



Neutral Citation Number: [2023] EWHC 1182 (Fam)

Case No: FD22P00737

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 18/05/2023

**Before :**

**MRS JUSTICE THEIS DBE**

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**Between :**

|  |                |   |
|--|----------------|---|
|  | <b>C</b>       | <b><u>Applicant</u></b>                 |
|  | <b>- and -</b> |   |
|  | <b>M</b>       | <b><u>1<sup>st</sup> Respondent</u></b> |
|  | <b>- and -</b> |   |
|  | <b>X</b>       | <b><u>2<sup>nd</sup> Respondent</u></b> |

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**Ms Ruth Kirby KC and Ms Cameron-Douglas (instructed by The International Family Law Group LLP) for the Applicant**

**Mr Mark Jarman KC and Mr Mani Basi (instructed by Dawson Cornwell ) for the 1<sup>st</sup> Respondent**

**Ms Charlotte Baker (instructed by Goodman Ray) for the 2<sup>nd</sup> Respondent**

Hearing dates: 4 and 5 May 2023

Judgment date: 18 May 2023

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**Approved Judgment**

This judgment was handed down at 2.00PM on 18<sup>th</sup> May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE THEIS DBE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. 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.

**Mrs Justice Theis DBE :**

**Introduction**

1. The court is concerned with the father's application under the 1980 Hague Convention ('the Convention') for the return of X (12 years old) and Y (5 years old) to the jurisdiction of Mauritius.
2. The children were unilaterally removed by the mother from Mauritius to England in early October 2022. The father promptly notified the Central Authority and these proceedings were commenced in November 2022.
3. Following a two day contested hearing on 24 and 25 January 2023 this court made an order on 3 February 2023 for the children's return to Mauritius by 10 March 2023, subject to certain protective measures being in place. The judgment setting out the reasons for that conclusion is reported as C v M [2023] EWHC 208 (Fam).
4. On 8 March 2023 an application was made on behalf of X for disclosure of the court bundle, which was granted on the same day. Further directions were made on 9 March 2023, including a stay on the return order until 4 April 2023. A hearing was listed on 16 March 2023 to consider whether X should be joined as a party and any further directions on X's application under Family Procedure Rules 2010 ('FPR') Part 12.52A to set aside the return order dated 3 February 2023.
5. X was joined as a party on 16 March 2023 and directions made for the court to determine X's set aside application on 4 April 2023.
6. The set aside application was granted on 4 April 2023 and directions made for this hearing, listed for two days on 4 and 5 May 2023.
7. The father's application for permission to appeal the 4 April 2023 set aside order was refused by Baker LJ on 28 April 2023.
8. The first day of the hearing on 4 May 2023 was largely ineffective, as the court was required to deal with a number of preliminary issues, including the father's application for an adjournment. That application was refused and directions were made for the father to file a further statement that evening with responses from the other parties the following morning, the court heard submissions on 5 May 2023 and reserved judgment.
9. The position of the parties can be summarised as follows. The father seeks an order for both children to be returned to Mauritius. That is opposed by the mother and X, relying on Article 13 defences of child's objections and grave risk of harm. There is no issue between the parties regarding X's objections, they part company on the exercise of the court's discretion as to whether to order a return.
10. If the court reaches the conclusion that X should not return to Mauritius the father seeks an order that Y is returned without X. That is opposed by the mother and X who rely on Article 13b defence of grave risk of harm.

**Relevant background**

11. This is set out in the 3 February 2023 judgment and will only be summarised here.
12. The parents are both dual British and Mauritian nationals. They met in England in 2000, married here in 2003 and both children were born here.
13. In 2019 they decided to leave the jurisdiction and went to Mauritius. They stayed with the mother's family. According to the mother and X it was a firm plan to move to Singapore, going via Mauritius to renew her passport; whereas the father states the plans were less certain regarding the move to Singapore and how long they would stay in Mauritius. Events overtook with the Covid travel restrictions and then the parents separation in November 2020 when the father left to live with his mother, who also lived in Mauritius.
14. After the parents separated the father saw Y every weekend for staying contact. X only participated in indirect video contact, which stopped in about November 2021.
15. In June 2022 the father instigated court procedures in Mauritius to seek contact with X. Both parties attended court-based mediation where they agreed when the father came to collect Y he would see X for 30 minutes. That arrangement was not successful and, according to the father, he was planning to restore the matter back to court when the mother unilaterally removed the children from Mauritius.
16. The first the father knew about the removal of the children was when he received a letter from the mother's English solicitors dated 7 October 2022. He received a further letter on 11 October 2022, informing him that the mother had issued divorce proceedings in this jurisdiction. The father has issued divorce proceedings in Mauritius and there is an issue regarding jurisdiction for those proceedings.
17. The father contacted the Central Authority in October 2022 and these proceedings were issued in November 2022. Following directions made on 29 November 2022 the matter was listed for a two day hearing on 24 and 25 January 2023. In addition to the written evidence from the parties a single joint expert, Ms Varuna Bunwaree, ('SJE') had been instructed to report regarding the enforcement of any protective measure in Mauritius. Also, there was a report from Ms Callaghan, from the Cafcass High Court team, regarding the children's wishes. Ms Callaghan had met with the children in early January. The only oral evidence at the January 2023 hearing was from Ms Callaghan.
18. For the reasons set out in the judgment dated 3 February 2023, the court found the Article 13 b grave risk of harm defence was not established, X's objections were established '*on balance*' but for the reasons set out in paragraph 40 the court exercised its discretion to order that the children should return to Mauritius by 10 March 2023.
19. The order set out the protective measures that needed to be in place. Those included the father paying for the mother and children to return, paying six months maintenance in advance, providing financial support for accommodation for the mother and children, medical insurance and securing an '*exequatur*', in effect registering the order made here in Mauritius.

20. According to the witness statement from X's head teacher, Ms H, X asked to speak to her on 7 February. She described X as being visibly distressed and shaking and asked Ms H for help, including if she could find someone who protects children and showed her a handwritten letter addressed to the NSPCC. Ms H asked if X had spoken to her mother and reports X saying her mother does not understand and cannot protect her. X described hearing her mother on the phone crying, looking for properties in Mauritius and when she asked her mother if everything was okay she responded it was fine and not to worry. Ms H considers X had not been told about any order for return and X had worked it out by overhearing conversations. X informed Ms H she had google searched how she could be helped and represented in court. As the Safeguarding & Child Protection Officer at the school, Ms H states she made a referral to the local authority and sought further information from the Head Teachers Forum. It was through that forum that she was given the name of Ms Broadley and made contact with her. Ms H confirms the school has continued to support X and states X is *'petrified of going back to Mauritius. She does not believe her mother really understands how strongly she feels and how scared she is.'*
21. According to the witness statement of X's solicitor, Ms Broadley, dated 8 March 2023 she was contacted by X's headteacher, Ms H, who expressed her concern regarding X's wellbeing and X's wish to be represented within the proceedings. Ms Broadley spoke to X three times on the telephone prior to her first statement.
22. In that first statement Ms Broadley states that she agrees with Ms Callaghan assessment as to X's maturity and that she did not present as having been coached by her mother. Ms Broadley continues in her first statement *'Indeed when I initially spoke to [X] it was clear to me that her mother had not discussed any aspect of the proceedings with her. [X] did not have any idea what has happened in the course of these proceedings, what had been ordered or why. She knew little about the Hague Convention and the process. Whilst this is to the mother's credit, the resultant effect is that [X] feels completely shut out of decisions made about her and feels that she has not been heard properly.'* Ms Broadley set out her experience in representing children in international child abduction proceedings and her assessment of X's competence to instruct her. She agrees with Ms Callaghan's that X's maturity is commensurate with her age and her headteacher's description of X's maturity as *'sophisticated maturity beyond her years'*. In Ms Broadley's view *'It is the earnestness and strength in which she conveys her wishes and feelings and why she feels the way she does and that it is consistent with what she believes is right for her which satisfies me without doubt that [X] is competent to instruct me. [X] is a naturally guarded person when she speaks but the more you speak to her the more she opens up and conveys how she feels with quiet conviction...In my view, her level of maturity and level of understanding and her ability to reflect upon in a mature manner her short, medium and long term interests, demonstrates to me a very quietly determined and capable young person.'*
23. In her second statement, dated 15 March 2023, after Ms Broadley had the opportunity to consider the trial bundle, the note of Ms Callaghan's evidence and further discussions with X she states that X *'instructs me in a very assured, compelling, clear and heartfelt terms that she will not go back to Mauritius. This is not said in a churlish or disrespectful way. [X] carries a gentle and sweet sincerity in how she expresses herself in her belief that that she has not been heard effectively in these*

*proceedings as she struggles with how and why the court would order her return to Mauritius, she would say, a return which would take her away from a country which she strongly identifies as her home.’ Ms Broadley considers X has the intelligence to comprehend the Hague process and a court order being made, it is at an emotional level with which X ‘struggles’. Ms Broadley distinguishes X from other children who have sought her advice in similar circumstances. Ms Broadley considers ‘There is immense anguish and confusion which [X] appears to have internalised, dealing with it by deflecting away from facing those feelings and memories’. Ms Broadley stated she was not surprised by Ms Callaghan’s evidence that X kept deflecting from talking about Mauritius save in a superficial way, and considers it may be a coping mechanism for X, coupled with the fact that she only met Ms Callaghan once and Y was present. As Ms Broadley sets out ‘For whatever reason, the depth and extent of [X’s] wishes and feelings and her objection to a return to Mauritius was not evident when the matter came before this court for final determination; but it is clearly evident now...Her anxiety and anguish at the prospect of her going back has clearly heightened and changed with her suffering sleepless nights, crying every day...The strength of her feeling caused her to research being represented by her own solicitor and seeking help from her teacher, teaching assistant and head teacher. She felt unable to turn to her mother and in fact she currently refuses to talk to her mother... When I suggested her mother may have been shielding her from court proceedings she refused to accept this describing times when she has felt the need to protect her mother from her father’s, at times’ violent and abusive behaviour. Whilst she instructs me that she loves her mother dearly she sadly does not have any confidence in her mother’s ability to protect her and her brother from harm...She herself describes being the focus of his anger and outbursts and later he behaves normally as if nothing has happened which also frightens her. She will not return to Mauritius and refuses to feel that sense of fear and dread again.’*

24. In her second statement, Ms Broadley gives an overview from X’s perspective of life in England, relocation to Singapore, the time spent in Mauritius from September 2019 and in England from October 2022.
25. Ms Broadley states ‘[X] does not believe that her mother realises how distressing a prospect of returning to Mauritius is for her. [X] is really very upset with her mother for keeping things from her and genuinely does not believe that she will protect her from harm in Mauritius and this is why she has turned to her school for support. She cries as she thinks that neither of her parents really care for her and [Y]. This is her genuine feeling and said with some force.’
26. In the previous judgment, I summarised the written evidence from the parents and have reconsidered that evidence again. In their most recent statements they have each emphasised their respective position. The father considers X’s desire to remain in the UK is based on a preference which has come about due to her aligning herself with her mother’s wishes, as Ms Callaghan referred to. He considers X’s wishes have hardened due to the outcome of the earlier hearing. He states ‘The only place where we call home is Mauritius, and this is where issues in relation to [X’s] and [Y’s] welfare ought to be determined.’ The father sets out in his statement the positive evidence about X and Y’s ‘caring and nurturing’ life in Mauritius, relying on the positive school reports for X in 2020, 2021 and 2022. The father denies X’s account of her alleged fear of him, stating her fear has no reflection in reality, as he only had

very limited contact with her since November 2020. He says he has done what he can to try and maintain his relationship with her and places the responsibility for the difficulties on the mother. His view is the mother has exposed X to her own views about the father. The father denies the allegations of abusive behaviour, although recognises that X was present during arguments between her parents which he places responsibility for on the mother. He takes issue with many aspects of the account given by X in Ms Broadley's statement about her father and the time in Mauritius. He considers he and X had a loving relationship prior to the parties separation in November 2020 and he has produced a number of videos to demonstrate that. His fear is if X does not return to Mauritius that his relationship with X will be irreparably damaged and details the more recent difficulties he has experienced in maintaining contact with X and Y. Although the final details regarding the protective measures are now in place the father describes the mother placing obstacles to those being put in place. The father considers X will comply with any orders made by the court, stating it is within the mother's gift to ensure X returns to Mauritius, he considers '*...the circumstances since the making of the return order have not changed in any way and all relevant issues have been considered by this court.*' and that X should not become '*overburdened and conflicted by being allowed to decide her own fate in this manner*'.

27. In her most recent statement the mother describes the change in X's position, her deterioration since she found out about the return order and her concern that the headteacher had made a referral to social services. It appears the mother did not tell X about the court's decision at the time, for the reasons she gives, now feels she is not trusted by X and is blamed by the father for the situation they are now in. The change in X has had a direct impact on her relationship with her mother and brother, her behaviour within the home and her attendance at school. The mother fears for the emotional consequences for X if the set aside application is not successful.
28. A recital in the order dated 4 April 2023 records '*The father does not seek to separate the children (X and Y) in the event the court determines that X should not be returned to Mauritius pursuant to the 1980 Hague Convention. In light of the father's position the court determined that an addendum Cafcass report was not necessary for the purpose of the re-hearing on 4 May 2023*'. The order included a direction for the father to notify the other parties and the court if he sought any witnesses to give oral evidence 28 April 2023.
29. Due to the delay in the filing of the addendum report from the SJE the parties proposed a revised timetable for the father's revised protective measures by 4pm 28 April 2023, the responses from the mother and X by 4pm 2 May 2023 and skeleton arguments and the bundle to be lodged by 3 May 2023.
30. The father was granted an extension to his public funding certificate to appeal the order dated 4 April 2023. His application for permission to appeal was lodged with the Court of Appeal on 25 April 2023. The other parties were not informed of these steps until 27 April 2023, when the application for permission to appeal had been issued. The grounds of appeal were drafted by counsel who had represented the father on 4 April 2023, Mr Gupta K.C. and Ms Cameron Douglas. The father's skeleton argument was lodged with the Court of Appeal just after 1pm on 28 April 2023 with a footnote in the skeleton argument referring to the hearing the following week, the need for urgency and if that was not possible an application to adjourn the re-trial will

be made. At just after 5pm on 28 April 2023 the Court of Appeal wrote to the father's solicitors stating that unless and until a stay is granted '*it should be assumed the hearing next week is going ahead*'. At just before 6pm the parties were notified Baker LJ had refused permission to appeal, with reasons to follow. The reasons were sent to the parties on 2 May 2023.

31. Ms Kirby K.C. was sent the papers on 29 April 2023 when she was abroad, travelling back on 3 May 2023.
32. In accordance with the order dated 4 April 2023 skeleton arguments were due to be filed by X and the mother by 12 noon on 2 May 2023, with the father's due to be filed by 11am on 3 May 2023.
33. On the 3 May 2023 both Ms Kirby and Ms Baker separately emailed the court to explain why their skeletons are likely to be filed late. Ms Kirby states in her email at just after 11 am '*Just trying to figure out who is attending the hearing tomorrow and what the revised plan is – given the lateness of evidence/absence of a CAFCASS addendum report and the shortness of time before tomorrow morning*'. Later that day the father's solicitors emailed Ms Callaghan asking whether she would be available to attend the hearing the following day. She responded saying she was not available to do that.
34. Mr Jarman K.C. sent his skeleton argument to the court and the parties at just after 12 noon and Ms Baker at 2pm on 3 May 2023. Just after 4pm Ms Broadley informed the court and the parties that X would like to attend the hearing. The father's solicitors filed a supplemental bundle at just before 5pm and sent a further email to Ms Callaghan at just before 5.30 pm stating that her attendance will be required the following day. Just before 6pm Ms Cameron-Douglas, on behalf of the father, sent an email to the parties stating that if an order is made that the children do not return to Mauritius it is the father's view '*that it will bring an end to his relationship with both children. In those circumstances, his position now is that he will seek an order that [Y] return to Mauritius in the even that the court exercises its discretion and allows [X] to remain*'. The father's unapproved skeleton was circulated to the parties at just after 10 pm on 3 May 2023 and the approved version sent to the court at just after 8am on 4 May 2023.
35. The father's solicitors continued to press Ms Callaghan regarding her attendance at the hearing. Her manager responded stating that she was not available and could not see any order requiring her to attend. The manager was correct. A direction had been made on 4 April 2023 requiring the father to notify the parties and the court by 28 April 2023 if he was seeking any witnesses to give oral evidence, the father did not give any such notification to the parties.
36. Prior to the hearing starting on 4 May 2023 the father did not seek an adjournment, he sought clarification as to X and the mother's position if the court ordered Y to be returned and not X. At the start of the hearing Ms Kirby raised this together with whether X should be present in court. Following a brief adjournment to enable the various issues to be discussed, Ms Cameron-Douglas sent an email to the court and the parties asking for more time, stating that the mother is unable to say whether she will return with Y if that were the court's decision and X cannot contemplate a return

to Mauritius but also cannot contemplate separation from Y. The parties asked for some additional time.

37. When the parties returned into court at 12.15 pm X remained outside court and Ms Kirby made an application for an adjournment, permission to file further evidence, a direction for a further Cafcass report and a three day listing in about seven weeks. There were further email exchanges over the short adjournment between the father's solicitors and Cafcass regarding the timing for filing of further reports. In response Cafcass raised the issue as to whether a full welfare report was being requested.
38. Just before 2pm Ms Kirby provided an update to the court and the parties regarding the father's position in an email. Having considered the option of withdrawing his Hague application and having a full welfare enquiry in this jurisdiction '*although superficially attractive to him to speed up what may turn into 18 months of litigation in two jurisdictions, he regrets he cannot today say that he believes a full welfare enquiry in this jurisdiction is the right option for the children...*'. The email confirms the father will be pursuing his application for an adjournment and, if granted, will be seeking an order for him to spend time with the children in this jurisdiction pending the adjourned hearing.
39. The adjournment application was opposed by the mother and X. Having heard the submissions from all parties I refused the application and directed the father to file any additional evidence he wanted to put before the court regarding his change in position with any protective measures he wished the court to consider, and updating position statement from the parties. Those documents were all filed and served prior to the start of the second day of the hearing on 5 May 2023.
40. Although X remained at court on 4 May 2023 she did not come back into court and attended school on 5 May 2023.
41. The SJE additional report provided information regarding the provisions for participation of children in proceedings in Mauritius. Although there is no equivalent for a child to be separately represented in proceedings, the child can make an application to be heard by a judge. It is then a matter for the judge as to how that is done and who is present. It is possible for either parent to object to any participation by the child, the views of the child are not binding but must be taken into consideration. The report also sets out the position regarding allegations of domestic abuse. Whilst there is no equivalent to PD12J in Mauritius the allegations are relevant to applications for injunctive relief or in relation to determining contact arrangements as between adults and children.
42. The father's additional statement sets out his reasons for the late change in position regarding separation of the children. He said there was not much time at the hearing on 4 April 2023 to properly consider this. Following the decision to pursue an appeal on 17 April 2023 he said the focus of efforts related to that and the next time he considered the issue was in discussions with his legal team during the afternoon 3 May 2023. Due to his fears that if the children are not returned he may not see them again for many years, he regarding his revised position as the least worst option. He considers this course would '*open the possibility of the court ordering [Y] to come home and his mother and [X] returning voluntarily*'. He stated if the court did order [Y] to be returned he believes '*that it is unlikely the children will be separated. I*



*know that [X] cares very much for [Y] and I believe that she will return to Mauritius, as will [the mother], if [Y] is ordered to return'. As regards protective measures, he said he agrees much of what X sets out. He is unable to provide insurance for her eye condition but undertakes to pay privately for any treatment she needs. By virtue of his changed position he is not able to agree not to seek the separation of the children. He confirms he has arrangements in place for counselling.*

43. The father's statement repeats the difficulties he has had in maintaining his contact with Y and compares the position now to the arrangements when Y was in Mauritius. He says this is what founds his concerns about the impact on his relationship with the children if they remain here. As he observes, if the mother can do this whilst under the spotlight of the court he is not confident any arrangements will be adhered to.
44. Turning to the arrangements for Y if he returned to Mauritius. The father confirms there is still a place at Northfields School where X attended and the parents planned for Y to attend from January 2023. Y could stay with him in his mother's apartment, which is familiar to him from when he spent time with the father prior to October 2022. He sets out how he could be available for Y as the hours he works would fit in with that due to the time difference with the South Asian markets. He would encourage and support any arrangements for Y to have contact with his mother and X, including funding the costs of flights. If the court does order Y's return he suggests that takes place in the May half term and he would come to the UK to spend up to 10 days with Y, supported if required. He states *'This timing would also give [X] and the [mother] the opportunity should they wish in the summer holidays once this school year finishes, giving [X] the opportunity to start a new school year [in Mauritius]'*.

### **Legal framework**

45. There is no issue that the court set out the relevant principles in the February 2023 judgment at paragraphs 27 – 30. The relevant paragraphs are repeated below for convenience.

“29. As regards Article 13 b the leading decisions are *Re E (Children)(Abduction: Custody Appeal)* [2012] 1 AC 144 and *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10. In *Re E* Baroness Hale made clear at paragraphs 31- 37:

- (i) The burden of proof lies with the person opposing the return [32].”
- (ii) No need for elaboration or gloss to the reference to ‘grave risk of harm’; by its terms it is of ‘restricted application’ [31] the risk must be grave [33].”
- (iii) There was recognition that the term ‘physical or psychological harm’ are not qualified but they ‘gain colour’ from the alternative ‘or otherwise’ placed ‘in an intolerable situation’. Whilst accepting a child will have to put up with a certain amount of ‘rough and tumble, discomfort and distress’ there are some things that it is not reasonable to expect them to tolerate. These include physical or psychological abuse or neglect and can include exposure to such behaviour [34].
- (iv) The analysis under article 13 b is looking to the future; the situation there would be if the child is returned to the home country which is not necessarily

the same as being returned to the person seeking the child's return. The situation the child will face on return depends on the protective measures that can be put in place [35].

- (v) Where the allegations relied upon are contested Baroness Hale stated as follows [36] *'Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues'*. As has been later stated by Moylan LJ in *Re C (Children)(Abduction: Article 13b)* [2019] 1 FLR 1045 this does not mean no evaluative assessment of the allegations could or should be undertaken, with due caution being factored in when conducting a paper evaluation.

30. Turning to the issue regarding child's objections the leading judgment is *Re M (Children)(Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] 2 FLR 1074 helpfully summarised by MacDonald J in *H v K (Return Order)* [2017] EWHC 1141 (Fam) at paragraphs 46 – 47:

*"46. The law on the 'child's objection' defence under Art 13 of the Convention is comprehensively set out in the judgment of Black LJ in Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)[2015] 2 FLR 1074 (and endorsed by the Court of Appeal in Re F (Child's Objections) [2015] EWCA Civ 1022) and I have regard to the clear guidance given in that case. In summary, the position is as follows:*

*(i) The gateway stage should be confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.*

*(ii) Whether a child objects is a question of fact. The child's views have to amount to an objection before Art 13 will be satisfied. An objection in this context is to be contrasted with a preference or wish.*

*(iii) The objections of the child are not determinative of the outcome but rather give rise to a discretion. Once that discretion arises, the discretion is at large. The child's views are one factor to take into account at the discretion stage.*

*(iv) There is a relatively low threshold requirement in relation to the objections defence, the obligation on the court is to 'take account' of the child's views, nothing more.*

*At the discretion stage there is no exhaustive list of factors to be considered. The court should have regard to welfare considerations, in so far as it is possible to take a*

*view about them on the limited evidence available. The court must give weight to Convention considerations and at all times bear in mind that the Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly".*

*47. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are authentically the child's own or the product of the influence of the abducting parent, the extent to which they coincide or at odds with other considerations which are relevant to the child's welfare, as well as the general Convention considerations (Re M [2007] 1 AC 619)."*

46. I have also been referred to the observations of Baroness Hale in *Re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 6019 where she stated '*no one intended that an instrument designed to secure the protection of children from the harmful effects of international child abduction should itself be turned into an instrument of harm*'. Also, the observations of Henderson LJ in *Re GP (A Child)* [2018] 4 WLR 16 [61] '*In order to decide whether this test [Art 13b] was satisfied, it was in my opinion necessary for the judge to examine in concrete terms the situation that would actually face [the child] on her return to Italy...'*

### **Submissions**

47. It is accepted that under Article 3 of the Hague Convention the children's habitual residence was in Mauritius at the relevant time. Under Article 12 this requires the children to be returned to Mauritius subject to any defence being established. The burden is on X and the mother to establish any of the defences under Article 13.
48. There is no issue between the parties that X objects to a return and has attained the age and degree of maturity at which it is appropriate to take account of her views in accordance with Article 13. Ms Baker submits the evidence demonstrates X's objections are stronger than when the court considered the matter in January, whereas Ms Kirby states it is really no more than further examples of the evidence the court considered in January.
49. The parties agree the court first needs to consider the discretion in the context of X's objections. Subject to the outcome of that the court will then need to consider the Article 13 b defence and, if established, re-visit the exercise of the court's discretion.
50. Ms Baker submits the objections by X are of a different quality and nature than those considered in January. Whilst Ms Broadley agrees with the assessment of X's maturity being commensurate with her age the court now has the additional evidence from Ms H and the evidence in Ms Broadley's statements. Ms Broadley describes X informing her she will not return to Mauritius in '*very assured, compelling and heartfelt terms*'. She describes her manner as being quiet and determined. The impact on X of the previous order has caused X serious stress and anxiety such that she requires counselling and Ms H referred the matter to the local authority. The evidence provides details of what X's own experiences have been from her perspective. The mother details in her statement the difficulties that have occurred in their relationship. Ms Baker refutes any suggestion by the father that this is being orchestrated by the

mother and relies on the evidence from Ms H and Ms Broadley about the way they were approached, and Ms Broadley's view about whether X has been coached by the mother.

51. As regards the exercise of the courts discretion regarding X's objections, Ms Baker relies upon the strength of X's objections as being '*at the high end of the scale. They are rational and reasonable in their nature, not directed towards superficial matters, and patently very strong.*' X is *Gillick* competent and all the professionals consider they are authentically her own, not as the result of any coaching by the mother. The desire to remain here and her objections to return to Mauritius are consistent with her overall welfare interests, understandable bearing in mind the period of time she had spent living here prior to 2019 and the circumstances in Mauritius from her perspective. Ms Baker recognises the court must have regard to the powerful policy considerations in this case but when balanced with the other matters she submits the discretion should be exercised so that X is not ordered to return to Mauritius.
52. If the court does exercise its discretion so as not to order X's return, Ms Baker submits the court needs to consider Y's position. She submits for the children to be separated would result in each of them being placed in an intolerable situation and they would be at grave risk of psychological harm. This is due to the fact that they have never lived separately, their mother has always been their main carer and the father has never had the full time care of Y, other than for limited periods of time. The impact of the harm and the level of intolerability cannot be ameliorated by the protective measures offered by the father. The level and nature of the contact proposed by the father is entirely different to what Y has known to date and is likely to have long term impact on Y and his relationship with both his mother and X. She submits the threshold is established in relation to both Y and X and when the court revisits the discretion, whilst factoring in the important policy considerations, the balance falls clearly in favour of the court refusing to order Y's return.
53. Mr Jarman supports Ms Baker's submissions. Since the hearing in January when the court considered X did object to a return to Mauritius her objections have strengthened and been demonstrated by the action X has taken. He relies on the following matters in the evidence. The deterioration in X's emotional presentation, writing the letter to the NSPCC and her position as set out in the statements from Ms Broadley which clearly describe X's objections and the impact on her if a return is ordered. This is not a situation of parental influence as X considers she needs to protect her mother from the father and does not feel the mother can protect her and Y. Ms H sets out the extent of X's distress and the mother describes the impact this is having on her relationship with X.
54. Mr Jarman submits that when it comes to the exercise of discretion the court needs to carefully consider the policy considerations but in the '*light of the nature, depth and strength*' of X's objections the welfare considerations such as her settled accommodation here, existing roots in the UK, expressed wishes and feelings and her father's ability to return to the UK to visit, or for longer, means these considerations require the court to exercise its discretion and refuse the application for X's return.
55. He submits that X's position also establishes the Article 13 b defence due to the impact on X of returning her against her wishes and considering her particular vulnerability. Any proceedings in Mauritius are likely to take many years and there

are more limited provisions for her engagement in those proceedings, both of which is likely to have a further detrimental impact on her. He submits that this defence is met in relation to both children. In relation to Y the father's revised position regarding separation will place Y in a position that he has not experienced before, namely living separately from his mother and sister, with them remaining in another jurisdiction and Y with a parent who has never had his full time care previously. Such separation, he submits, is likely to put both children at grave risk of psychological harm and place them in an intolerable situation. In relation to X he submits to *'the return of this articulate intelligent 12 year old would have a significant impact on her physical and mental health and such a return would put her at risk of grave risk of harm. In any event any return to Mauritius would be intolerable, against her clearly stated wishes and feelings, unable to trust either her mother or father...In light of the evidence of [X's] physical and mental deterioration in England since 3 February, the court can infer the impact a further return order would have on [X]'*.

56. Mr Jarman submits the proposed protective measures in the circumstances now presented to the court regarding X, and if her return is not ordered, as proposed by the father in relation to Y, are not sufficient to reduce that harm.
57. Ms Kirby submits the court reached the correct decision on 3 February 2023 and the court's judgment needs only to be *'amplified in order to make a further return order'*. She submits X's involvement in these proceedings has caused her further emotional harm, in addition to that caused by her mother in removing the children in October 2022 and has only served to cause further delay and a *'a misplaced hope and expectation that her involvement will change the position'*.
58. She contends this case has all the hallmarks of unnecessary involvement of children in litigation. In January X made her position perfectly clear in her meeting with Ms Callaghan that she preferred living here and did not want to see or spend time with her father. This was referred to by the court in the February judgment at paragraphs 22 – 24. The only thing that has changed is evidence of just how strongly X feels about those matters, she has aligned herself with her mother and, Ms Kirby submits, *'seeks to re-run M's case but from her perspective'*.
59. Ms Kirby accepts the real issue is whether the court's discretion should be exercised in a different way. She resists that relying on the following matters. X has been under the influence of her mother with no contact with her father for a number of months, in circumstances where the mother has not supported the continued relationship between the children and their father. The Hague Convention policy factor is important in the circumstance of this case, where the mother took the action she did, an application could have been made in Mauritius and there is no evidence that the actions taken by the mother were child focussed. Her actions disrupted the relationship between the children and the father and disrupted the children's schooling. The aggravating features before, during and since the court's decision in February, including the poor handling of the way X was informed of the courts decision, the inability of the mother to support ongoing contact with the long term consequences of that and how credible it is that X was *'used by M as a last ditch effort to set aside/not enforce the order that had been made correctly on the law'*. The father is confident that the mother and X would not want to be separated from Y and they would return to Mauritius if a return order was made in relation to Y, he considers *'it would be worth the short term separation from his sister and his mother for his longer term interests of having a*

*relationship with both of his parents*'. The most recent complaint of domestic abuse was more than a year prior to the abduction and that related to allegations about the father allegedly having shouted at X. The mother's own complaints of domestic abuse were two years prior to the abduction. The protective measures now in place manage any risks relied upon. There remains, Ms Kirby submits, great uncertainty about the children's position in this jurisdiction, including their accommodation, the distance from their school and which school X will be attending in September when she moves to year 7.

60. Mr Kirby emphasises the circumstances that point to the mother being behind X's actions, she submits X is a *'girl with a brief'*, her position in the circumstances where she had not seen her father for 16 months means her position that her mother cannot protect her and her father is a danger *'were neither rational nor recent'*. She contrasts the presentation to Ms H on 7 February 2023 with the that during the interview with Ms Callaghan in early January. Ms Kirby submits it is likely the mother has worked X *'into a frenzy'*. X first spoke to Ms Broadley on 16 February.
61. Ms Kirby takes issue with any suggestion that X's disrupted education may have impacted on X's ability to communicate with confidence with Ms Callaghan. In her report she referred to X as being a *'very articulate child'* who moved from being anxious at first to *'confidently expressing her views'*. She was able to express her views about how she felt about staying in England and did not want to return to Mauritius, mainly because of her father who she described to Ms Callaghan as a *'bully'* and made allegations of domestic abuse from over two years prior to her interview with Ms Callaghan in January 2023. Ms Kirby suggests the increase in X's objections since 3 February 2023 is likely to have been influenced by her mother as she now is unable, as she could to Ms Callaghan, say anything positive about her school or life in Mauritius and now suggests her mother cannot protect her, which she did not mention to Ms Callaghan. Ms Kirby suggests that the mother may have instructed X to go to her school rather than take her straight to a solicitor. She submits the court should not be swayed by X stating she will not return to Mauritius, it is likely, bearing in mind the wider evidence about X, that she would comply with any order.

### **Discussion and decision**

62. On 4 April 2023 I determined there had been a fundamental change in the circumstances which was more than just a variation of matters known at the time of the hearing in January 2023, due to the different quality and nature of the evidence than the court had at the January hearing regarding X's wishes
63. There is now no issue between the parties that X does object to returning to Mauritius. The central issue is what, if any, impact that has on the way the court exercises its discretion. In the February 2023 judgment at paragraph 40 the rationale that underpinned the decision to exercise it to order X's return are set out. They will need to be re-evaluated and considered in the light of all the evidence the court now has, bearing in mind the summary nature of this application.
64. Having considered all the evidence, I have reached the conclusion that the court should exercise its discretion and not order X's return. It is recognised that the court will need to re-evaluate the exercise of its discretion in the light of any conclusions

reached under Article 13 b. In relation to X's objections this is for the following reasons:

- (1) The nature and quality of X's objections have changed, they remain aligned to her views about her father and her wish to remain here but now include wider considerations about her views about Mauritius and her parents' ability to protect her. Whilst it is right the protective arrangements are comprehensive and include providing for her to remain in her mother's care, in their own accommodation, with a framework for managing any contact with the father, the impact of a return on X, in the light of the updating evidence, will be significant.
- (2) I have carefully considered whether the mother has orchestrated recent events, as the father seeks me to conclude, and am alive to the timeline of the views being expressed after a return order has been made. Whilst I can't rule out X being influenced by her mother's position I accept the evidence of Ms H and Ms Broadley regarding the level of X's distress they have witnessed, X's own account of the impact on her and Ms Broadley's experience in dealing with these cases together with her assessment that X's views are her own and they are clear, strong and compelling. X has remained resolute she will not return to Mauritius. The detailed account given by Ms Broadley in her statement is balanced and compelling. The court has to be alive to the risks of the mother's influence, as was Ms Broadley, whose assessment that X was not being coached is accepted.
- (3) I have carefully considered the points made forcefully by Ms Kirby, relying in particular of the contemporaneous evidence of X's progress at the school in Mauritius, which undermines how X views that time now but I have to weigh in the balance the detailed statements from Ms Broadley regarding X's views now and her stated position that she will not return to Mauritius. This is a summary process and whilst there may be an element of X's view of the past regarding her schooling being viewed through the prism of her strongly held views now, the views X currently holds remain the reality for her and they need to be given considerable weight by the court bearing mind her age and maturity.
- (4) Y's position needs to be re-considered in the light of this change. Prior to October 2022 he was seeing his father each weekend and had done so for nearly two years following the parents' separation in November 2020. He has always lived with X, and his mother has been his main carer, certainly since November 2020. If X remains here the court is going to need to separately consider his situation in the light of that as well as balancing the risks to X if Y is ordered to return on his own.
- (5) Whilst it is right the protective measures that are now in place do provide a significant package of support, including a return to a school that is familiar and provision for separate accommodation which replicates the position prior to October 2022, but those now have to be viewed in the light of X's views, in particular her view that neither of her parents have been able to protect her and Y. Ms Kirby submits if this is right it leaves X in a more vulnerable position here where there is no, or limited, wider family support. What is more apparent now is the impact on X of what she reports she observed regarding the alleged abusive behaviour between her parents and what she alleges was directed towards her. Whilst the father in his written evidence denies any such behaviour and there has

been not findings about that behaviour, he does not demonstrate any recognition, from X's perspective, of the impact she reports such behaviour has had on her.

- (6) I have weighed in the balance the evidence about the availability of the court process in Mauritius to determine any application by the mother to return to this jurisdiction, the arrangements for X's participation in those proceedings, and the father's agreement not to object to such participation by X. However, I need to weigh in the balance the length of time such an application would take (1-2 years, if not more) and the detrimental impact that delay would have on X.
- (7) The policy considerations in this case are strong, in particular the unilateral removal, the way it was done, including the timing for the children and the consequences for them in terms of their education and the impact on their relationship with their father, particularly for Y.
- (8) Whilst the policy considerations remain strong, in the light of the evidence the court now has they are, in my judgment, outweighed by the other evidence and considerations in this case. The court is very conscious of the points made by Ms Kirby about the involvement of children in these cases. Each case is fact specific and the court is alive to the risks of children becoming involved at the instigation of one parent or another. I am satisfied this is not one of those cases relying, in particular, on the evidence of Ms H and Ms Broadley. For whatever reason, whether due to Y's presence or needing more time to feel able to open up, X was unable to convey the strength of her objections in her meeting with Ms Callaghan. This is no criticism of Ms Callaghan but more likely due to X's particular circumstances and her characteristics. I have carefully considered whether X's position is being orchestrated by the mother and whilst I can't rule out the mother's position having some impact on X the evidence, when looked as a whole, supports X's wishes as reported by Ms H and Ms Broadley as being X's own wishes and feelings that are genuinely felt. There would, in my judgment, be significant emotional consequences for X if despite those clearly expressed wishes the court nevertheless made a return order. It would be more than the uncertainties, turmoil *'rough and tumble, discomfort and distress'* involved in everyday life, and would cross the line where, in the words of Baroness Hale, would then risk the Hague Convention being turned into an *'instrument of harm'*.
65. Turning now to consider the Article 13 b defence. This is relied upon by X and the mother in different ways. In relation to X, Ms Baker submits if the court reaches the conclusion it has in relation to her, it would put Y at grave risk of emotional harm and/or place him in an intolerable situation if he was ordered to return on his own. In addition, Ms Baker submits, the defence also applies to X as any order for her to return, in the light of the court's conclusions about her wishes will also put her at grave risk of emotional harm and/or place her in an intolerable situation. X's position is supported by the mother. Ms Kirby submits the court needs to carefully balance the impact on the father's relationship with the children if they remain here, together with his assessment that it is unlikely the mother and X will want to be separated from Y, so are very likely to return to Mauritius voluntarily. The father contends the measures that he can put in place, as outlined in his most recent statement, provide a clear known framework for Y to return to and will help reduce any consequences for him of being separated from his mother and sister, which the father considers is only likely to be short term.



66. Having carefully considered the wide canvas of evidence and the submissions of the parties, I have reached the conclusion that in the circumstances that exists now the Article 13 b defence is established and that the protective measures proposed will not prevent the children being put at grave risk of harm and/or be placed in an intolerable situation. Y has only ever lived with his sister, there is no suggestion they have other than a close sibling relationship. His mother has been his main carer, for over half his life, since November 2020. Whilst it is right he had regular weekly contact with his father until October 2022, which has effectively ceased following the unilateral removal by his mother, to remove him from those who have cared for him and been an integral part of his life will put him at grave risk of emotional harm and/or place him in an intolerable situation. I recognise he has an existing relationship with his father, knows his paternal grandmother and will have some familiarity with the surroundings the father proposes, however those factors would not, in my judgment, manage the risks arising from the separation from his mother and sister. I do not share the confidence the father has that the mother and X will follow and, in any event, that uncertainty alone is likely to increase the grave risk of harm to Y.
67. In relation to X, whilst I have reached my conclusion under the objections defence I consider the Article 13 b defence applies to her, as well. To order her to return against her express wishes, where the court has accepted that evidence, would undoubtedly place her at grave risk of harm. The protective measures proposed, which are largely in place, would provide some reduction in that risk but in my judgment, in the circumstances as they exists now, are now not sufficient that she would not remain at grave risk of harm.
68. Having reached the conclusion the threshold for this defence is met in relation to both children the court needs to re-evaluate and re-visit the exercise of its discretion in the round, considering all the evidence the court has, avoiding a too rigid approach.
69. Having stood back again and balanced the relevant considerations, I have reached the conclusion that the court should exercise its discretion and not order X and Y to return to Mauritius for the following reasons:
- (1) The policy considerations remain an important factor for the reasons outlined above. This is particularly so due to the circumstances of the abduction and the impact that has had on the father's ability to maintain any relationship with the children, in particular Y.
  - (2) However, the court has to balance that with the wider welfare considerations for the children.
  - (3) In relation to X to order her return in circumstances where the court has accepted she objects, does so in strong terms and has exercised its discretion in relation to that defence not to order her return, it would be inimical to her welfare to order her to return to Mauritius. It is likely to expose her to continued litigation here if, as would be likely, she does not comply with any order for return bearing in mind the steps she has taken in speaking to Ms H and in her discussions with Ms Broadley over a period of time. This is not the court being held to ransom but a realistic assessment of the evidence the court has.

- (4) In relation to Y he has not lived without his sister or mother for the whole of his life. The evidence points to his place being firmly anchored within that arrangement and a consequent strong bond between the siblings. To separate him from the known stability of care, with the consequent grave risks to his emotional and psychological welfare would need to be clearly justified. The importance of the father's continued relationship with Y must, of course, be weighed in the balance, together with what the father alleges is the mother's lack of support in maintaining that relationship. Also, the father's proposals do involve some arrangements that would be familiar to Y (such as returning to accommodation he knows where his paternal grandmother lives) thereby providing some amelioration of the other considerations. Whilst it is right the removal of Y from Mauritius has had a detrimental impact on his relationship with his father, there are other ways that can be managed that would cause Y less harm than separation from his sister and mother. For example, part of the father's recent evidence is that he would come over to this jurisdiction to spend time with the children. There is no reason why that could still not take place, thereby providing a foundation for that relationship to be restored.
- (5) The father's confidence about the mother and X returning to Mauritius voluntarily is not shared by the court. Whilst it is recognised they would not want to be separated from Y it is contrary to Y's welfare, as well as X, for them to be put in that position. Until very recently the father did not support the separation of the children, he still does not but in the event of the court determining X does not return he seeks for that option to be considered. Having reached the conclusion about X based both on her objections and under Article 13 b it would be counter intuitive for this court to then endorse a course, as suggested by the father, that places pressure on X to return. This is not only inimical to X's welfare but also to Y, as the continued uncertainty with the real risk that there could be a long term separation between the siblings does not meet his welfare needs. If the father still maintains that position for Y to be returned to Mauritius that can be considered as part of a wider and more detailed welfare enquiry than is possible within these summary proceedings.
- (6) This is a summary process and, as a result, has its limitations. A more detailed welfare examination, in the context of the long term arrangements for the children, may justify different orders, but that would be a matter for another court, if agreement cannot be reached. The welfare enquiry sought by the father as part of his adjournment application sought to introduce within this summary process full welfare evidence that is more commensurate with a contested application within the jurisdiction that is required to determine issues regarding the long term care arrangements. That is not the purpose of the summary Hague Convention proceedings, which are aimed at securing (subject to Article 13 defences) the child's swift return for decisions to be made in that country as to the child's long-term future.
- (7) The court has factored in the father's justified concerns about the mother's lack of willingness to support contact, even when under the spotlight of the court and his references to the mother's attitude in text messages exchanged around the time of their separation. However, the father's position that unless both or Y returns he will lose his relationship with them forever overstates the reality. The recent

evidence of the father's ability to come to this jurisdiction to spend direct time with the children, in particular Y, provides some mitigation of that important welfare concern. He works remotely which provides added flexibility. It also has to be viewed in the context of the longer term history of the mother supporting the contact arrangements between the father and Y over a two year period following the parties separation.

70. Having now reached the conclusion the court has I recognise this has been a difficult period for all parties involved in this litigation. Subject to any other applications that may be made, I would encourage the adults involved to access what specialist resources may be available to support them and their children to try and bring about resolution of their difficulties that would avoid the uncertainties of further contested litigation.