J at [31] summarised the applicable principles from *Re E* to be as follows:

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

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

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

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

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

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

56. MacDonald J noted too at paragraph 32 that

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

57. In *Re C (Children) (Abduction: Article 13(b))* [2019] 1 FLR 1045 Moylan LJ made clear that it is not the case that the court has to accept allegations made without conducting an assessment of the credibility or substance of the allegations:

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

58. I also remind myself that the section is referring to the harm likely to be caused to the child, not the adults. It is, however, clear from *S (A Child) (Abduction: Rights of Custody)* [2012] 2 FLR 442 that the subjective anxieties of a respondent can found an Article 13(b) defence.

59. If I find the terms of Article 13(b) are satisfied, this does not automatically lead to an order for non-return. The factual findings do not more than open the door to the exercise of discretion. That discretion has to be exercised having regard to the underlying policy of the Convention as well as all the other circumstances of the case. However, the very fact that the court has found that there is a grave risk will militate strongly in favour of exercise of discretion not to return.

60. As part of my analysis I have to scrutinise carefully the protective measures that are proposed by the father. I also have to consider whether further protective measures need to be imposed and whether she will have access to justice in Poland should she or C be subject to abusive behaviour

F The issues

61. I must therefore consider the following questions:

i) Was C habitually resident in Poland or England at the point of the alleged unlawful removal.

ii) If C were to return to Poland would it expose him to an intolerable situation or to the grave risk of physical or psychological harm? If so, should I refuse to make an order for return.

iii) In relation to the second point I have to consider the protective measures that have been proposed by the father, any further measures that may be necessary and access to justice that may have available to the mother.

G My analysis

The parties' cases on habitual residence

62. The father's case is that C had acquired habitual residence in Poland by the date of the removal to England. He says that the parties agreed that the move to Poland was intended to be permanent and, by the time of the removal on 24 January 2022 C had achieved the degree of social integration into his new family and social environment sufficient for him to be habitually resident in Poland.

63. The mother's case is that in carrying out the balancing exercise advocated by Black LJ in *Re J (A Child) (Finland) (Habitual Residence)* [2017] 2 FCR 542 at [62] and endorsed by Moylan LJ in *Re B (A Child) (International Centre for Family Law, Policy and Practice intervening)* [2020] EWCA Civ 1187 I should find that C's habitual residence remained England.

64. Given that C is in an infant an important consideration is the habitual residence of the parents with care of him, though I remind myself that it is C's habitual residence, rather than that of his parents, which should be the principal focus of my enquiry.

65. I set out the key facts below starting first with the period up to and including the move to Poland.

66. Both the parents are Polish and both come from the same town.

67. The mother moved to England from Poland in 2006. She lived in England from 2006. She married DM and divorced him in England. P was born in England and educated here until July 2021 and from January 2022 onwards.

68. The mother's brother, his wife and their two children live in the same English town as the mother. Although there was a disagreement between the mother and her sister-in-law they did see each other in England, and in Poland. All the mother's friends were here. The mother worked as a customer adviser.

69. The mother's return trips to Poland were, until July 2021, for the purpose of holidays only.

70. C was born in England. He is a dual British and Polish national. He lived all of his life in England until July 2021 when he, his parents and his brother moved to Poland. He has both a British passport (obtained in February 2021) and Polish citizenship that both parents obtained by attending together at the Polish Consulate in Manchester.

71. C was habitually resident in England prior to July 2021.

72. The parties agree that the potential move to Poland was discussed in 2019 and that the mother was attracted to the idea of child care by her parents. I also accept that P was having difficulties at school and this would have been another motivating factor for a change.

73. In July 2021 the parties resolved to leave England for Poland.

74. It is the mother's case that the father pushed for a move and that she was more reticent about it. I do not accept that the mother was "pressurised" into moving. The move required a significant amount of preparation from both parents particularly in relation to the purchase of the joint property they occupied in T as discussed below. I note that the parties had to attend together at the Polish consulate in Manchester to obtain Polish citizenship for C.

75. I find that overall the decision to move to Poland was a joint decision.

76. Prior to the move the mother attended at P's school and, she says, enquired whether his place could be kept open to be told that it could not and he would have to reapply.

77. In 2014 the mother had started renting a property in T. By reason of her occupation the mother benefited from a Right to Buy discount. The parties agreed to buy it in July 2017. It was purchased for £175,000 with a mortgage of £108,000 exhausting their mortgage capacities.

78. The mother says that the property was purchased as security in the event that the move to Poland failed. The father says it was an investment. The Right to buy rules preclude any purchased property from being rented out. To meet the mortgage payments after their departure to Poland the parties had to rent the property, fairly informally, to a friend, R. The rules also preclude a sale for 5 years after purchase.

79. The timing of the purchase is, of course, both interesting and important.

80. P's last day at school was 9 July 2021.

81. On or about 12 July 2021 the parties left for Poland. The father hired a van and transported a number of boxes of belongings. The mother says that a large number of items, were stored with family friends. The father responds that, in fact, they were intended to be sold.

82. The family remained registered at the GP surgery in England

83. That, then, is the background to the move.

84. One of the key questions is the parental intentions when they first moved to Poland. Their intentions are an important, but not determinative factor, in deciding C's habitual residence: was it intended that the move to Poland in July 2021 was permanent or that it be on a trial basis?

85. The evidence as to parental intention on this matter points both ways.

86. The mother says that the move was intended to be for a trial period only; that they had frequent discussions in which she said that she wished to return in the event that P did not settle and that she wanted to retain the property in England (which is in joint names now) for that reason. She says that she was particularly worried about what she described as the father's violent behaviour to P.

87. The father says that the move was intended to be permanent and was not on a "trial basis".

88. The supporting evidence in favour of the mother's position includes the fact that she had lived in England for 14 years and her friends and brother were here. She emphasises, in particular, the fact that, on the same month as the move in July 2021, the parties put down firm financial roots in England with the purchase of the property in T. But the father says that the property was an investment and the parties took advantage of a right to buy clause to obtain a substantial reduction.

89. The mother's case as to the preservation of a bolthole has some practical difficulties: the property was in the joint names of the parties as was the mortgage which could only be afforded with the assistance of the father's earnings.

90. The mother says, further, that she specifically asked P's school to keep his place open. She exhibited a letter dated 21 February 2021 (the date appears to be an error), which simply states that P attended the school until from 1 September 2016 until 9 July 2021 and makes no reference to any suggestion that P would return to the school in the event that any trial period in Poland failed.

91. The move to Poland in July 2021, of course, involved taking P from England, where his father lived and with whom he was having contact. I asked Ms Kumar what the mother had said about the removal to DM and was told that the mother had informed DM that the move was for a trial period only. DM has written a letter in support of the mother in these proceedings. That letter in fact, simply deals with the possibility of P returning to live in Poland. Dated 26 April 2022 it says "I do not agree to take my

child to Poland for living there permanently. I currently live and work in London supporting my child". There is no reference to the first move to Poland at all.

92. There is almost no contemporaneous documentation. There are no text messages or letters or records between the parties giving any further clarity as to their intentions.

93. The father's position is that the move was permanent. He exhibited a letter from friends after a farewell dinner when the parties were about to leave for Poland. The supporting documents from the mother's friends, whilst critical of the father in general terms, also make no reference to any the terms or basis of the removal.

94. So to help decide this matter I have to look at what actually happened in Poland to test the idea of a trial period.

95. The parties moved in July 2021. The father spent some of the Summer holiday renovating his parents' property into which they moved. That property was next door to his brother, his brother's wife and their two children aged 13 and 10. It was also just a few kilometres from the father's sister and the mother's parents.

96. The father says that the parties socialised extensively with the Polish families, he says every day, and it stands to reason that, having deliberately moved nearby, that C would have spent a lot of time with his extended paternal family.

97. P joined the same school as his father's nephew and niece and was in the same class as the father's niece. When P joined the school in Poland in September 2021 the mother nothing was said to the school about it being a trial period only.

98. Life in Poland, however, did not go as planned

99. The mother says that the main reason for her refusal to have a permanent move was to ensure that P was settled in Poland and because she was worried about the father's behaviour towards P.

100. In her statement the mother points to quite concerning incidents following the move to Poland. She speaks of

i) The father grabbing P by the cheek and hitting him on the bottom with a belt on 27 July 2021.

ii) The father slapping P on the bottom

iii) On 11 September 2021 the father pulling the duvet off the mother and demanded that she get him a thermometer and when the mother left and returned with her mother saying she was taking C, grabbed her shoulders and pushed her

iv) The father threatening to smack P on the bottom with a brush

v) The father grabbing P and forcing him in the car on 28 September 2021

101. All of these are denied by the father. The mother's sister, in fact, has written a letter to say that it is the mother who hit her son with a belt. The father's position is that it is P who behaved extremely badly towards him and lies about him.

102. The mother also says that the father's parents were unfriendly to her and treated C differently to P. The father was difficult about money.

103. On 28 September 2021 matters came to a head. Following a further argument in which the mother says that the father again grabbed P, the mother left the property with C and P and moved to her parents. She made two complaints to the police about the father's behaviour in September 2021 and December 2021 neither of which were pursued by the police.

104. That separation following the breakdown of the relationship between P and the father was in my view, the clear sign that any alleged test period was at an end. On the mother's case P was traumatised by the father's behaviour. He has been offered therapy by the school.

105. That separation cannot have meant anything other than if there were a trial period dependent upon the success of the move, then that the trial had failed.

106. On leaving the paternal grandparents' property the mother wrote a letter explaining why she left. The letter accuses the father of violence, which he denies. But it says nothing of the mother's wish to return home, or that any trial period. That would have been an obvious time to say: "we are going home, it hasn't worked here". The letter ends by saying "recently you let me down by raising your hand to strike me and my child. I loved you with all my heart but it's time to save the life that I deserve". There is no reference to a wish to return to England. I accept, though, that this would have been an emotional time for her.

107. The mother then went to her parents' house.

108. The mother says that she reported the matter to the police who attended at her mother's address on 29 September 2021 and, she says, gave the father a warning. The father denies that he received a warning and has a letter from the police stating that he had never been in trouble with the police.

109. The father attended at the maternal grandmother's on 29 September 2021 the day after separation. The father says that the mother told him that she would never stop him seeing C and not to waste money on lawyers. The mother says that the father was apologetic and asked the mother to give the relationship a chance to which she said he had to sort himself out first. The following day, she says, he attended again and asked how she wanted to deal with things, through the courts or through discussions between them and said he would support his son. That was the 30 September 2021.

110. There is then no reference in the mother's statement as to any further discussions between the parties about their relationship. There is no reference in the mother's statement to any further arguments with the father, or to any complaints about his behaviour towards her, C or P or to any discussions about the failure of the alleged trial period or a return home.

111. C remained living with his mother and brother in the maternal grandparents' house for a further period of 4 months.

112. In her statement the mother says that, following separation the father "he continued to visit C". In fact, the father saw C at least four times a week on an unsupervised basis at his parents' house; the father says six times. The location of that contact would have meant that C would also have seen his paternal grandparents and the aunt, uncle and cousins living next door.

113. The mother says that he did not want her to work, though she wanted to do so, and preferred her to look after their child, so she relied on benefits. The father's own case is that the mother made no attempt to integrate in Poland and she says she did not do so, and was isolated and unhappy. I return to that issue below.

114. In January 2022 the tenant of the English gave notice to quit. The mother told the father that the tenant was leaving and, she says, he said that the financial responsibility for the property was hers. She says he tried to come off the mortgage.

115. With the property in T soon to be unoccupied the mother brought C and P from Poland to England. Initially she lived with a friend before the property became vacant. She did not tell the father in advance. I find the timing of the departure of the mother to England was based not on the failure of any trial period but more on the availability of alternative accommodation.

116. It is right to say that the mother had initially advertised that the father had said, on being informed that the English property was soon to be unoccupied, that she should go and live there. That consent defence was not pursued, sensibly, and I do not find that the father consented to, or knew, that the mother was leaving Poland.

117. I have balanced all the factors pointing in favour of a temporary move, particularly the historical connection of the mother with England and the retention of the recently purchased property with the factors in favour of a permanent move. I pay regard, in particular, to the following

    i) The absence of supporting corroborative evidence in relation to the basis or existence of a trial period of time in Poland.

    ii) The fact that, on the mother's case, the trial would have failed as at September 2021 but that did not prompt any discussion between the parties as to a return to England after that date. The parties both remained in Poland for four months after separation and the timing of the mother's departure was prompted, primarily by availability of accommodation.

118. I have come to the finely balanced conclusion that the intention to move to Poland was a permanent one and that the property purchase in England was an investment property for the parties for the future.

119. It is, therefore, in the context of that intention to permanently relocate to Poland that I consider the extent of C's integration in Poland.

120. I accept though that the mother became increasingly unhappy and isolated in Poland and I find that, by January 2022, she clearly wanted to leave.

121. I remind myself that the test for habitual residence is, in simple terms, whether or not there is a sufficient degree of integration of C in Poland for it to have become his habitual residence as at the date immediately before his removal to England on 24 January 2022. It is "some degree" of integration rather than full integration. It is clear that C's habitual residence until leaving for Poland was England.

122. The key facts as to the C's level of integration in Poland are set out in the following paragraphs.

123. C and his family arrived in Poland in July 2021. He was twelve months old. He remained in Poland until 24 January 2022 when he was 18 months old. C spent the first two months living with his paternal grandparents and the next four months living with his maternal grandparents.

124. The return to Poland was a planned return to the town from which parents both originated and where both sets of grandparents live. Both parents are Polish. It was intended that the mother would have child-care help from grandparents.

125. Between July 2021 and September 2021 C lived in the paternal grandparents' property with his entire immediate family: his parents and his brother. The property was next door to his paternal uncle and aunt and two cousins. Within a few kilometres were his paternal aunt and his maternal grandparents

126. C, as a child between the ages of 12 months and 18 months, would have socialised with his extended family every day for the first two months of his time in Poland.

127. Thereafter from the parties' separation in September 2021 until January 2022 C spent every day with his maternal grandparents and would have spent time on at least four occasions a week, including an extended period on Sundays, with his father and paternal grandparents and possibly with other family members too.

128. C acquired Polish citizenship in August 2021 and the parties obtained a Polish birth certificate in the same month. He was registered with local doctors and saw them on a number of occasions.

129. C also retained connections with England. He is a British citizen. He remained registered with his GP in England, as did his parents and brother. His maternal uncle and family, with whom he had had enjoyed some contact remained in England. The only substantial asset owned by his parents, and his home for the first 12 months of his life was in England.

130. In determining the habitual residence of this infant I have to consider carefully the habitual residence of the mother. C had no staying contact with his father and I find the mother was the primary carer. I note that the authorities are clear that the habitual residence of a child would usually, but not always, follow that of the primary carer.

131. It is agreed between the parties that the mother did not integrate into Polish society. The father's explicitly states that in his evidence. The mother says that "emotionally

and psychologically" she could not settle there as she was so worried about the father's "violent and abusive" behaviour. I accept entirely that she was unhappy and sometime between September 2021 and January 2022 she had resolved to return to England. But I remind myself that the mother makes no complaint about the father's behaviour, other than providing insufficient funds, for that same time period.

132. I have to focus on the day to day life of C within the context, as I find, of a initial plan to move permanently to Poland. Consonant with that plan, C spent a six month period integrating into family life in Poland, living in places that were central to both the maternal and paternal families. He would have enjoyed time with members of his family, whether maternal grandparents, or paternal grandparents, uncles and aunts or cousins every day. Even after the separation of the parties he saw his father and paternal grandparents at four times a week.

133. There was no attempt by the mother to restrict C's integration into the social and family life of Poland on the basis that it was a "trial period" only. Any feeling of being unsettled experienced by his mother did not affect the time spent with the paternal family or in my view affect the quality of his integration into his social and family life in Poland.

134. I therefore conclude that C had sufficient degree of integration into social and family life in Poland for it to have been his habitual residence in January 2022. The fact that his mother had changed her mind about a permanent move to Poland some time after separation in September 2021 does not alter my finding.

135. I therefore find that C was habitually resident immediately before his removal. That removal was wrongful under Art 3.

136. I therefore have to consider the mother's defence under Art 13 (b).

Art 13 (b)

137. The mother's case in relation to Art 13 (b) is founded on two main bases:

i) Abusive behaviour towards the mother and, particularly, P.

ii) The impact of a return on P, and therefore on C.

138. The allegations made by the mother can be summarised as follows:

i) In July 2020 the father grabbed P by his clothes and dragged him to his room

ii) On 22 May 2021, the father grabbed P by his cheeks and threatened to hit him in the mouth causing bruising

iii) On 22 May 2021 the father grabbed the mother by the cheeks causing bruising;

iv) On an unspecified date the father slapped P on his bare bottom

v) On 27 July 2021, the father grabbed P by his cheeks and chin, dragged him to the bathroom and hit him with a belt over his bare bottom

vi) On the weekend of 11 September 2021, the father aggressively pulled the duvet off the mother and demanded she get him a thermometer and when the mother left and returned with her mother saying she was taking C, the father grabbed her shoulders and pushed the mother.

vii) The father threatened to smack P on the bottom with a brush

139. There are no allegations of abusive behaviour against C.

140. The mother's case in relation to abusive behaviour is supported by letters from two friends.

141. I consider that there is sufficient evidence for me not to dismiss these allegations. I take them at their highest.

142. The return of the mother and C to Poland, in practical terms, would mean a return to her parents' home. She would be living separately from the father and P would not come into contact with the father.

143. If I take those allegations of abusive behaviour at their highest I am not entirely persuaded that they fit within the definition of grave risk as defined by Art 13 (b).

144. My enquiry though, must go further. In her position statement Ms Kumar highlighted how traumatised P has been by the father's alleged behaviour towards him. She emphasised the level of C's antipathy to returning. P and C are brothers and have a strong relationship.

145. In her position statement the mother explained that she was put in an impossible position given that P had said he would not return with her should there be a summary return of C to Poland. At the hearing the mother accepted that P would have to accompany her should she return. He has no one else to look after him. It is of note that she took P to Poland in July 2021 with apparently no opposition from DM even though DM now says that he will object to his removal

146. I find that the mother will return with C and P together. She has, though, emphasised the importance of protective measures which are necessary for that return. Any separation of the siblings, or of C from his mother would, in my view, potentially lead to a grave risk of psychological harm to C or put him in an intolerable situation. So, I find that protective measures will be required to mitigate that risk.

147. The father has offered the following undertakings which I have scrutinised with care.

i) Paying for flights for the mother, C and P to return to Poland;

ii) The father and the paternal grandparents vacating their home for the mother and the children to live in until the first on notice hearing in Poland. That will not be required as the mother will return to her parents' home

iii) Undertakings not to use or threaten violence against, pester, intimidate or harass the mother.

iv) Undertakings not to communicate with the mother save to facilitate contact;

v) Undertaking to have supervised contact only with C (if required);

vi) Undertakings not to attend the mother's place of residence in Poland;

vii) To pay £100 GBP every month.

148. To those undertakings the father agreed to add the following at the hearing on request from the mother

i) Undertaking not to institute criminal proceedings against the mother on her return

ii) Extending the undertaking not to use or threaten violence against, pester, intimidate or harass to P

149. The mother was critical of the financial package too. The father now earns £600 per month, I was informed, less than 20% of his previous income of £800 a week. The mother has identified that £100 is inadequate, and assistance needs to be provided with the mortgage on the property in T.

150. I do not consider that the financial dispute between the parties is relevant to a finding in relation to Art 13 (b). There is no suggestion that the mother will be left in destitution

151. I would merely make the observation £100 per month is clearly inadequate, even given the reduced cost of living in Poland. The mother on any summary return, would have to provide for three individuals. She had sought £700 per month but I consider that the father's income should be shared equally. That is ultimately a matter for the Polish courts.

152. The father has stated that he will meet half the mortgage on the property in T. It is a joint debt. In same vein whilst reiterating the observation that the financial package is not relevant to my consideration under Art 13(b) I make the observation that the package seems unreasonable. But I have no doubt that the mother will be able to obtain swift relief in Poland. The mother also sought financial assistance for legal fees in Poland. I have no evidence that the mother will be unable to obtain swift relief for all aspects of her financial claims in Poland. I do not consider that an examination of appropriate protective measures requires me to request an extension of the undertakings to include legal fees.

153. The protective measures as offered, as augmented at the hearing, neutralise the grave risk of harm or being placed in an intolerable situation. Moreover, I remind myself that Poland is a Brussel IIA country as were until recently and is a 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Child (1996 Hague Convention) country as we still are. The premise of both those schemes is that there is an efficient functioning system enabling access to justice. I have received no evidence of any appreciable delay in applying for orders to deal with domestic abuse or financial need and no evidence that the mother would not be able to obtain access to justice for interim relief if she so sought. That absence of evidence coupled with undertakings provide appropriate protection so the any risk under Art 13

(b) is neutralised. I therefore do not have to consider the question of discretion. The undertakings have been accepted by the court and have the force of an order. Therefore, the undertakings are to be treated as necessary measures of protection under Art 11 Hague Convention 1996 which Polish authorities are required to treat as though made by court in Poland.

H Conclusion

154. I have determined that C was habitually resident in Poland immediately before his removal on 24 January 2022. His removal was therefore wrongful pursuant to Art 3.

155. I have further determined that the protective measures set out above provide mitigation to any risk under Art 13 (b) and I am clear that, with these measures in place, the Art 13 (b) defence is not satisfied in this case.

156. I am required by the terms of the Convention to make an order that C be returned to Poland forthwith. In my judgment forthwith means no later than 4pm 10 June 2022

157. That is my judgment.