Neutral Citation Number: [2022] EWHC 1216 (Fam)

Case No: FD22P00185

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/04/2022

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between :

E	**Applicant**
- and -	
D	**Respondent**

- -
- -

Mr Mark Jarman (instructed by **Freemans Solicitors**) for the **Applicant**
Ms Seema Kansal (instructed by way of Direct Access) for the **Respondent**

Hearing dates: 11 and 12 April 2022

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Approved Judgment

I direct that 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 Justice MacDonald:

INTRODUCTION

1. I am concerned with an application under the Child Abduction and Custody Act 1985 for a summary return order under the 1980 Hague Convention. The application concerns V, born in 2016 and now aged 5. The applicant mother, E, is Latvian. She seeks the summary return of V to the jurisdiction of Malta. The mother attended this hearing in person, having travelled to England for direct contact with V earlier this month, as agreed between the parties on 10 March 2022. The respondent father, D, has dual Canadian and British Citizenship. He resists the summary return of V on the grounds that V was habitually resident in England and Wales on the relevant date, and therefore his removal of V from Malta was not wrongful, that the mother consented to the removal of V from the jurisdiction of Malta and that returning V to Malta would expose him to a grave risk of physical or psychological harm or would otherwise place him in an intolerable situation.

2. It is important to note at the outset that the purpose of proceedings under the 1980 Hague Convention is to ensure, subject to a small number of narrow exceptions, the prompt return of the child to the jurisdiction of his or her habitual residence in order that that jurisdiction can determine all disputed questions of welfare. As Mostyn J noted in *B v B* [2014] EWHC 1804, the objective of the Convention is to ensure that a child who has been removed unilaterally from the country of his or her habitual residence in breach of rights of custody is returned forthwith in order that the courts in that country can decide his or her long term future. It is likewise important to recall that a decision by the court to return a child under the terms of the Convention is, no more and no less, a decision to return the child for a specific purpose and for a limited period of time pending the court of his or her habitual residence, in this case the courts of Malta, deciding the long-term welfare position.

3. At the outset of the hearing, the father applied through Ms Kandal for the court to hear oral evidence on the issue of consent. The court has before it extensive written evidence. At a time when he was a litigant in person, the father filed and served a statement running to some three hundred pages including exhibits. That statement sets out in intricate detail the basis on which the father contends that the mother consented to the retention of V in the jurisdiction of England and Wales on or around 4 January 2022. In her statement in reply, the mother provides a point by point rebuttal of the father's case. Within this context, and having regard to the rarity with which the court will accede to applications to permit oral evidence in summary proceedings under the 1980 Convention, I declined to permit oral evidence, satisfied as I was that the court had sufficient documentary evidence to determine summarily the issues before it fairly.

4. Finally, at the outset of this hearing, the father confirmed that he now did not seek to rely on a video in which he is shown questioning V about certain things the mother is alleged to have said. As I noted during the hearing, whilst this was a proper concession for the father to make, the video in question should never have been made in the first place. V is five years old. In the long experience of this court, there are few actions more corrosive to a child's emotional wellbeing than an attempt by a parent to involve the child in the adult dispute before the court. This was the inevitable effect of the father pressuring V to recount things that his mother is alleged to have said. The court hopes that the father will reflect on this behaviour and ensure that it does not happen

again. The father also indicated during the course of the hearing that he did not seek to pursue extensive allegations in his statement that V's teachers, and the wider community, in Malta were racists and acted in a discriminatory way towards V.

BACKGROUND

5. The father was born in 1974 and is now aged 48. The mother was born in 1991 and is now aged 32. The parties met in 2014 and thereafter commenced a relationship, the father having been previously married and divorced. The parents are not married. As I have noted, V was born on 17 June 2016.

6. V resided with his parents in this jurisdiction until he was 17 months old. At that point, the family moved to the jurisdiction of Canada in November 2017, where the father's parents and extended family continued to reside. The mother contends that the move to Canada was motivated by financial concerns, enabling the father to rent out his flat in London to cover the considerable mortgage on that property, the father having lost his job shortly after the purchase of the property was completed. The father likewise states that the move was to enable the parents to save money, but also so that V could spend some time with the paternal grandparents. The parents resided in Canada with V from November 2017 to May 2019.

7. The parents arrived in Malta on 14 May 2019 with V. Save for a 12-week period in Canada between June and September 2020, the parents resided in Malta with V until 21 December 2021. The parents rented a property on a long-term basis. The mother secured work and the father worked in finance from home in Malta. The father contends in his statement that he is "the Director of a successful global financial services firm", albeit it would appear from an email produced by the father at this hearing that he struggled to generate income whilst in Malta. Following the arrival of the family in Malta, the parents made applications for residence permits, which were granted by the Maltese Government. The father contends in his statement of evidence that the applications for residence cards were made in order that the family could avail themselves of free healthcare and education in Malta. V was granted a residence permit on 18 November 2020.

8. V was registered in school in Malta in 2019. Within this context, V attended nursery between 2019 to 2021, as the compulsory school age in Malta is 5 years old. V was granted a school fees exemption on 13 April 2021 This court has before it photographs of V with school friends in nursery. V commenced his Year 1 education at Primary School in September 2021. The father contends that it was always the intention of the parents that V would ultimately seek admission into a London public school, which in his statement in the private law proceedings I come to below was described as a medium to long term ambition.

9. Within the foregoing context, there is a dispute between the parents as to whether their time in Malta was intended as a permanent relocation of the family or a temporary visit. The mother contends that the decision was to relocate to Malta on a permanent basis. The mother further contends that Malta was chosen by the parents because it was an English speaking country in Europe, much closer to the maternal grandmother in Germany and which benefited from an attractive tax regime for the father's financial work as well as a good standard of living at a low cost and a temperate climate. The mother further contends that a factor was that English is used in Malta at all levels of

the education system, albeit that children are also required to take lessons in Maltese. Whilst the father acknowledges in his statement of evidence that Malta was selected for its tax arrangements, he further asserts that it was not intended as a final destination for the family and that the advent of the COVID-19 pandemic resulted in the family remaining in Malta notwithstanding it was not intended as a permanent residence.

10. Between June 2020 and September 2020 the parents and V spent 12 weeks in the jurisdiction of Canada. The father contends that this was intended to be a permanent relocation to Canada and relies on the fact that on 6 March 2020 the parents submitted a notice to terminate their tenancy of the flat in Gozo, Malta. The father further contends that the family wished to relocate from Malta to Canada from as early as April or May 2020 but that they were prevented from doing so by COVID-19 travel regulations, eventually travelling to Canada in June 2020, the father says with all their belongings. Malta reopened from lockdown in July 2020 for international travel. Against the father's account, the mother contends that the intention was always that the family would return to Malta, the trip to Canada encompassing V's holiday. The mother relies on the fact that V was granted a residence permit on 18 November 2020, *after* the family returned to Malta from Canada. Within this context, I note that the father's statement asserts that that their landlord in Gozo periodically contacted the family in Canada to enquire if "we were actually coming back". That statement is put into further context by an email produced by the father at this hearing dated 6 March 2020 and giving notice on the tenancy. That email makes no mention of permanent relocation to Canada and states as follows regarding the reasons for surrendering the lease and the parents' and the desire to retain it subject to their financial situation improving:

> "As discussed, because I have not worked for over a year, [E] and I need to serve notice to terminate our lease at [the flat] (Our money situation is not good at the moment.) If however I am able to find work (and some money), we would like to continue to stay because we enjoy living here."

11. In the event, the family did return to Malta in October 2020. The mother contends this is consistent with the fact that the trip to Canada was not intended to be a permanent relocation. Further, the family returned to the same flat in Gozo as they had left in June 2020. Again, I note that the father states that their landlord in Canada periodically contacted the family in Canada to enquire about their return. In his statement, the father contends that the motivation for the family returning to Malta was because the mother had fallen out with the paternal grandmother in Canada, that the COVID-19 rate was extremely high in London and they decided to weather the pandemic on Gozo. The father also contends that the mother was very reluctant to leave Canada, suggesting the driver of the return to Malta was primarily the father. Indeed, his statement makes clear that he was instrumental in persuading the mother to return to Malta.

12. As I have noted, the father contends that it had always been the intention of himself and the mother that V would be educated in England, the medium to long term plan being that he would be admitted to a London public school. Within this context, the father asserts that his retention of V in England in January of this year was consensual. The following matters of evidence are relevant to the evaluation of that assertion.

13. As at 9 July 2021 a contract for the purchase of a property in London in the building where the family own a flat listed the father's address as the family's flat in Gozo. On arrival in England in December 2021, the father did not take up residence in the family's

flat, which remains tenanted, bur rather occupied the adjacent property to which the 9 July 2021 contract is said to relate. The father contends that the mother left him on 5 December 2021 and that he travelled with V to England on 20 December 2021. The father says that the mother was aware that he had purchased one way tickets to London for himself and V and that the mother followed by way of a separate flight on 23 December 2021 for the purposes of visiting her family in England. The court has before it a text exchange between the mother and father concerning the tickets for the father and V and copies of the boarding passes for that flight. In addition, the court has a copy of the father's UK Passenger Locator Form for that journey (which at that time was still required by the UK Government in respect of all passengers arriving in the UK). That UK Passenger Locator Form gives the father's address as the flat in Gozo and states a return date of 31 December 2021.

14. The mother contends that the family travelled to England in December 2021 as she wished to spend time with her brother, who resides in England, and her mother who would visit from Germany. The parents visited the mother's family together in Ipswich. The mother states that it was in England that she decided that the relationship was over but expected the father and V would be returning to Malta shortly after she did, the mother contending that V was due to start school again on 6 January 2022. Within that latter context, there is no evidence before the court that any arrangements were made prior to V's departure from Malta on 20 December 2021 for him to say goodbye to school friends or friends at his football club. V's football club was not notified that he would not be returning until 22 January 2022. Further, I note that exhibited to the father's statement is an email to V's school in Malta dated 20 January 2022, a little over two weeks *after* the date on which V was due to start the new term in Malta which stated as follows:

> "It is great sadness that I inform our family has been torn apart and that V no long lives in Gozo. As a result, V will no longer be attending [school]. V misses everyone and says goodbye."

15. It transpires that prior to the father travelling from Malta to England with V, the father had registered V at a school in London. Within the context of the father's assertion that it had always been the intention of himself and the mother that V would be educated in England, and that his retention of V in England on or around 4 January of this year was consensual within that context, the contents of the form registering V at the school in London are of note. In particular, that form dated 11 December 2021 contains no mention of contact details for the mother, who is simply named without more in the document. Under, "Information About Parental Responsibility for the Child" the mother, who holds parental responsibility, is not mentioned at all by the father. Indeed, her existence is not acknowledged at all on the form. Further, on 30 December, the father unilaterally terminated the parties' tenancy in Malta without informing the mother of the same.

16. Within this context, during the course of the hearing, the father's case on consent, whilst not formally abandoned, evolved into one of consent *or* acquiescence. With respect to consent, the father relies on a text from the mother dated 29 December 2021 in which she stated ""You staying with V in London for the rest of your life and my mum goes home on the 1st". With respect to acquiescence, the father asserts that the mother was put on notice that V would be going to a new school in England, and hence staying in England, on 1 January 2022 when the father sent photographs to the mother of V in his

new school uniform. The father contends that the mother did not offer any objection nor did she seek to revoke V's enrolment in the school at this point in time. The father further relies on what he says was the maternal grandmother's approval of his course of action as indicated by her hemming the trousers on V's uniform. Within this context, the father further relies on the fact that the mother returned to Malta on 4 January 2022 without V, in the full knowledge that he had been enrolled in school in London. The mother contends that she became aware from photographs sent by the father of V in his uniform only once she had returned to Malta.

17. For her part, the mother states that she believed that the father would return to Malta with V. She relies on the fact that V was due to start school on 6 January 2022 in Malta (there being no indication prior to the father's email of 20 January 2022 that his school place in Malta had been cancelled) and that on 21 January 2022, only a little over two weeks after she had left England for Malta in the expectation that the father and V would follow, the mother had contacted the father stating her intention to return to England to collect V and return him to Malta. The fact that the mother stated this intention from as early as 21 January 2022 is clear from the father's own evidence.

18. In response to the mother's stated intention from 21 January 2022 to collect V from this jurisdiction and return him to the jurisdiction of Malta, the father issued private law proceedings under the Children Act 1989 on 7 February 2022. His application was for a child arrangements order and a prohibited steps order. Those orders were granted without notice by Deputy District Judge Grant sitting at the Central London Family Court. Whilst the order of DDJ Grant declared the court satisfied that the child was habitually resident in this jurisdiction, the father manifestly failed to discharge the duty of candour on a party seeking a without notice order. In particular, there was no mention in the father's evidence to DDJ Grant of the fact that, within the context of having left the jurisdiction of England and Wales for Canada in November 2017, V had not been in the jurisdiction since that date and had resided in Malta from May 2019 until shortly before the application under the Children Act 1989. At best, the father's application was misleading. At worst, it deliberately withheld from the Family Court material information relevant to the question of jurisdiction and, hence, relevant to the question of whether or not it was proper for the court to make orders under the Children Act 1989.

THE LAW

Habitual Residence

19. Having regard to the terms of Art 3 of the 1980 Convention, when considering an application for a return order under the 1980 Convention, it is necessary to establish whether V was habitually resident in Malta at the time of his alleged retention in the United Kingdom. The father asserts that V was not habitually resident in Malta at the time of his alleged retention England on or around 4 January 2022. The mother contends that he was. Within this context, the following legal principles fall to be applied.

20. For habitual residence to be established the residence of the child must reflect some degree of integration in a social and family environment (*Area of Freedom, Security and Justice) (C-532/01)* [2009] 2 FLR 1 and *Re A (Jurisdiction: Return of Child)* [2014] 1 AC 1). Whether there is some degree of integration by the child in a social and family

environment is a question of fact to be determined by the national court, taking into account all the circumstances specific to the individual case. Habitual residence must be established on the basis of all the circumstances specific to the individual case (*Case C-523/07* [2010] Fam 42). With respect to those circumstances, in *Re A (Area of Freedom, Security and Justice)* and *Mercredi v Chaffe* [2011] 2 FLR 515, the Court of Justice of the European Union identified the following, non-exhaustive, list of circumstances that might be relevant in a given case:

i) Duration, regularity and conditions for the stay in the country in question.

ii) Reasons for the parents move to and the stay in the jurisdiction in question.

iii) The child's nationality.

iv) The place and conditions of attendance at school.

v) The child's linguistic knowledge.

vi) The family and social relationships the child has.

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

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

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

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

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

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

v) It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the

integration of the child into the environment rather than a mere measurement of the time a child spends there.

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

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

viii) The requisite degree of integration can, in certain circumstances, develop quite quickly. It is possible to acquire a new habitual residence in a single day. There is no requirement that the child should have been resident in the country in question for a particular period of time. The deeper the child's integration in the old state, probably the less fast his or her achievement of the requisite degree of integration in the new state. Likewise, the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his or her achievement of that requisite degree. In circumstances where all of the central members of the child's life in the old state to have moved with him or her, probably the faster his or her achievement of habitual residence. Conversely, were any of the central family members have remained behind and thus represent for the child a continuing link with the old state, probably the less fast his or her achievement of habitual residence.

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

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

22. Restrictions imposed by the CCOVID-19 pandemic do not prevent the acquisition of habitual residence (see *JM v RM (Abduction: Retention: Acquiescence)* [2021] EWHC 315 (Fam)).

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

Consent and Acquiescence

24. The father also relies on the consent and acquiescence exception in Art 13 of the 1980 Hague Convention.

25. As to the question of consent, in *Re P-J (Abduction: Habitual Residence: Consent)* [2009] 2 FLR 1051, [2009] EWCA Civ 588 the Court of Appeal made clear that consent to the removal of the child must be given in *clear and unequivocal terms*. Further, consent can be given to the removal at some future of unspecified time, or upon the happening of some future event, but such advance consent must still be operative and in force at the time of the actual removal. Further, in respect of the latter, 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.

26. Within this context, the Court of Appeal made clear in *Re P-J* that 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. Within this context, 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. The burden of proving the consent rests on him or her who asserts it and, in this respect, the inquiry is inevitably fact specific and the facts and circumstances will vary infinitely from case to case. 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? Within this context, at [57] Lord Wilson held that:

> "[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 Art 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."

27. With respect to the question of acquiescence, the crucial difference between consent and acquiescence relates to timing. Acquiescence must follow the abduction rather than precede it. The leading authority is the decision of the House of Lords in *Re H (Minors)(Abduction: Acquiescence)* [1998] AC 72. The following principles were therein articulated:

    i) The court is concerned primarily not with the other parent's perception of the applicant's conduct, but with the question of whether the applicant acquiesced in fact. It is a question of the actual subjective intention of the wronged parent, not the outside world's perception of her intention.

    ii) The subject intention of the wronged parent is a question of fact for the judge to determine in all the circumstances of the case, the burden of proof being on the applicant.

iii) In the process of the fact-finding operation to ascertain the subjective intention, the court will attach more weight to contemporaneous words and actions of the applicant than to bare assertions by the applicant of evidence of intention.

iv) Where the words and actions of the applicant clearly and unequivocally show, and have led the other parent to believe that the wronged parent clearly is not asserting or going to assert his right to the summary return of the child and are inconsistent with such a return, justice requires that the applicant be held to have acquiesced.

28. Within the foregoing context, acquiescence is unlikely to be established where the applicant does not know of the removal or retention or does not know it is wrongful (see *Re S (Abduction: Acquiescence)* [1998] 2 FLR 115. Absence of taking court action does not necessarily indicate acquiescence (see *Re F (Minor)(Child Abduction)* [1992] 1 FLR 548). Delay can be indicative of acquiescence but the authorities in which delay has been held to constitute acquiescence tend to deal with delays of almost a year (see for example *W v W (Child Abduction: Acquiescence)* [1993] 1 FLR 211 and *Re D (Abduction: Acquiescence)* [1999] 1 FLR 36).

Harm

29. The father further relies on the harm exception set out in Art 13b of the 1980 Convention. The law in respect of the defence of harm or intolerability under Art 13(b) was examined and clarified by the Supreme Court in *Re E (Children)(Abduction: Custody Appeal)* [2012] 1 AC 144. The applicable principles may be summarised as follows:

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

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

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

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

v) Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be

put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child's immediate future because the need for protection may persist.

vi) Where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation would become intolerable, in principle, such anxieties can found the defence under Art 13(b).

30. In *Re E*, the Supreme Court made clear that in examining whether the exception in Art 13(b) has been made out, the court is required to evaluate the evidence against the civil standard of proof, namely the ordinary balance of probabilities whilst being mindful of the limitations involved in the summary nature of the Convention process. Within the context of this tension between the need to evaluate the evidence against the civil standard of proof and the summary nature of the proceedings, the Supreme Court further made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as grounding the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm can be identified.

31. The methodology articulated in *Re E* forms part of the court's general process of reasoning in its appraisal of the exception under Art 13(b) (see *Re S (A Child)(Abduction: Rights of Custody)* [2012] 2 WLR 721), and this process will include evaluation of the evidence before the court in a manner commensurate with the summary nature of the proceedings. Within this context, the assumptions made with respect to the maximum level of risk must be reasoned and reasonable assumptions based on an evaluation that includes consideration of the relevant admissible evidence that is before the court, albeit an evaluation that is undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention.

32. In determining whether protective measures, including those available in the requesting State beyond the protective measures proposed by one or both parties, can meet the level of risk reasonably assumed to exist on the evidence, the following principles can be drawn from the recent Court of Appeal decisions concerning protective measures in *Re P (A Child) (Abduction: Consideration of Evidence)* [2018] 4 WLR 16, *Re C (Children) (Abduction: Article 13(b))* [2019] 1 FLR 1045 and *Re S (A Child) (Hague Convention 1980: Return to Third State)* [2019] 2 FLR 194:

i) The court must examine in concrete terms the situation that would face a child on a return being ordered. If the court considers that it has insufficient information to answer these questions, it should adjourn the hearing to enable more detailed evidence to be obtained.

ii) In deciding what weight can be placed on undertakings as a protective measure, the court has to take into account the extent to which they are likely to be

effective both in terms of compliance and in terms of the consequences, including remedies, in the absence of compliance.

iii) The issue is the effectiveness of the undertaking in question as a protective measure, which issue is not confined solely to the enforceability of the undertaking.

iv) There is a need for caution when relying on undertakings as a protective measure and there should not be a too ready acceptance of undertakings which are not enforceable in the courts of the requesting State.

v) There is a distinction to be drawn between the practical arrangements for the child's return and measures designed or relied on to protect the children from an Art 13(b) risk. The efficacy of the latter will need to be addressed with care.

vi) The more weight placed by the court on the protective nature of the measures in question when determining the application, the greater the scrutiny required in respect of their efficacy.

33. With respect to undertakings, what is therefore required is not simply an indication of what undertakings are offered by the left behind parent as protective measures, but sufficient evidence as to extent to which those undertakings will be effective in providing the protection they are offered up to provide.

DISCUSSION

34. Having regard to the evidence before the court and the comprehensive submissions of counsel for the mother and counsel for the father, I am satisfied that as at the date of V's retention by the father on or about 4 January 2022, V was habitually resident in the jurisdiction of Malta for the purposes of Art 3 of the 1980 Convention. On the evidence before the court, I am satisfied that the mother neither consented nor acquiesced to the retention of V in the jurisdiction of England and Wales. In these circumstances, I am satisfied that the father's retention of V in the jurisdiction of England and Wales was wrongful. I am likewise satisfied that returning V to the jurisdiction of Malta would not result in a grave risk of physical or psychological harm to V or would otherwise place him in an intolerable situation. In the circumstances, I am required to summarily return V to the jurisdiction of Malta. My reasons for so deciding are as follows.

Habitual Residence

35. I am satisfied on the balance of probabilities that at the time the father retained V in the jurisdiction of England and Wales V was, as a matter of fact, habitually resident in Malta, having on that date some degree of integration in a social and family environment in that jurisdiction.

36. Within the context of the application before the court being required to be dealt with by way of a summary process, the authorities make it clear that it is not necessary for this court to make a searching and microscopic enquiry into the question of habitual residence. The essential task of the court is to analyse the situation of V as at the date he was retained by his father, on or around 4 January 2022. Whilst the father submits

that by the date of his *application* V's habitual residence had changed, in fact the relevant date is the date of retention on or around 4 January 2021.

37. When considering the question of habitual residence, it is *V's* habitual residence which is in question, and hence *his* level of integration in a social and family environment which is under consideration by the court determining the question of habitual residence. In so far as the position of the parents bear on this question, the authorities make it clear that, in circumstances where the social and family environment of an infant or young child is shared with those on whom she is dependent, it is necessary to assess the integration of that person or persons (usually the parent or parents) in the social and family environment of the country concerned, in this case Malta. Within this context, I am not able to accept the submission of the father that the parents prior situations in other jurisdictions, and in particular in England, of themselves impact heavily on the analysis of the question of whether V was habitually resident in Malta on or around 4 January 2022.

38. That is not to say that V's nationality is irrelevant to the question of his habitual residence. V was born in the United Kingdom and holds British Citizenship. By themselves, both those factors might tend to support a claim of habitual residence in the jurisdiction of England and Wales. However, in this case, as at 4 January 2022 V also had, or was entitled to, Canadian citizenship and a Canadian passport. In addition, he had had a Maltese residence card, as had his parents, from November 2020, obtained after the family returned to Malta following their trip to Canada. On the mother's evidence, V is also entitled to a Latvian passport. Within this context, I am satisfied that the fact of V's British Citizenship and possession of a United Kingdom passport carries less weight against the factors in this case demonstrating a degree of integration in a social and family environment in Malta, where V, who holds joint British and Canadian citizenship had a legal right of abode by reason of his Residence Card.

39. It is also not to say that, in circumstances where V is a young child who shared his social and family environment in Malta with the parents, the position of the parents in Malta as at 4 January 2022 is irrelevant. As at that date, and as indicated by his UK Passenger Locator Form, the father's address remained the flat in Gozo. His company remained registered in Gozo. Both the mother and father retained Maltese residency by virtue of the residence cards that they had obtained in November 2020. Whilst the father contends that by this time, and following the breakdown of the parents' relationship, a consensual plan to move V to England to be educated had been implemented, involving him moving back to London with V, for reasons I will come to, I am satisfied that that is not the case. In any event, by 4 January 2022 the mother and father had only been absent from Malta for a period of 14 days and 12 days respectively. Within this context, and having regard to the matters set out earlier in this paragraph, it is plain that as of 4 January 2022 both parents retained a substantial degree of social and family integration in Malta in terms of residence, accommodation and work. This conclusion is further supported by the reasons for the parents' move to and the stay in the jurisdiction of Malta. Whilst parental intention is not determinative and there is no requirement that there be an intention on the part of one or both parents to reside in the country in question permanently or indefinitely, in my judgment it is relevant that the first reason given by the father for moving to Malta is the question of the tax advantages, the father going on to register his business in that jurisdiction. As I have noted, the parents acquired a property by way of a long term let and secured a

right of residence in Malta. There was, in this context, a significant amount of adult pre-planning of the move. None of these matters are supportive of the father's case that Malta represented nothing more than a temporary stop on the way to New Zealand, which would have been the destination but for the family becoming stranded by the COVID-19 pandemic. Rather, I am satisfied that the evidence points to a considered decision to relocate the family and the family business to Malta for an extended period. By contrast, whilst the father seeks to portray the move to England as, likewise, part of a carefully pre-planned consensual design to have V educated in England, for reasons I will come to, I am satisfied that this was not the case.

40. Within that context, save for a period of 12 weeks or so in Canada from June 2020 to September 2020, V had resided in Malta consistently since May 2019, latterly with a right of residency under the Residence Card obtained in November 2020 upon the family returning to Malta from Canada, that latter action in my judgment indicating a degree of intention to remain in Malta in the longer term. Further, I am satisfied that the trip to Canada in 2020 was not, as the father contends, an attempt at permanent relocation to that jurisdiction. Rather, I am satisfied that as the mother contends, the trip was more akin to a holiday. This latter conclusion is demonstrated both by the fact that the father's claim that the family intended to relocate to Canada as early as March or April 2020 is flatly contradicted by the email he sent to his landlord on 6 March 2020. As I have noted, that email makes no mention of permanent relocation to Canada and makes clear the desire of the parents to retain the flat if that proves possible having regard to their financial situation, the father making it clear that the family "enjoy living here." In these circumstances, I am not satisfied that the trip to Canada acted materially to reduce V's degree of integration in his social and family environment in Malta.

41. No party sought to dispute the fact that between May 2019 and December 2021 V attended nursery in Malta. Whilst, as I will come to, it is the father's case that it was always the consensual plan of the parents that V would be educated in England, the parents arranged for V to commence his Year 1 education in Malta in September 2021. Within this context, the evidence before the court tends to suggest that V had developed good relationships at school. The father's email dated 22 January 2002 makes clear that V missed everyone at his school. The father no longer pursues the allegations of racism and discrimination that he levelled at V's school, which in any event are inconsistent with the contents of the aforementioned email. Whilst the father's statement worked hard to give the impression that V was excluded at school by reason of his not speaking Maltese, this is misleading. It is the case that V does not speak Maltese but, as the father conceded through counsel at the hearing, V was taught in English at school, albeit he was also required to learn Maltese. It is also clear that V was involved in extra-curricular activities, in particular a football club, and developed significant social relationships, as evidenced by the photographs contained in the bundle. The father enrolled V in catechism classes with the local Parish Church in Gozo on 28 August 2021 and V regularly attended those classes until 21 December 2021. V was registered at the local health centre and was able to access free health care, as the father's points out, by virtue of the parents being registered as resident card holders. Each of these matters is indicative of V having some degree of integration in a social and family environment as at the date the father retained V on or around 4 January 2022. Whilst it may be the case that certain of V's personal items remained in England at the property in London or in storage in London, in my judgment this factor does not

act to detract from the degree of social and familial integration V had achieved in Malta at the time he was retained in England by the father.

42. Within this context, I am satisfied as a matter of fact that, as at 4 January 2022, V had some degree of family and social integration in Malta such that he was habitually resident in that jurisdiction at the time he was retained by his father. Further, whilst as I have noted V was born in England and is a British Citizen, and whilst he continued to have maternal extended family and some friends in that country, prior to December 2021, V had not been in England since November 2017, when he was 17 months old. He had never attended school in that country nor had he engaged in other social activities in that country prior to 21 December 2021. Within this context, the degree of social and family integration that V had with England was limited at the point of his arrival on 21 December 2021. When the father returned with V to England, it was not to the family home, which remained tenanted, but rather to another flat in the same building.

43. In these circumstances, I am satisfied that it cannot be said, when set against his degree of social and family integration in Malta at the time he left that jurisdiction, the period between his arrival in the jurisdiction of England and Wales on 21 December 2022 and his retention by the father on or around 4 January 2022, that V had developed a sufficient degree of social and family integration for him to lose his habitual residence in Malta and gain habitual residence in the jurisdiction of England and Wales, the deeper the child's integration in the old state, the less fast his or her achievement of the requisite degree of integration in the new state. Whilst Ms Kansal sought on behalf of the father to rely on the decision in *Re G-E (Children) (Hague Convention 1980: Repudiatory Retention and Habitual Residence)* [2019] 2 FLR 17 as authority for the proposition that prior time in the jurisdiction in which the child is retained can act to change habitual residence swiftly, that case is plainly distinguishable on its facts.

44. Whilst the father attempts a percentage breakdown of the time V spent in various jurisdictions, his calculations are inaccurate because they include the period prior to the birth of V. A breakdown of the periods *V* has spent in each of the jurisdictions he has visited in fact demonstrates that he has spent the majority of his young life in Malta, spending the first 17 months of his life in the United Kingdom, then in Canada from November 2017 to May 2019 and thereafter in Malta until December 2021 save for a 12 week period in Canada. Most importantly however, the authorities make clear that 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.

45. Having regard to the matters set out above, I am entirely satisfied that at the date the father retained V in the jurisdiction of England and Wales, on or around 4 January 2022, V was habitually resident in the jurisdiction of Malta for the purposes of Art 3 of the 1980 Hague Convention. The father does not dispute that at this time the mother was exercising rights of custody in respect of V for the purposes of Art 3 of the Convention.

Consent and Acquiescence

46. I am not satisfied that it can be demonstrated on the evidence that the mother consented or acquiesced to the retention of V in the jurisdiction of England and Wales.

47. The father's case in respect of consent centres on his contention that from 2019 it was the joint intention of the parents that V would be educated at a London public school, the father exhibiting to his statement emails enquiring during that year when an application could be made for V's admission (one of which I note, on 20 May 2019, enquired whether it would be possible for V to go to a school on Malta prior to arriving at the London public school). Within this context, the father argued that the retention of V in England and his commencement at school there was part of a plan agreed by the mother.

48. However, this contention is undermined by a number of matters. V commenced his Year 1 schooling in Malta in September 2021. If the agreed plan had been to educate V in England, it is difficult to understand why V commenced his Year 1 schooling in September 2021 only to be moved part way through the year in December 2021. Rather, those facts speak, in my judgment, to unilateral action on the part of the father. This is reinforced by the fact that when the father applied to admit V to school in England on 11 December 2021 he made no mention of the mother on that application form save by way of a single reference to her name with no contact details. The only reasonable inference from that action is that the father was seeking to hide from mother his plans to enrol V in school in London by preventing that school being able to contact the mother. The mother did not know the father was making arrangements for V to be registered with St Thomas of Canterbury Primary School as early as 11 December 2021. It is not clear why this school permitted registration without making enquiries of the mother. The fact that the father was acting covertly in respect of his intention to retain V in England and to place him in school there is further reinforced by the fact that no goodbyes were organised by the father for V with either his school friends or his friends at his football club. This is evident from the fact that the father only informed V's school in Malta on 22 January 2022 that V would not be returning to school in Malta.

49. I am likewise satisfied that the father did not make the mother aware that he had purchased one way tickets to London for himself and V. The father was solely responsible for purchasing the plane tickets for himself and V, the mother by that time having left the family home. Within this context, at no point does the father contend that he told the mother orally that he had booked one way tickets. Rather, he relies in his statement on the assertion that "I sent [E] a copy of our *one-way* tickets on WhatsApp on 24 November 2021, she wrote back '***Amazing***'" (emphasis in the original). However, there is nothing on the face of that message to indicate the tickets were one way. The father makes no mention of that fact in describing the tickets. He did not in fact forward the ticket to the mother but rather a copy of one of the boarding passes, which also did not indicate that the ticket to London was a one way ticket. Within this context, the mother's response of "amazing" is more consistent with being impressed at the price he had secured for what she thought was a return ticket than an acknowledgment of the fact the tickets are one way. As I have already noted, on his UK Passenger Locator Form, the father gave his address, and that of V, as the flat in Gozo.

50. Within the foregoing context, I am satisfied that as at 21 December 2021 the mother was not aware that the father intended to retain V in England following their departure from Malta to that jurisdiction. In those circumstances, by reason of the clandestine actions of the father, the mother was not equipped to consent to that retention prior to

V travelling to England with the father, let alone that there was clear and unequivocal evidence that she did so.

51. It is the case that at a time when both parents were in England, and the mother had made plain her view that the relationship was over, that the mother texted the father on 29 December 2021 stating, "You staying with V in London for the rest of your life and my mum goes home on the 1st" However, that single text, sent during the course of an argument about whether the maternal grandmother would get to see V cannot, in my judgment, be taken to be clear and unequivocal consent to the retention of V in the jurisdiction of England and Wales on or about 4 January 2022. The same must be said about other statements the father alleges that the mother made, in particular on 18 November 2021 that "Alone I will be in the new flat" and, at some point on 20 to 23 November 2021 during an argument in the office bedroom, that "Go ahead and take V if that is all I have to do to get rid of you". Having regard to the need for a clear and unequivocal statement of consent, none of these alleged utterances are in my judgment sufficient. In all the circumstances, I am not satisfied that the father has demonstrated that the mother consented to V's retention in England on or around 4 January 2022.

52. Within the foregoing context, and as I have noted, during the course of the hearing the father's case evolved from concentrating on consent to concentrating acquiescence. Within this context, the father submitted that, following the retention of V in England on or around 4 January 2022, the mother acquiesced to that retention. In this regard, the father relies on the fact that the mother raised no objections when she was sent photographs of V in his new school uniform on 1 January 2022 and thereafter left London on 4 January 2022 without V. As I have noted, the mother contends that she was not aware that the father had booked only one way tickets for himself and V and believed that they would be following her back to Malta in time for V to commence his school term on 6 January 2022. As I have noted, no steps were taken by the father to notify V's school until 22 January 2022 that he would not in fact be returning. The mother likewise contends that she did not see the photographs of V in his new school uniform until she was back in Malta. However, most importantly, it is plain on the father's own evidence that by 21 January 2022, only some 17 days after V's retention in England, the mother was making clear that she was going to return to England in order to collect V and take him back to Malta. These actions, set out in detail in the father's statement, are entirely inconsistent with a subjective intention on the part of the mother to acquiesce to the retention of V in England and Wales. Whilst the father contends that the mother only took this approach after being informed that the Central London Family Court had made orders in respect of V preventing the mother from removing him from England and ordering that he live with his father, the mother's immediate reaction on being notified of such orders itself supports the contention that the mother had not developed a subjective intention to acquiesce to the retention of V in the jurisdiction of England and Wales subsequent to 4 January 2022.

53. Within the foregoing context, I am satisfied that there is no proper basis for concluding on the evidence before the court that, as a matter of fact, the mother either consented to the retention of V in the jurisdiction of England and Wales on or around 4 January 2022 or that the mother had the subjective intention to acquiesce to that retention.

Art 13(b)

54. As I have noted, the father did not seek to pursue his allegation that V experienced "severe racism and discrimination at school, sports and in the community" by reason of him being "a fair skinned foreign child", an allegation that the mother disputed as deplorable. Within that context, the father's contentions regarding Art 13(b) centred on his assertion that the mother does not have adequate accommodation for V, does not have the financial means to support V and that the mother fails properly to supervise V, drinks in his presence and "is 'laissez-fair' with V on mountainous cliff tops in Malta" and is immature and inattentive. The father also sought to depict the mother as immoral, engaging in affairs with "multiple men".

55. There is simply no evidence to support the father's contention that V is not physically safe in the care of the mother. There is no history of police or social services involvement. Beyond one incident where V is said to have been at risk of running into the road, the father fails to particularise any specific incidents where the mother has neglected V's physical safety. Likewise, beyond the father's florid accounts of the mother's alleged personal life, there is no evidence before the court that the mother presents a risk of emotional harm to V.

56. The mother has produced at this hearing a signed tenancy agreement, which indicates she has paid the deposit on that property. The mother remains in employment and can meet the outgoings on that property for herself and V. I pause to note that during the course of the hearing the father indicated that, unless V returns to Malta with him, he will not contribute to the cost of accommodation for V. The evidence before the court indicates that V, who is now a non-EU citizen following the departure of the United Kingdom from the EU can reside in Malta without his father under the Maltese residency rules, subject to certain steps being taken as confirmed by the Maltese authorities in an email to the father. In any event, V is entitled to a Latvian passport which will make him, once again, an EU citizen.

57. Within the foregoing context, in this case a reasoned and reasonable assessment of the evidence leads to the clear conclusion that the criteria set out in Art 13(b) are not met. There is no evidence before the court capable of demonstrating that to return V to the jurisdiction of Malta would result in a grave risk of physical or psychological harm to V or would otherwise place him in an intolerable situation. Within this context, I do not need to go on to consider protective measures, being satisfied as I am on the evidence before the court that there is no grave risk of harm or intolerable situation that requires to be protected against. The case advanced by the father comes nowhere near satisfying the high threshold set by Art 13(b) of the 1980 Hague Convention.

CONCLUSION

58. In her well structured and comprehensive submissions, Ms Kandal said all that reasonably could be said in support of the father's case. However, for the reasons set out above, I am satisfied that as at the date of V's retention by the father on or about 4 January 2022, V was habitually resident in the jurisdiction of Malta for the purposes of Art 3 of the 1980 Convention. On the evidence before the court, I am satisfied that the mother neither consented nor acquiesced to the retention of V in the jurisdiction of England and Wales. In these circumstances, I am satisfied that the father's retention of V in the jurisdiction of England and Wales was wrongful. I am likewise satisfied that

returning V to the jurisdiction of Malta would not result in a grave risk of physical or psychological harm to V or would otherwise place him in an intolerable situation. In the circumstances, I am required to return V to the jurisdiction of Malta unless one of the exceptions relied on by the father is made out.

59. In the circumstances, I make a return order pursuant to Art 12 of the 1980 Hague Convention. I will give permission to the parties to disclose a copy of this judgment to any Maltese court engaged with proceedings concerning V's future welfare. Finally, I am further satisfied that the return order I make should be implemented by way of V returning to the jurisdiction of Malta with his mother on 17 April 2022.

60. The father is at present trying to purchase further a property in this jurisdiction and argues his life is centred in this jurisdiction. Within this context, his assertion that he would travel with V were the court to make a return order came only during the hearing, the father's previous position being that he would not return to Malta. Further, and within the context of his having wrongfully retained V in England and Wales, the father has a link with a third jurisdiction, namely Canada, and a Canadian passport.

61. I am further concerned about the father's attitude towards the mother and certain of the father's conduct towards V, as made plain in the evidence he has filed with the court. As I have noted, whilst withdrawn as evidence in these proceedings, the father is seen in the video in question attempting to extract evidence from V for use in these proceedings by questioning him quite inappropriately about things the mother is alleged to have said. Within this context, in these proceedings the father has proceeded to file a lengthy and repetitive statement which, in parts, is little more than a calculated and deeply unpleasant character assassination of the mother. By way of example, and in circumstances where he did not make any serious attempt to establish any of the allegations for the purposes of Art 13(b), the father asserted without any cogent evidence that the mother is "disrespectful and unbecoming", "a delinquent mother", that she "acquired a destructive propensity to party with transient foreign hotel workers", that she "indulged in continuous excessive partying coupled with extra-marital affairs" such that she "lost interest in motherhood", that "V's future and long-term education…ranks far behind [her] personal desires" and that the mother has had "extramarital affairs with multiple men…of illicit repute, often involving drug use". On the face of it, the father has publicised what he considers to be the mother's responsibility for the family breakdown to parents involved with V's football club and to his school.

62. Within the foregoing context, I am satisfied that it should be the mother who accompanies V back to the jurisdiction of Malta and that it should be the mother with whom V resides pending the first hearing of any proceedings in Malta. Counsel will be invited to draw the order accordingly.

63. That is my judgment.