



Neutral Citation Number: [2023] EWHC 560 (Fam)

Case No: FD22P00672

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London

Date: 1 March 2023

Before:
MR RICHARD HARRISON KC
Sitting as a Deputy High Court Judge

Between:

V

Applicant

and

C

Respondent

Re R (A Child) (Wrongful Retention: Child's Objections: Discretionary Return)

Mr Michael Edwards (instructed by **Oliver Fisher Solicitors**) appeared on behalf of the **Applicant**.

Ms Ruth Cabeza (instructed by **Wilson Solicitors LLP**) appeared on behalf of the **Respondent**

Hearing dates: 20, 21 and 24 February 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 1 March 2023 by circulation to the parties or their representatives by e-mail.

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their

family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

MR RICHARD HARRISON KC:

Introduction

1. I am concerned with a young person to whom I shall refer in this judgment as ‘R’. He was born in 2009 and is now aged 13½. I shall refer to the parties as ‘the father’ and ‘the mother’ respectively.
2. On 20 February 2023, I met R briefly at court in the company of Ms Catherine Callaghan, the Cafcass Officer. In her first report, Ms Callaghan described R as a teenager who presented as ‘*a polite, articulate young person whose level of maturity is consistent with his chronological age*’. Having met him, I entirely agree with that description and would add that he comes across as a charming and engaging young person who is a credit to his parents. He is lucky to have two parents who love him and want to do what they feel is best for him. It is his misfortune, however, that his parents disagree and that he is caught in the middle of their dispute. In common with many young people his age who find themselves in a similar situation, this creates a conflict of loyalties for him.
3. In the summer of 2022, R came to stay in England with his mother for a holiday. At the end of the summer, he was expected to return to Portugal, the country in which he had until that point lived since his birth. Instead of returning him, the mother retained him in England.
4. In those circumstances, the father now applies for R to be returned to Portugal under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (‘the 1980 Hague Convention’), an international instrument given statutory force in this jurisdiction by the Child Abduction and Custody Act 1985 (‘the 1985 Act’).
5. Although the application comes before the court nearly six months after the date of the retention, the father acted promptly once he learned from the mother that she would not send R back to Portugal. He made his application through the Portuguese Central Authority on 27 September 2022. The application was then transmitted to the International Child Abduction and Contact Unit (‘ICACU’) acting as Central Authority for England and Wales. ICACU instructed solicitors on 10 October 2023 and proceedings were issued under the 1985 Act on 19 October 2023.
6. The mother accepts that her retention of R last summer was a wrongful retention for the purposes of Article 3 of the 1980 Hague Convention. This means that the court is obliged to make an order returning R to the jurisdiction of Portugal ‘forthwith’, unless the mother can establish one or more of the exceptions contained in Article 13, the burden being on her to do so. If an exception is established, the court has a discretion as to whether a return should be ordered or not.
7. The mother relies upon two Article 13 exceptions, known in shorthand as:
 - (a) The ‘grave risk’ exception under Article 13(b); and
 - (b) The ‘child’s objections’ exception under Article 13(2).

8. The father was represented at this hearing by Mr Michael Edwards of counsel and the mother by Ms Ruth Cabeza of counsel. I am grateful to both of them for the skilful way in which they have represented their clients in a difficult case.
9. Neither party gave oral evidence to the court. I did, however, have the benefit of hearing evidence from Ms Callaghan.
10. As I have said, I also met R for approximately 20 minutes in the company of Ms Callaghan, who made a note which has been circulated to the parties. I explained my role to R and allowed him the opportunity to ask me questions or to tell me anything he wished to say. In fact, R did not raise anything of relevance to these proceedings (we spoke briefly about the court system more generally).
11. At the outset of the hearing, the mother applied for permission to adduce a further statement, an application which I allowed (the application was not seriously resisted by the father; although the statement was excluded from the court bundle, a copy was provided to me before the start of the hearing so that I could read it *de bene esse*). Her only other statement is dated 2 February 2023 and was prepared at a time when she was acting in person. Shortly after it was filed, she was granted legal aid and she prepared a fuller statement with the assistance of solicitors. This was served on the father on 10 February 2023, which in my view allowed him sufficient time to deal with it. The delay in obtaining legal aid was not due to any fault on the mother's part. The father has been able to file two statements in the proceedings and, in my view, there would have been an imbalance in the evidence had I restricted the mother to relying upon the short statement she prepared when acting in person. The statement had in any event been sent (by agreement) to the Cafcass officer and it would thus have been artificial for me not to see it.
12. The case has not been assisted by a significant delay in the listing. One consequence of the delay was that the Cafcass report in the bundle was based upon an interview with R which took place nearly four months ago. At the outset of the hearing the parties raised with me the potential for R to meet me, as he had expressed a wish to do. Given the forensic constraints that apply to meetings between judges and children and the length of time which had elapsed since R had been able to communicate his views, I directed that prior to meeting me, R should be interviewed again by Ms Callaghan.

The background

13. The parties and R are all Portuguese nationals. The father previously served in the Portuguese Airforce and now works in local government. The mother follows creative pursuits. I am told that last year she completed a degree in graphic design and that she wishes to pursue a Masters in that subject. She currently works in a supermarket undertaking shifts at different times.
14. The parents, who are aged 40 and 39 respectively, have known each other since 2004, the year in which they began a relationship. They started living together in 2006. R was born in 2009 in Lisbon, the city in which the family was living at the time.
15. Approximately a year after R's birth, his parents' relationship broke down. The father moved out of the family home. R remained living there with his mother and maternal grandmother. He spent time with his father who was living elsewhere.

16. In 2011 there were proceedings before the Portuguese Court which led to an order being made for R to live with each of his parents on a rotating basis whereby he would spend fifteen consecutive days with one of them followed by fifteen days with the other. Understandably, however, given R's young age the father came to the view that this shared care arrangement did not best serve R's interests and so he agreed instead that R should live with the mother and have regular contact with him. The parties did not take steps to vary the court order in consequence of this new arrangement.
17. Both parties thereafter formed new relationships. The mother and her new partner, however, separated in 2014.
18. In 2015 the father married his partner. He remains married to her. They have a son, V, who was born in 2014 and is now aged 8 or 9. R and V have a close relationship, although they have different interests.
19. In March 2015 the mother moved from Portugal to live in England. There was a disagreement between the parents about whether R should also relocate to England. It appears that the mother may have initiated some form of legal process, although in the event she did not pursue a relocation application and decided to move here alone. According to the father, the mother's motives for the move were that she had struggled to cope with caring for R while working and that she had financial difficulties. I am not in a position to make any findings about this.
20. The mother's twin sister also lives in England and on the mother's case this was a significant factor behind her decision to move here. Her sister has 3 children with whom she says R has a good relationship.
21. Accordingly, the parties agreed that from that point onwards R would live with the father in Lisbon and spend time with the mother both in London and in Lisbon. As she puts it, *'I always kept in touch with [R] with regular calls and constant visits to Portugal, my presence in my son's life is constant.'* She also describes remaining closely involved in his education to the extent that she would phone him every morning during the 2020 lockdown to ensure that he was awake and ready to attend online school and maintained the routine of calling him in the morning before school even after the period of lockdown came to an end.
22. In 2018, when R was aged 9, the father and his wife decided that she and the children (R and V) would move to a small town in the North of Portugal, approximately 5 hours' distance from Lisbon. The father's wife's family come from the area to which the family decided to move. The father remained in Lisbon initially, he says for approximately 2 months. According to the mother she was not informed about the proposed move by the father but learned of it from the girlfriend of another relative during R's summer trip to England. She says that the father had made clear that she should not be told about the impending move and that R objected to it. The discovery led, on her case, to a disagreement between the parents followed by a fraught telephone call between the father and R during which the father reprimanded R for having revealed to the mother that he was soon to be moving. Again, this is not something about which I can make any findings.
23. In 2019, relations between the parents appear to have been at a low ebb. The mother says that the father would not permit her to take R to England that summer and that instead he went on holiday to Spain with his paternal grandmother (an arrangement which she says R was prevailed upon to conceal from her).

24. In 2019 the father issued proceedings which led to an order being made – I understand, by consent – by the Judicial Court of the District of Vila Real on 26 September 2019. This provided for R to live with the father and for parental responsibility to be shared. The order also contained a provision for R to have unrestricted contact with the mother whenever she was in Portugal (subject to maintaining his school commitments and to giving the father 48 hours’ notice). The order further provided for R to spend 45 consecutive days each summer with the mother in England and for the Christmas and Easter holidays to be alternated.
25. Since the September 2019 order, the mother has had contact with R in both England and Portugal, although less often than may have been envisaged when the order was made. I am told that the typical pattern was that R would have direct contact with his mother twice a year: once during either the Christmas or Easter holidays in Portugal (sometimes in Porto when the mother would stay with the paternal grandmother and sometimes in Lisbon when she would stay with her family), and a second time for a lengthy period over the summer the majority of which would be spent in England. As I commented during the hearing, this arrangement does not seem to me to have been child-focussed as (1) it resulted in there being very long gaps up to six months in which R did not see his mother at all (apart from over a video screen), and (2) it allowed R to spend very little holiday time in the company of his father and his paternal family or socialising with his friends in Portugal.
26. On the father’s case, every time R came to England for holidays, the mother would suggest that he should remain with her. The father would, however, insist upon R’s return and before 2022 the mother would return him. The father’s evidence is that R ‘*is easily influenced by his mother*’ and has sometimes said that he wants to stay with her after a holiday; upon returning to Portugal, however, he would get back into the routine of his life at home and at school.
27. By contrast, the mother accuses the father of ‘*parental alienation*’. She says that that R was put in a position where he had to conceal important information from her, such as his father’s continued absence from the new home in the North of Portugal while he worked in Lisbon. She says that the father ‘*defames*’ her, accusing her of abandoning her son and that he has failed to inform her about significant events in R’s life such as a serious car accident in which he was involved in 2020.
28. For the 2022 summer holidays, the parties arranged for R to have contact with the mother from 12 July until (at the latest) early September to allow him to be back at his home with the father in good time to start school on 15 September 2022. The mother and R stayed in Lisbon until 20 July before coming to England.
29. Towards the end of the summer, the mother contacted the father by telephone to inform him that R did not wish to return to Portugal. The father has subsequently learned that before starting his holiday with the mother, R had said goodbye to his friends and told them that he would not be returning to school after his holiday in England. In my view, it is likely that he would only have done so after discussing with his mother the potential for him to remain living in England. The mother’s belief appears to be that as a matter of Portuguese law R was free to choose where he wished to live once he attained the age of 12, a belief which she communicated to R himself according to what he told Ms Callaghan. Neither R nor the mother told the father before the start of the holiday that there was a plan afoot for him to remain in England.

30. The mother proposed to enrol R in school in England. She initially attempted to do this unilaterally, but the father objected. I understand that the question of R's schooling was raised at the case management hearing in October 2022, but the father maintained his objections (Mr Edwards told me that it was expected that the proceedings would be concluded before the end of the year). Accordingly, R has not been in any form of schooling since July 2022 and has thus missed an important period of his education. This may not be due entirely to the father's objections: R informed Ms Callaghan that he had taken some form of educational test which he had failed and that this was an impediment to him starting school. It was not clear to me or to Ms Callaghan what this test might have been.
31. As I recorded above, following R's retention in England the father acted promptly in taking steps to pursue an application under the 1980 Hague Convention.
32. After the father's application was issued, the proceedings came before Mr Sachdeva KC sitting as a deputy High Court Judge on 26 October 2022. He gave various case management directions, including for the filing of evidence and the preparation of a Cafcass report. He also directed that the matter be listed for a final hearing on a date to be fixed after 9 December 2022. It was then anticipated that the final hearing would be listed later in December; in fact, it was not listed until 20 February 2023 (approximately 18 weeks after the proceedings were issued and far later than the six-week target referred to in Article 11 of the Convention).
33. The mother, who had appeared in person on 26 October 2022, consulted solicitors on 28 October 2022. They made an application for legal aid on 1 November 2022. The mother's statement and her answer was due to be filed by 16 November 2022 but she did not file either document.
34. On 14 December 2022 the father's solicitors made an application for directions in the light of the mother's non-compliance.
35. On 16 December 2022, the mother's solicitors wrote to the court explaining that the mother's legal aid application had yet to be determined. They were therefore not in a position to prepare a statement on her behalf or to represent her at any hearing. They enclosed a chronology of their communications with the Legal Aid Agency ('the LAA').
36. On 23 January 2023, the proceedings came before Moor J. The mother continued to act in person. The order records receipt of a letter from her solicitors in which they stated that she had been assessed as financially eligible for legal aid; however, a merits assessment was in the process of being undertaken. Moor J's order further records the imperative that the application should proceed at the February hearing as there was a risk that if R did not return to Portugal by the end of February he might have to redo his school year. The LAA was urged to treat the mother's application for legal aid as a matter of the highest priority in view of the impending hearing and the court's direction that she should file her evidence by 2 February 2023.
37. The mother filed a short statement on 2 February 2023, as directed. Shortly afterwards her application for legal aid was granted which led her solicitors to prepare a further statement which I have permitted her to adduce.

The Cafcass evidence

38. Ms Callaghan prepared a written case analysis on 1 December 2022. At this stage of the proceedings she had seen the father's first statement but not the evidence which has subsequently been filed. She conducted an interview with R for approximately one and a half hours on 29 October 2022 (that is to say nearly four months ago). At that stage he had been in England for just over three months and approximately two months had elapsed since the date of his retention.
39. As I set out above, at the commencement of this hearing I directed that a further meeting should take place at court between R and Ms Callaghan, followed by a short meeting with me at which Ms Callaghan would be able to take a note. I am grateful to Ms Callaghan for her assistance in facilitating these further meetings and for preparing a written update summarising her meeting with R and the meeting involving me.
40. Ms Callaghan was assisted in her meeting on 29 October 2022 by a Portuguese interpreter, although R's level of English was good and he only required assistance from the interpreter two or three times during the course of the discussion. He did not have an interpreter for the second meeting.
41. Ms Callaghan began her first meeting with R by explaining her role and enquiring about his understanding of the meeting. He responded: *'So that you can help me stay here'*. R went on to talk about the circumstances in which he had come to England, explaining that:
- "I already knew that I would be staying, I had told my dad that I did not want to stay in Portugal. He is saying that my mum convinced me, but it was always my choice."
42. R told Ms Callaghan that he had not been attending school in England, initially saying that *'dad won't let me'*. He also said that he had failed a test involving phrases and numbers which meant that he was unable to start school. He said: *'I need documents and because of my grammar I could not start school, but dad was not agreeing'*.
43. R spoke about his experience of school in Portugal. He said that he had been in Year seven of secondary school (which I understand to be the first year of secondary school) and that he had been bullied. He stated: *'at the start I didn't really see it as I had friends protecting me, then they threw bread on me.'* He told Ms Callaghan that he had previously been bullied by a group of boys in years five and six and that the more recent bullying had been carried out by the same boys. Asked whether he had spoken about the bullying to his parents or teachers, R informed Ms Callaghan that the father had previously arranged for him to be seen by a psychiatrist or therapist but that he had only seen this person on one occasion. He eventually spoke about the bullying to his father who had told him he would have to deal with it. He did not tell his mother as he expected her to react the same way. He felt that his father should have spoken to the school principal about the situation. He also commented that his grades had dropped. Although his friends had supported him, this had made him *'feel depressed'*. In her oral evidence, Ms Callaghan made clear that her impression was that the bullying had been a more significant issue for R in Years five and six (when it had taken place approximately once a week) than it became following the transition to secondary school.
44. R told Ms Callaghan that he was currently living in a three-bedroom house in a town outside London with his mother and eighteen-year-old cousin. He was spending his days drawing, sketching and reading and kept in touch with his friends in Portugal via WhatsApp and playing online games on his computer. He does not particularly enjoy

sports apart from swimming and occasionally volleyball. R stated that his mother was working in a supermarket, mainly in the evenings and that his cousin worked during the day (the mother's case is that she works all hours of the day). He spent some time cooking and shopping with his mother.

45. R described his mother as being *'good at art, graphic design and she is really funny and likes to sing and dance.'* He said of his father: *'I really like him, but he has a strong personality, we talk but we don't do a lot together. He is kind to me, but he has his own strong opinions.'* He also commented that his father sometimes doesn't let his step-mother speak and that he makes jokes about women. He went on to say: *'he is a kind dad, and he helps me with my homework but it's his personality, we don't always agree on things'*.
46. R spoke fondly of his younger brother, describing his interests and how he speaks to him on a regular basis.
47. R said that he missed his brother *'very much'*. He also said that: *'I miss my dad a bit, it's his personality and not his fault, I do really like him'*; and that: *'I kind of miss my step mum and I really miss my great aunt'* (the latter being the sister of his step grandmother). R also spoke positively about his paternal grandmother whom he used to visit on a regular basis and mentioned two paternal uncles and his paternal grandfather (saying that he had spoken to the latter about three or four times since coming to England).
48. R told Ms Callaghan that *'I always wanted to live in England with my mum, I knew when I was twelve, I could make the choice. I told my dad that I wanted to stay in England, but he said no'* (he later clarified that it was his mother who had told him that he could make the choice after the age of twelve). He said that his mother encourages him to speak to his father. He added: *'I told dad that I won't come back, and he said no, and a bunch of bad things. That made it worse, he said your problems won't stop and bullying will continue in England.'*
49. It was evident that R did not have a high opinion of the small town to which he had moved from Lisbon at the age of nine. He described as being limited in terms of things to do and a place where *'everybody knows everybody'*. He spoke about being sad when he left Lisbon as he had *'left my friends and my mum's family and friends'* adding that *'there was no good reason for that, dad didn't care about the effect on me'*.
50. R said that he wanted to stay living in England as he felt there were more opportunities as the place he is living is close to a big city (by which he meant London). By contrast, in the small town in the North of Portugal *'there is no art school or university'* and *'you have to move for job opportunities or college'*. His interests are in fashion and art and he aspires to study fashion at university. Asked how he would feel if either of his parents lived in Lisbon, R's face lit up. He told Ms Callaghan that *'I would love to live with my mum in Lisbon, Portugal is where most of my family are. My mum knows how I feel about that.'*
51. When discussing these proceedings, R told Ms Callaghan that his mother had told him that were she in his father's position she would have done the same thing (i.e. make an application under the Hague Convention) as she knows how he feels. R added: *'I am mad at my dad, it's like anything I say he uses against my mum. This makes me wary of talking to him, so I mostly talk to my brother when he calls. My mum isn't putting any pressure on me, it is my decision.'*

52. R told Ms Callaghan that he would be *'really sad'* if he had to return to Portugal. He was worried about going back to school and having to explain his absence to his friends, saying that *'most of them already know but people will ask me questions'*. He then said to Ms Callaghan: *'there is something kind of worrying me. I want to start socialising again, I don't have any friends here.'*
53. With Ms Callaghan's assistance, R dictated a letter to the judge in which he said: *'I just want to say that I hope you will let me stay with my mother because I really don't want to live in this small town, and I really prefer to live in England with my mother.'* Ms Callaghan made clear in her oral evidence that despite his expressed sentiments R had not said that he would refuse to go and live with his father if this was the court's decision. On the contrary, her view was that R would go back if such an order was made, although he would be sad and disappointed with the decision. She later said that he may present as 'cross' in those circumstances and that he would probably be angry with his father.
54. In his recent meeting with Ms Callaghan, R expressed similar views to those he had previously articulated. He was critical of his father but acknowledged that *'[he] could be kind, but they have very different views on a lot of things'*. He described his father as having rigid views and, by way of example, referred to him being critical of veganism or transgender young people. In her oral evidence, Ms Callaghan agreed that R's views of his father were *'complex'*. She didn't feel that the type of disagreements R had with his father were particularly unusual for teenage boys. She did not get the sense that R was either fearful of or held any real animosity towards the father.
55. R spoke again about the bullying he had experienced stating that since Year 5 he had not liked things that were happening in school. There was an improvement during lockdown (when school was online), a period when he had *'made lots of friends online'*. He also said that he had made friends at secondary school but was concerned that the bullying was starting up again. He said that his father had told him he would speak to the teacher but did not know whether he had done so; the second time it had happened his father had said that he would have to deal with it. He told Ms Callaghan that his friends were supportive to him, so in respect of those that had bullied him previously he recalled *'I didn't give attention to them'*. R acknowledged that there could be bullying were he to start a new school in England but said *'we don't know if we don't try'*.
56. Although R had not seen any court documents, he said that his mother had told him a bit of what his father had said; he did not like that his father was saying that his mother does not help him and that he is the person who has been his main carer.
57. R told Ms Callaghan that his main worries in the event of a return to Portugal were that his father would hold what had happened against him and that he might prevent R from having contact with his mother. He feels that his father hates his mother, whereas his perception is that the reverse is not the case. He does not feel able to talk to his father about his sexuality as he is a person who holds strong views (*'at times'*, as Ms Callaghan clarified in her oral evidence); by contrast, he feels more comfortable discussing things with his mother. He expressed a wish to live with his mother. In her oral evidence, Ms Callaghan said that it is not unusual for a child of separated parents to express a wish to live with one of them.

58. Ms Callaghan's opinion is that R's views have not been coached or rehearsed. His present views are essentially the same as those he previously expressed. The main differences were the worries he expressed, which I have summarised in the preceding paragraph.
59. Asked about the bullying, Ms Callaghan said that it was troubling and that the best way to deal with it would be for the parents to work together in conjunction with the school. Therapy was also a potential option. She acknowledged that as a young gay man, R might experience bullying in England or in Portugal. It was important for R to be raised in a non-judgmental environment. Ms Callaghan did not agree with the proposition that R feels that he lacks unconditional support and acceptance in his father's household; rather he does not feel as comfortable talking about himself and his sexuality with his father as he does with his mother.
60. Overall, Ms Callaghan's professional judgment is that R has effectively experienced an extended holiday period in England and that he holds an idealised version of living here. He has not yet experienced a life in England in which he would have to start at a new school, with all the structure and rules this would entail. In her oral evidence she described school as a big issue which has not been tried. In response to questions from me, she said that if R were to remain in England it would be challenging for him to start in Year 8 in the middle of the school year. Among the challenges he would face would be developing friendships at a point when friendship groups had already been formed. Another challenge would be coping with the academic work (although he speaks good English, it is not his first language, and he has never been educated in the English curriculum). Ms Callaghan said there was a risk that he could become frustrated if he feels left behind academically and this could affect his self-esteem. That is not to say that he could not necessarily rise up to the challenges, but these would be significant.
61. I found Ms Callaghan's evidence to be insightful and I agree with her professional judgment, especially that which I have summarised in the preceding paragraph. I also accept her opinion that R's views are authentically his own, although in my judgment they are inevitably likely to have been influenced to some degree by his mother: both her telling him that he was of an age where he could choose where to live and more recently in sharing details of the proceedings with him.

The law

Overview of the 1980 Hague Convention

62. The aims and objectives of the 1980 Convention are recorded in its preamble and in Article 1. They can be summarised as follows:
 - (a) To protect children from the harmful effects of being subject to a wrongful removal or retention.
 - (b) To ensure the prompt return of abducted children to the country of their habitual residence.
 - (c) To respect rights of custody and rights of access held in one Contracting State in other Contracting States.

One of the ways in which the Convention is intended to secure its objectives is by deterring would-be abductors from wrongfully removing or retaining children.

63. The welfare of the child is not 'the paramount consideration' under the 1980 Convention. However, the preamble records the general principle that '*the interests of*

children are of paramount importance in matters relating to their custody'. In *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27 it was held by the Supreme Court that each of the following is 'a primary consideration' in Convention proceedings:

- (a) The best interests of the children subject to the proceedings;
- (b) The best interests of children generally.

64. The Supreme Court explained at paragraph 18 of that decision that a faithful application of the provisions of the Convention will ensure compliance with Article 3.1 of the United Nations Convention on the Rights of the Child (which provides that in all actions concerning children, the best interest of the child shall be a primary consideration).

65. Where (as is accepted in this case) a child is subject to a wrongful retention and an application for the return of the child is lodged within a year, Article 12 of the Convention provides that the court must order the return of the child forthwith. This has to be read in conjunction with Article 13 which provides (so far as relevant to this case) that:

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

a) ...

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

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views...”

Article 13(b): grave risk

66. The burden of establishing the grave risk exceptions lies on the respondent to an application.

67. The leading authorities are *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27 and *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10.

68. In *Uhd v Mackay* [2019] EWHC 1239 (Fam) MacDonald J summarised the key principles 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).

69. It is relatively common in Hague Convention proceedings for allegations to be made by one party and denied by the other. As the proceedings are summary in nature and it is rare for the court to hear oral evidence, the court is usually not in a position to resolve such disputed allegations. This can give rise to difficulties where a respondent's assertion that Article 13(b) is satisfied is founded upon factual assertions which the court is unable to resolve. In this connection, the Supreme Court said the following at paragraph 36 of *Re E*:

“There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. Mr Turner submits that there is a sensible and pragmatic solution. 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.”

70. The court is not obliged to follow the approach suggested in paragraph 36 of *Re E* in every case. In *Re K (1980 Hague Convention: Lithuania)* [2015] EWCA Civ 720 Black LJ said the following at paragraph 53:

“I do not accept that a judge is bound to take this approach if the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an Article 13b risk. That is what the judge did here. It was for the mother, who opposed the return, to substantiate the Article 13b exception (see *Re E* supra §32) and for the court to evaluate the evidence within the confines of the summary process.”

The features of that particular case which allowed the judge to depart from the guidance in *Re E* were summarised as follows:

“Hogg J found the mother's evidence about what had happened to be inconsistent with her actions in that she had continued her relationship with the father and allowed him to have the care of E, see for example what she said in §37 about the mother not having done anything to corroborate her evidence. She also put the allegations in context, bearing in mind what Mr Power had said about something good having happened in E's parenting, which she took as a demonstration that E would not be at risk if returned to Lithuania (§36). The Article 13b argument had therefore not got off the ground in the judge's view. The judgment about the level of risk was a judgment which fell to be made by Hogg J and we should not overturn her judgment on it unless it was not open to her (see the important observations of the Supreme Court on this subject at §35 of *Re S*, supra). Nothing has been said in argument to demonstrate that the view Hogg J took was not open to her; in the light of it, it was unnecessary for her to look further at the question of protective measures. She would have taken the same view even if the child had been going back to the father's care, but the Article 13b case was weakened further by the fact that the mother had ultimately agreed to return with E.”

71. In *Re C (Children) (Abduction: Article 13(b))* [2018] EWCA Civ 2834 Moylan LJ also gave specific consideration to paragraph 36 of *Re E* holding that ‘*In my view, in adopting this proposed solution, it was not being suggested [by the Supreme Court] that no evaluative assessment of the allegations could or should be undertaken by the court.*’ He emphasised however that ‘*Of course a judge has to be careful when conducting a paper evaluation but this does not mean that there should be no assessment at all about the credibility or substance of the allegations.*’

72. In *Uhd v Mackay MacDonald* J summarised the approach to be taken as follows:

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

73. Article 13(b) was again considered by the Court of Appeal in *Re A (Children) (Abduction: Article 13(b))* [2021] EWCA Civ 939. Moylan LJ provided a comprehensive summary of the relevant principles at paragraphs 84 to 89 of the judgment, which it is unnecessary for me to set out in full. At paragraph 92 he considered what had been said in *Re C* and *Re K* about the ability of the court to depart from the core guidance given by the Supreme Court in *Re E* and to undertake an evaluation of disputed allegations, emphasising that:

“Black LJ [in *Re K*] was referring to discounting the *possibility* that the allegations would *give rise* to an Article 13(b) *risk*. She was not otherwise diverging from the approach set out in *Re E*. It is also plain that she was referring to the end of the spectrum, namely when the court was able *confidently* to discount the possibility that the allegations gave rise to an Article 13(b) risk. This is not to dance on pins but is a distinction of substance derived from the court not being in a position to determine the truth of the allegations relied on as establishing the Article 13(b) risk.” [emphasis in the judgment]

74. Moylan LJ further held at paragraph 94:

“In the *Guide to Good Practice*, at [40], it is suggested that the court should first ‘consider whether the assertions are of such a nature and of sufficient detail and substance, that they could constitute a grave risk’ before then determining, if they could, whether the grave risk exception is established by reference to all circumstances of the case. In analysing whether the allegations are of sufficient detail and substance, the judge will have to consider whether, to adopt what Black LJ said in *Re K*, ‘the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an Article 13(b) risk’. In making this determination, and to explain what I meant in *Re C*, I would endorse what MacDonald J said in *Uhd v McKay (Abduction: Publicity)* [2019] 2 FLR 1159, at [7], namely that ‘the assumptions made by the court with respect to the *maximum level of risk* must be reasoned and reasonable assumptions’ (my emphasis). If they are not ‘reasoned and reasonable’, I would suggest that the court can confidently discount the possibility that they give rise to an Article 13(b) risk.”

He went on to emphasise, however, that a judge must be ‘*careful*’ when undertaking an evaluative exercise, because of the limitations created by it being invariably based only on an assessment of the written material. It is not permissible for a judge to discount allegations of abuse merely because he or she has doubts about their validity or cogency. On the contrary if the judge concludes that allegations would ‘potentially’ establish the existence of a grave risk, the court ‘must’ consider how the risk can be ameliorated.

75. In conducting any evaluation for the purposes of Article 13(b) the court must consider in concrete terms the situation that the child will face upon a return: *Re P (A Child) (Abduction: Consideration of Evidence)* [2018] 4 WLR 16.

Child’s objections

76. The leading authority on the child’s objections exception - at least so far as the so-called ‘gateway’ stage is concerned - is *Re M (Republic of Ireland) (Child’s Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26. As to discretion, the leading authority is *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55.

77. In *Re Q & V (1980 Hague Convention and Inherent Jurisdiction Summary Return)* [2019] EWHC 490 (Fam) at paragraph 50, Williams J summarised the relevant principles to be derived from both of the *Re M* cases as well as the later decision of *Re F (Child’s Objections)* [2015] EWCA Civ 1022 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 Article 13 will be satisfied. An objection in this context is to be contrasted with a preference or wish.

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

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

v) At the discretion stage there is no exhaustive list of factors to be considered. The court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available. The court must give weight to Convention considerations and at all times bear in mind that the Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly.

vi) 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.

The same summary appears in the judgment of MacDonald J in *B v P* [2017] EWHC 3577 (Fam).

78. As Williams J also pointed out at paragraph 51 of *Re Q & V*, in some cases an objection to a return to one parent may be indistinguishable from a return to a country.

79. Although in *Re M (Republic of Ireland)* the Court of Appeal distinguished an objection from a preference or wish, they did not set out a positive definition of the term. No such definition is to be found in the 1980 Hague Convention or in the Explanatory Report. The French language version of the Convention uses the reflexive verb '*s'opposer*' in this context, a verb which can be translated as either 'to object' or 'to oppose'.

80. At paragraph 77 of *Re M (Republic of Ireland)* Black LJ offered the following guidance:

"I am hesitant about saying more lest what I say should be turned into a new test or taken as some sort of compulsory checklist. I hope that it is abundantly clear that I do not intend this and that I discourage an over-prescriptive or over-intellectualised approach to what, if it is to work with proper despatch, has got to be a straightforward and robust process. I risk the following few examples of how things may play out at the gateway stage, trusting that they will be taken as just that, examples offered to illustrate possible practical

applications of the principles. So, one can envisage a situation, for example, where it is apparent that the child is merely parroting the views of a parent and does not personally object at all; in such a case, a relevant objection will not be established. Sometimes, for instance because of age or stage of development, the child will have nowhere near the sort of understanding that would be looked for before reaching a conclusion that the child has a degree of maturity at which it is appropriate to take account of his or her views. Sometimes, the objection may not be an objection to the right thing. Sometimes, it may not be an objection at all, but rather a wish or a preference.”

81. *Re F (Child's Objections)* [\[2015\] EWCA Civ 1022](#) the Court of Appeal was critical of the introduction of glosses to the meaning of the word ‘*objection*’ including the introduction of the concept of ‘*a Convention objection*’ or the suggestion that for these purposes what needs to be established is ‘*a wholesale objection*’. Black LJ made clear that:

“Whether a child objects is a question of fact, and the word “objects” is sufficient on its own to convey to a judge hearing a Hague Convention case what has to be established; further definition may be more likely to mislead or to generate debate than to assist.”

82. So far as the exercise of discretion is concerned, in *Re M (Children) (Abduction: Rights of Custody)* Baroness Hale emphasised that once the gateway is crossed, discretion is ‘*at large*’: it is not the case that a return can only be refused in exceptional cases. At paragraph 43 she said:

“... in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare.”

At paragraph 46 she added:

“In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. 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 her own” or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances.”

Submissions

83. Each of the parties made detailed submissions to me both orally and in writing. I have borne in mind all of the arguments which they have made. What follows is a summary of the main points raised by each of them.

The Mother

Art 13(b)

84. The mother submits that R is a young gay teenager who has faced bullying at school with homophobic overtones. His father has not provided him with the necessary support and holds rigid views which inhibit R from being able to discuss his sexuality with him and to feel properly supported in addressing the bullying which he faces. The mother makes allegations about the extent of the bullying faced by R which go beyond that which R himself disclosed to Ms Callaghan, making reference to terms of homophobic abuse which she says have been directed at R. She described R as having been living in fear as a result of the bullying. Ms Cabeza emphasises that R told Ms Callaghan that the bullying made him feel depressed and submits that if returned to Portugal there is a risk that his mental health could deteriorate.
85. Ms Cabeza further submits that the small town to which R would be returning restricts R's ability to interact with a more diverse cohort of peers. She says that R does not feel comfortable expressing himself and makes the point that, according to R, the father holds very negative views about R's transgender friend. She says that the father has not attempted to prevent the bullying which is based upon homophobic attitudes and that he is unable to pursue his preferred hobbies such as ballet. She says that R has felt unable to inform his father about his sexuality. Ms Cabeza further submits that if returned to Portugal, R would lose the support of his mother and that he would be unable to express himself freely as he does now. She contends that R does not enjoy a relationship with his father that will allow him to grow and develop into the person he wants to be.
86. In her submission, the issues R would face upon a return could not adequately be addressed with protective measures, although as a minimum she requests the following undertakings from the father (which she says would be extremely difficult to enforce):
- a. not to denigrate M to, or in front of, R;
 - b. to allow unrestricted contact between M and R; and
 - c. not to criticise R for his sexuality or his expression of himself.

Child's objections

87. Ms Cabeza submits that R's expressed views amount to an objection to returning to Portugal. At the age of 13 ½ he has attained an age and degree of maturity at which it is appropriate to take account of his views.
88. As to the exercise of discretion, Ms Cabeza acknowledges that the policy of the Convention is a factor weighing in favour of ordering a return, but submits that no other considerations do so. She submits that the question of R's education is a 'neutral' factor as R will face challenges whether he returns to Portugal or remains in England. She emphasises the points made in support of her Article 13(b) submission and submits that in the circumstances it is understandable that R should object to returning to such an environment.
89. As a mature teenager whose views are authentically his own, Ms Cabeza submits that R's objections, in combination with the other welfare considerations upon which she

relies, should prevail over the policy matters which point the other way. Ms Cabeza further emphasises that the decision by R to remain in England was not taken on the spur of the moment; it was something he has wanted to do for some time.

90. Although there is a Portuguese order in place, Ms Cabeza submits that the English courts are now just as well placed to determine welfare issues and in particular to take account of R's views.
91. I suggested to Ms Cabeza that it would be open to the mother to return to Portugal herself, say to Lisbon, and remain there while the Portuguese courts conducted a full welfare enquiry as to whether it was in R's interests to relocate to England. She submitted that the mother has made her life in England and that it was not reasonable to expect her to take such a step.
92. In the event that R was able to remain in England, Ms Cabeza suggested that he would be able to maintain his relationship with his paternal family by having contact with his father in a reversal of the arrangement currently enshrined in the Portuguese order.
93. Ms Cabeza identified other factors in favour of refusing a return as follows (I summarise):
 - (a) The father's hostility towards the mother and her fears that there would be problems with contact.
 - (b) R's inability to engage with his father over his sexuality and his awareness of his father's strong views on certain subjects.
 - (c) The impact of a return on his emotional welfare and his ability to deal with bullying when it arises.
 - (d) The fact that the mother could now enrol R in a school local to her, support him and promote his paternal relationship.

The Father

Article 13(b)

94. Mr Edwards submits that there is nothing in this case that comes close to Article 13(b). Issues of bullying and R's sexuality, he contends, are matters for the parents to deal with, as the father has been doing by engaging with R and his schools in Portugal. There is nothing to suggest that the bullying had reached the threshold envisaged by Article 13(b).

Child's objections

95. Mr Edwards submits that R's expressed views do not amount to an objection to returning to Portugal, but rather a wish or a preference to remain living with his mother. He relied in particular on the fact that R spoke enthusiastically about the hypothetical possibility of living in Lisbon with his mother. He also drew attention to the fact that, despite everything, R is able to speak fondly of his father and paternal family, his brother in particular. He emphasised Ms Callaghan's evidence that in the event that a return was ordered, R would comply.
96. Alternatively, Mr Edwards submits that the discretion should be exercised in favour of a return. In addition to the policy considerations and the existence of the Portuguese order, made by consent, Mr Edwards relies strongly upon the fact R's position is not realistic: as Ms Callaghan said, he has in effect enjoyed an extended holiday in England and not experienced the reality of a structured life here involving going to school; the

picture he holds of England is 'idealised'. If enrolled in school in England, he would face challenges, as Ms Callaghan identified.

97. Mr Edwards points to the strength of R's connections with Portugal. He is a Portuguese child who has always lived in that jurisdiction. He has a good relationship with his extended Portuguese family on both sides, the majority of whom live in Portugal. R's friends are in Portugal, and he is currently socially isolated.
98. Mr Edwards further submits that although this is not a case of obvious parental influence, the mother wrongly informed R that he could decide where to live after the age of twelve.
99. In addressing the issue of bullying, Mr Edwards makes the point that the evidence suggests that this reached a low point in Years 5 and 6 when R was at primary school; the bullying had been less of an issue more recently.

Analysis and conclusions

Article 13(b)

100. I am satisfied that this is a case where I can confidently discount the possibility that R will suffer the risks of harm or face an intolerable situation in the manner contemplated by Article 13(b).
101. If R returns to Portugal it will be to the care of his father and to a household in which his step-mother and brother are also living. He has been able to speak in positive terms about all of them and told Ms Callaghan that he missed them, especially his brother. Although he may well feel angry with his father about having to return against his wishes, he has been able to acknowledge that his father's kindness as a parent, despite him not agreeing with some of his father's views.
102. I do not accept that R will be unable to discuss being bullied or his sexuality with his father. It is notable that previously he did raise the question of being bullied with him, but not with his mother. The mother exhibited to her second statement an exchange of messages between her and the father from 8 September 2022. In one of these she asked the father whether he was aware of R's sexual orientation. He did not react with shock or disapproval but said it was something of which he had been aware for many years.
103. I do not seek to minimise the harmful impact upon any child of being bullied at school, especially when the abuse is homophobic in nature. I accept, however, the point made by Mr Edwards that the bullying appears to have been less of an issue at secondary school than it was when R was at primary school. It is also significant, in my view, that by contrast with the position here, R has friends in Portugal, and they have supported him in dealing with the bullying. Unfortunately, bullying is an issue which children have to confront from time to time. If R were to start school in England, it is possible that he might experience bullying there too.
104. The father has previously referred R to a therapist and although that referral appears to have stalled it is evident that the father did not simply sit back and allow his son to suffer in silence but was proactive seeking help for him. I have no doubt that, if they judge it appropriate, one or both of the parents will raise the issue with R's school so that they can adopt appropriate strategies to address it.

105. The matters set out above are sufficient to lead me to the conclusion that Article 13(b) is not satisfied in this case.
106. In addition, I note the mother's own unwillingness to return with R to Lisbon, even for a temporary period, which does not sit easily with her asserted belief that the risks of harm and intolerability which R will face upon a return without her are 'grave'. While I acknowledge that she has lived in England for some years, her ties are not so strong as to prevent her from going back to Portugal on a temporary basis were it absolutely necessary for her to do so. As a loving mother, I find difficult to accept that she would refuse to countenance doing so if she truly believed that in returning without her R was at risk of suffering the type of harm contemplated by Article 13(b).
107. I, of course, accept the principle that if a grave risk is found to exist upon a return, the source of the risk is irrelevant even if it stems from the unreasonable refusal of a parent to accompany the child. I agree, however, with the judgment of MacDonald J in *AT v SS* [2015] EWHC 2703 (Fam) at paragraphs 43 and 44 when he held that:

"However, to say that where it is *established* that the situation on return would expose the child to a grave risk of harm or otherwise place him in an intolerable situation the source of that grave risk of harm or intolerable situation is irrelevant is not the same as saying that the source is irrelevant to the task of *establishing* whether the situation on return would so expose the child.

...

Within this context, I am unable to accept the submission that the source of the grave risk of harm or intolerability contended for in a given case is simply irrelevant to *establishing* whether the criteria set out in Art 13(b) are met. It follows that I am also unable to accept the submission that the fact that the mother in this case is, by her conscious refusal to return, the source of the situation that S would face were he is returned to Holland is simply irrelevant to *establishing* whether that situation will expose him to a grave risk of physical or psychological harm or otherwise place him in an intolerable situation. Were the court to conclude that on return to Holland separation from his mother and placement in care *would* expose S to a grave risk of physical or emotional harm or would otherwise place him in an intolerable situation then it is correct that it matters not whether the separation and all that follows is due to the mother's contumelious attempt to frustrate the Convention process or an involuntary inability to travel or something between those two extremes. The mother's conscious refusal to return is nevertheless relevant to the court's assessment of *whether* the situation for, S should he be returned to Holland, falls within the tightly drawn boundaries of Art 13(b)."

108. In my judgment, where a parent asserts that a situation to which a child will be returning gives rise to an Article 13(b) risk while also refusing to take reasonable steps to mitigate that risk, a court is entitled to view with scepticism their apparent willingness to allow the child to be exposed to such a fate. In some cases, a court may conclude that if an order is made, the taking parent will not maintain their stance of refusing to accompany the child. The court is in any event entitled to take into account that parent's stance in evaluating whether Article 13(b) is established. In this case, I am satisfied that the Article 13(b) exception does not arise even without having regard to this additional factor.

Child's Objections

109. I accept Ms Cabeza's submission that R's expressed views amount to an objection to returning to Portugal.
110. Although R has communicated that he would welcome a hypothetical return to Lisbon with his mother, this is not an option available to him as the mother is not willing herself to contemplate a return. Neither is returning to Lisbon with his father an option for R.
111. In my view, R is opposed to returning to Portugal in the manner that is proposed in circumstances where there are no alternatives on offer. It is thus not possible to distinguish returning to Portugal from the particular circumstances of the return.
112. R's objection goes beyond a mere preference to live with his mother in England, despite his use of the word 'prefer' in his letter to the judge (I remind myself in this regard that English is not R's first language). It is significant that remaining in England was not a decision made by R on the spur of the moment: on the father's case he said goodbye to his friends before leaving Portugal and told them that he would not be returning. It is also, in my view, significant that R has spoken about feeling sad if he had to return; Ms Callaghan's evidence is that he may present as cross and will probably be angry if required to do something against his wishes. In my judgment, the fact that R has not said that he will refuse to comply with an order for return is consistent with his being a well-mannered child who is not defiant. It does not mean that he does not object to returning.
113. So far as the discretion is concerned, in my view this is reasonably finely balanced as there are factors which point both ways.
114. The policy of the Convention carries significant weight in a case where R has been retained away from his primary carer following a period of holiday contact. As Hale J made clear in *Re HB (Abduction: Children's Objections)* [1997] 1 FLR 392, parents need to feel confident when sending their children on holiday that they will return at its conclusion. It is also significant that the retention is in breach of a Portuguese order which the mother has taken no steps to vary, although I do not accept Mr Edwards's submission that the order should carry enhanced weight through having been made by consent. The father acted promptly in bringing his application; the delay in listing is not his fault and does not diminish the weight to be given to the policy considerations.
115. I also accept that given R's age (13 ½), his expressed objections should carry weight, especially as they are authentically his own and, in part at least, are based on matters which from his perspective are rational such as his wish to live with his mother and to get away from the bullying he experienced at school. On the other hand, the weight I give to R's objections has to be tempered by the fact that his view of life in England is 'idealised'; he has not experienced the reality of living here under a structured regime involving going to school.
116. I accept Mr Edwards's submission that although R's objections are his own, he has been influenced to some degree by his mother, but this is not a factor which causes me to diminish the weight I give to his objections. Overall, the evidence does not suggest that the mother has been actively seeking to dissuade R from returning to Portugal; he described it as 'my decision'. She has also ensured that R has maintained regular indirect contact with his father and paternal family.

117. I have taken into account all of the other matters raised by Ms Cabeza and Mr Edwards which I need not repeat. In the end, I have come to the clear conclusion that balance falls in favour of ordering a return. In my judgment, on the particular facts of this case the policy considerations in favour of a return combined with other factors outweigh R's objections.
118. The additional matters which have led me in particular to this conclusion are:
- (a) I accept Ms Callaghan's evidence about the challenges R would face starting at a new English school in the middle of the academic year. In my judgment these would be significant. There is a substantial risk that he would not cope with the work and that this would lead him to feel frustrated and damage his self-esteem. Moreover, it could have a longer-term impact, as he moved into Year 9 and beyond, on his potential to succeed in public exams such as GCSEs which would have adverse consequences for the ambitions he holds to study at university.
 - (b) R has no friends in England. If he started school now, he would be moving into an environment where the friendship groups have already been established. There is a risk that he would be isolated at school and if he experienced bullying, as he did in Portugal, he would not have the support of friends to fall back on.
 - (c) R's education has suffered through being away from school for more than a term and a half. His school place in Portugal remains open to him and he will be able to reintegrate into that school and its curriculum far more easily than starting afresh here.
 - (d) Although R has suffered from bullying in Portugal, this was more of an issue in primary school than recently. It is important that he has friends who will support him. I do not accept the mother's submission that the father will simply ignore the issue. It is also open to the mother to raise the matter herself with the school.
 - (e) The evidence does not suggest that R has been unable to raise his sexuality with his father. The exchange of text messages referred to above not only demonstrates the contrary, but also suggests that the father accepts his son for who he is. There is no credible evidence to suggest that the father holds an antipathy towards homosexuality; this does not follow from the fact that he may have expressed views which suggest lack of acceptance of people who are transgender (even if this is true). In any event, although the mother will not be present in Portugal, she will continue to support R through their telephone and video contact which takes place every day and through what I hope will be more frequent visits to Portugal on her part.
 - (f) There is no doubt that the majority of R's extended family are in Portugal. He has good relationships with members of his family on both sides. He has a close relationship with his brother and, despite feeling cross with him, also with his father (both of whom he says he misses).
 - (g) Although the mother asserts that the father may not permit her to have contact with R, the arrangement is already contained in a Portuguese court order. There is no evidence to suggest that the father will disobey it.
 - (h) In my view, any decision that R should relocate to England should only be made following a full welfare investigation. The Portuguese courts are better placed to undertake such an investigation. Apart from the fact that Portugal currently has exclusive jurisdiction under the 1996 Hague Convention (itself a factor of some significance) the evidence about R's existing life is primarily in Portugal. Any welfare assessment would need to weigh the advantages of a move to England – in particular R's wish to live with his mother – against the potential detriment to his educational prospects and his relationships in Portugal. If a move is to take place, it

should be done in a planned way with particular consideration being given to R's educational future. He is talented and ambitious and both parents should be working in concert to help him fulfil his ambitions.

119. I strongly suspect that a significant element of R's objections is a sense of dread at having to face the consequences of his decision last summer to remain in England. He is anxious about how his father may react and worried about having to explain what happened to his friends. Unless R is to cut himself off forever from his life in Portugal (which would be wholly contrary to his interests), these are anxieties he will have to confront at some stage in any event. In my view, the sooner he does so the better from his perspective. Otherwise, they have the capacity to escalate as an issue in his own mind. Many people – adults and children alike – have experienced the sort of dread that R may now be feeling after taking a decision which was unwise. Confronting his decision by returning to Portugal, in my view, is likely to bring about a sense of relief for R as he once again experiences the love and affection of his father and paternal family and comes to realise that the anxieties he may have built up were overblown.
120. Another matter which I consider to have played a significant part in the views R has formed is the lack of direct contact he has been able to have with his mother. I do not consider the current arrangements whereby he only sees his mother twice a year, including an extended block comprising 45 days over the summer, to be in his interests. In my view, although it is not my task to make long term welfare decisions, it is clear that R needs to see his mother more frequently than has been the case hitherto. I also think it would benefit him if he were able to spend some of his summer holidays in Portugal enjoying some relaxed time with his paternal family and interacting with his peers. At present, his experiences of his father are predominantly of a parent who has to maintain the school routine (although he does also spend significant holiday time with his father including approximately 45 days over the summer) whereas he spends time with his mother in a relaxed holiday environment. Cost is an issue, but at R's age he should be able to fly unaccompanied. In my view, R should be spending time with his mother at least every holiday and also for any extended weekends that take place in the middle of term. It should additionally be possible for the mother to fly to Portugal to spend time with him during term time, perhaps for a weekend in Porto. I hope that this is a matter which the parties can discuss and agree. If not, I will hear submissions as to whether I should make a temporary order on the basis of my jurisdiction under Article 11 of the 1996 Hague Convention.
121. Article 11 confers upon the court a limited jurisdiction and any orders I make will only have effect until such time as the Portuguese Court is in a position to deal with any application which either parent may make. I do, however, consider that R's circumstances are sufficiently urgent to justify the use of the jurisdiction in this case. It will benefit R and make the return easier to manage if he and his parents have a clear understanding as to the arrangements going forward and he knows that he will be seeing his mother more frequently than has hitherto been the case.
122. The order should also record the undertakings offered by the father. Both parties, in my view, should give an undertaking not to denigrate R to the other and to allow him to have unrestricted indirect contact with the other parent during the times he is with them. I do not consider it appropriate to require the father to undertake not to criticise R for his sexuality; there is no credible evidence that he has done so.
123. I will hear submissions as to the timing of a return. My view is that it should take place soon, within a matter of days, to enable R to resume his schooling. Assuming she

remains willing to travel back, R should be accompanied to Portugal by his mother. The father should fund the cost of her flight (which will be cost neutral for him as he was proposing to fly here himself).

124. I conclude by repeating that I found R to be an impressive young person. I know that he will be disappointed by my decision, but I hope he will understand and accept it. The mother has a role to play in this: R should be told that I have listened carefully to what everybody had to say and decided that this is the best solution for him. I hope she will encourage and support him in returning to Portugal. The parents should feel proud of the son they have brought up. He has a bright future ahead of him. It is important that his parents should put aside any animosity they hold towards each other and focus on trying to work together collaboratively in order to support him throughout the remainder of his childhood and ultimately to help him achieve his ambitions.