



Neutral Citation Number: [2024] EWHC 17 (Fam)

Case No: FD21P00888

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 16/01/2024

**Before:**

**THE HONOURABLE MR JUSTICE MACDONALD**

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**Between:**

**B**  
**- and -**  
**N**

**Applicant**

**Respondent**

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**Ms Cliona Papazian and Ms Lucy Logan Green** (instructed by **Makin Dixon Solicitors**) for  
the **Applicant**

**Mr Tertha Gupta KC and Mr Harry Langford** (instructed by **Ben Hoare Bell LLP**) for the  
**Respondent**

Hearing dates: 16 November 2023  
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**Approved Judgment**

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties  
or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Approved Judgment**Mr Justice MacDonald:**

## INTRODUCTION

1. This matter comes before the court having been remitted to the Family Division by the Court of Appeal (see *X (Child Abduction: Habitual Residence)* [2022] EWCA Civ 1423). Matters have moved on considerably since the order of the Court of Appeal of 8 September 2022.
2. The court has before it applications with respect to X, born in September 2014, and now aged 9. The father of X is B, represented by Ms Cliona Papazian and Ms Lucy Logan Green of counsel. The mother of X is N, represented by Mr Teertha Gupta of King's Counsel and Mr Harry Langford of counsel. X currently resides with his father in Germany. The applications before the court are the father's application for permission to withdraw his application under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereafter 'the 1980 Convention') for the return of X to the jurisdiction of Germany, and the mother's application for orders under Part II of the Children Act 1989 and the inherent jurisdiction of the High Court. In circumstances I will come to, at the outset of the hearing the father conceded that the English court retains jurisdiction in respect of X by operation of Art 7 of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereafter 'the 1996 Convention').
3. Within this context, the father asserts that the proper forum for the determination of the welfare dispute between the parents is the jurisdiction of Germany, and that the court should now transfer jurisdiction for X to Germany pursuant to Art 8(1) of the 1996 Convention. The mother resists this course, arguing that this case falls outside the scope of Art 8(1) of the 1996 Convention, and seeks the return of X to this jurisdiction and the determination of her applications under the Children Act 1989 and the inherent jurisdiction.
4. The court has been assisted by the written and oral submissions of leading and junior counsel. In light of the complexity of the issues in this case, I reserved judgment and now set out my decision and reasons. Following the conclusion of the hearing on 16 November 2023, and with the permission of the court, the parties lodged further written submissions on 4 December 2023 dealing with a further authority identified and submitted to the court by Mr Gupta and Mr Langford subsequent to the hearing.

## BACKGROUND

5. The background to this matter is set out both in the first instance judgment of Theis J (see *B v N* [2022] EWHC 1260 (Fam)) and in the judgment of the Court of Appeal. The following aspects of the background are relevant for the applications now before this court.
6. The father is a German citizen and is now 68 years of age. The mother is a Ugandan citizen and is now aged 34. Both parents have children from previous relationships. The parents met in 2013, online. Thereafter, they had a short relationship, as a result of which X was born in 2014. There remains a substantial dispute between the parties

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regarding X's living arrangements in the years following his birth, and it is difficult to identify any common ground with respect to the facts.

7. During his early childhood, X remained living with his mother in Uganda. In 2017, X was granted a German passport. In May 2018 X travelled to Germany for a short period before returning to Uganda. Although the periods remain disputed, during early 2019 X spent time in both Germany and Uganda.
8. The father took X to Germany on 29 April 2019. Since that date, X has not returned to Uganda. The evidence before the court demonstrates that the mother sought to persuade the father to return X to Uganda. The father deflected those requests. The exchange of messages from the mother seeking return, and messages in reply from the father deflecting that request, continued into 2020.
9. The mother travelled to England in January 2020. It would appear that the father was not aware of this development. In July 2020 the mother claimed asylum in the United Kingdom. At this point, the mother contacted the father and informed him that she had a six month visa permitting entry to the United Kingdom. In response, the father intimated that he would seek to make arrangements to visit England with X. The father flew to England with X and the father's eldest son on 30 September 2020 on return tickets. In circumstances that remain strongly contested, X remained with the mother whilst the father and his eldest son returned to Germany. In exchanges between the parents the father suggested that X would be staying with the mother in England only until January 2021. In response, the mother asserted in one message that "we made no mandatory Christmas deal. I told you I only need him until my process is done".
10. In the context of the United Kingdom being in lockdown due to the Covid-19 pandemic, the father did not press for the return of X to Germany and he remained living with the mother in England and attending school. In May 2021, some eight months after X had come to England, the mother issued proceedings under Part II of the Children Act 1989 in the Family Court, seeking a child arrangements order. Whilst the father did not challenge the jurisdiction of the English court at the first two hearings of the mother's application, at the third hearing the father indicated through counsel that he intended to issue proceedings under the 1980 Convention for the summary return of X to the jurisdiction of Germany. At this point, on 5 November 2021, the proceedings under the Children Act 1989 were stayed.
11. Whilst on 2 July 2021 there was a direction in the English proceedings for statements, the mother's statement dated 5 May 2021 deals with matters only up to 1 January 2021. The father's statements cover a similar period, as does the mother's third statement in response. A statement by the mother dated 4 August 2021 deals with the then proposals for contact. No further statements have been provided in the English proceedings and, whilst one was directed, no Cafcass welfare report was prepared prior to the proceedings being stayed. Within this context, I note that the Cafcass Safeguarding letter dated 11 June 2021 made the following comment regarding forum:

"The parties make allegations against the other which are concerning in nature; the external information does little to provide clarity in this regard but perhaps this is not surprising given that one party does not live in the UK, with X also having only come here in September of last year. Little is therefore likely to be known of them by UK authorities. Whilst this may be

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the case, the differing accounts of the parties has raised questions for me in terms of whose needs this dispute over arrangements perhaps best meets, to include whether England is actually the right area of judiciary to consider and/or determine this application given that X is thought to be a German national having habitually lived there (with the reported agreement of both parties) prior to coming to the UK.”

12. The father submitted his application under the 1980 Convention to the German Central Authority on 31 October 2021. The German Central Authority transmitted that application to ICACU, which appointed solicitors to bring proceedings on behalf of the father. The father’s application seeking the summary return of X was issued in the Family Division on 18 November 2021. The application was heard by Theis J in April 2022 and judgment was handed down on 25 May 2022 granting the father’s application for summary return.
13. The mother filed a notice of appeal against the decision of Theis J on 21 July 2022, whereupon the return order made in favour of the father was stayed. On 8 August 2022 the Court of Appeal granted the mother permission to appeal and listed the appeal hearing on 8 September 2022, shortly before the two year anniversary of X’s arrival in the jurisdiction of England and Wales.
14. Ahead of the appeal hearing, and by agreement with the mother, the father had contact with X in England for four days at the end of August 2022. On 28 August 2022, the father removed X from the jurisdiction of England and Wales and took him to Germany without the mother’s consent. Whilst, on 31 August 2022, Russell J made an order requiring the immediate return of X to the jurisdiction of England and Wales the father did not comply with that order. At the date the mother’s appeal came before the Court of Appeal on 8 September 2022 X remained in Germany with the father. The Court of Appeal allowed the mother’s appeal and remitted the father’s application under the 1980 Convention to the Family Division for re-hearing.
15. Following the decision of the Court of Appeal, the mother made no further applications to the English court and appears to have taken no steps to enforce the return order made by Russell J on 31 August 2022 and affirmed by Judd J on 6 September 2022. However, on 24 August 2023, four days prior to the twelve month anniversary of X’s removal from England and Wales by the father, the mother issued proceedings in Germany under the 1980 Convention. On 22 September 2022, the German court dismissed the mother’s application under the 1980 Convention on the ground that X objected to being returned to the jurisdiction of England and Wales.
16. This court has a translation of the Memorandum of the evidence given to the German court on 15 September 2023. The German court heard from X on that date and the bundle contains a translated copy of an account of his meeting with the judge. The Memorandum records the evidence of X’s procedural guardian. The bundle also contains a translated copy of the account of the procedural guardian’s meeting with X. The German court recorded the following evidence from X’s procedural guardian:

“[The procedural guardian] emphasises once again that it was X’s wish not to go back to England. He does not describe England as his home. It is important for him to maintain contact with Uganda. He also feels at home in Germany and wants to stay with his father.

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The recommendation of the procedural guardian is that X should keep his centre of life in Germany, because his expressed will is to be regarded as strong and the procedural guardian considers it to be a psychological risk if X were to be brought back to England.”

Despite the very young age of the minor, [the procedural guardian] is convinced that the minor is mature enough to form a will to that effect. X is very reflective and constant in his statements. In the opinion of the procedural guardian, he is not influenced by any side. In particular, X is able to justify his opinion well.”

17. As noted, the German court handed down judgment on 22 September 2023. In that judgment, the German court held that X’s views amounted to him opposing return within the meaning of Art 13(2) of the 1980 Convention, that he had reached an age and level of maturity that gave reason to take his views seriously and that there was no possibility of carrying out a return in such a way as X would not oppose it. In reaching these conclusions, the court observed as follows:

“X has not only made it clear to the procedural guardian, but also in his personal hearing to the court, that he does not want to return to his mother in England under any circumstances. His statements to this effect did not remain general and unfounded. On the contrary, his remarks – quite surprisingly for the court in view of his age of just 9 years – were characterised by an impressive reflection and justification of his decision. X has credibly conveyed that he has always wanted his home to be understood in Germany. He has his roots in Uganda and feels so strongly connected to this ‘home of the heart’ that regular visits to the country with his father are very important to him. This is also because he has three other half siblings there. He misses his mother and his siblings living in the United Kingdom, but otherwise has no connection to the United Kingdom. In Germany, he has his school, his friends and hobbies that he enjoys.

The court is convinced that the child’s fear of remaining in England, and thus in particular of remaining with the child’s mother permanently, as described by the child, is to be assessed as credible. The mental inconsistency of the applicant described by the child in graphic terms are not likely to be sufficient to establish a serious danger or unreasonable situation for the child within the meaning of Article 13 paragraph 1 lit b of the Hague Convention. However, the descriptions of this effect support the formation of the will and the solidified volition of the only 9 years old child according to the definition of ‘opposing’ in Article 13 paragraph 2 of the Hague Convention. The child’s considerations are characterised by considerable maturity, to the effect that he himself considers possible solutions to his situation and comes to the conclusion that he can stay in contact with his mother via telephone and her visits to Germany. Thereby the child does not fail to mention positive impressions and experiences from living with the child’s mother in England and also the ongoing parental conflict. However, it is important to him to convey to the grownups that he achieved his own intentions and not only does he want to remain in his familiar environment in Germany, but also a certain level of protection in the care of his father.”

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18. Finally, having determined that Art 13(2) of the 1980 Convention was satisfied with respect to X, the German court went on to hold as follows with respect to the discretion to make an order for return in any event:
- “The court does not see the possibility of carrying out the return of the child in such a way that the child does not oppose it. Generally speaking, it would be possible for the child’s father to accompany the child, at least for a certain transitional period, and this would also be reasonable for the child’s father. In view of the child’s repeated descriptions of domestic violence in the care of the child’s mother and of her mental inconsistencies, however, a return of the child to the sole care of the child’s mother – even under restrictions – is currently inconceivable from the perspective of the best interests of the child in light of its right to physical and mental integrity, even if the child’s father were to accompany the child for a transitional period”.
19. Whilst the mother asserts that X’s stated wishes were clearly the result of coaching by the father, and in their Skeleton Argument Mr Gupta and Mr Langford level a number of criticisms at the German proceedings, the mother did not appeal the decision of the German court.
20. The father asserts that following the dismissal by the German court of her application under the 1980 Convention, the mother told X that she accepted the decision of the German court and that X would remain living in Germany. The father further contends that X has repeatedly told his mother that he wants to live in Germany and that he is happy in that jurisdiction living with the father and his elder half-brother. The father asserts that in mid-October the mother unilaterally ceased all contact with X, she having up to that point had video contact with X three to four times per week. Through Mr Gupta and Mr Langford, the mother contends that she stopped indirect contact as it was “too traumatic”. Through Ms Papazian and Ms Logan Green, the father alleges that the mother simply stopped calling X, leaving him disappointed.
21. At the outset of this hearing, both parties agreed that there was no longer any utility in the proceedings issued by the father in this jurisdiction under the 1980 Convention continuing and, further, that it was not a proportionate use of the court’s time to engage in an extended debate as to whether those proceedings should be dismissed or permission given to the father to withdraw them. In the circumstances, both parties agreed that the father’s application under the 1980 Convention should be dismissed.
22. As I have noted, the parties each submit that this court retains jurisdiction in respect of X by operation of Art 7(1) of the 1996 Convention. Neither party sought to resile from that position in their supplementary written submissions. Within this context, and finally, at the hearing both parties concurred that the primary question for this court was now one of forum, in circumstances where there remain welfare issues to be determined in respect of X. Initially, both parties agreed that the court should approach the question of forum in this case within the framework provided by Art 8 of the 1996 Convention. However, subsequent to the hearing Mr Gupta and Mr Langford drew the attention of the court to the decision of Arbuthnot J in *A (A Child) (Abduction: Jurisdiction: 1996 Hague Convention)* [2021] EWHC 581 (Fam), in which Arbuthnot J held that the court cannot transfer jurisdiction under Art 8(1) of the 1996 Convention where jurisdiction is retained pursuant to Art 7(1) until the conditions in Art.7 (1)(a) or

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(b) are met. In these circumstances, and as I have noted, I permitted further written submissions from the parties.

## SUBMISSIONS

*The Mother*

23. Through Mr Gupta and Mr Langford, the mother contends that Art 8(1) of the 1996 Hague Convention cannot apply in this case in circumstances where this court retains jurisdiction pursuant to Art 7(1) of the Convention. As I have noted, the mother relies in support of that submission on the decision of Arbuthnot J in *A (A Child) (Abduction: Jurisdiction: 1996 Hague Convention)*. Mr Gupta and Mr Langford highlight the conclusion of Arbuthnot J at [52] in *A (A Child) (Abduction: Jurisdiction: 1996 Hague Convention)* that, in circumstances where Art 8(1) makes reference to a court having jurisdiction under Arts 5 and 6 of the 1996 Convention, but does not refer to Art 7, the court cannot transfer jurisdiction under Art 8(1) of the 1996 Convention whilst jurisdiction is retained pursuant to Art 7. Within the foregoing context, Mr Gupta and Mr Langford submit that this court cannot transfer its retained jurisdiction in respect of X pursuant to Art 8(1) of the Convention, because this case falls outside the scope of that provision and does not fall within the scope of the Convention.
24. In so far as Ms Papazian and Ms Logan Green seek to rely on the decision of the Court of Justice of the European Union (hereafter ‘CJEU’) in *TT v AK* [2023] 1 WLR 4028 to gainsay the decision in *A (A Child) (Abduction: Jurisdiction: 1996 Hague Convention)*, Mr Gupta and Mr Langford submit that this court is no longer bound to rely on the decisions of the CJEU pursuant to s.6 of the European Union (Withdrawal) Act 2018. Mr Gupta and Mr Langford further submit that, in any event, the decision in *TT v AK* concerned Art 15 of Council (EC) Regulation 2201/2023 (hereafter ‘BIIa’) which, by contrast to Art 8(1) of the 1996 Convention they submit, does not contain a limiting clause excluding cases where jurisdiction is retained following an alleged child abduction.
25. If the court does not accept the submission of the mother that this case is outside the scope of Art 8(1), then Mr Gupta and Mr Langford submit that the facts of this case lead to a conclusion that it is this court that is better placed to assess the best interest of X. They rely on the following matters:
  - i) The mother has no confidence in the German system, her German lawyers, or in the ability of the German court to ascertain the wishes and feelings of X in circumstances where she maintains that the father has coached X to say he wishes to remain in Germany.
  - ii) The mother would face grave difficulties in participating in proceedings in Germany. Whilst she has funding for the English litigation, she does not for proceedings in Germany, she not being entitled to legal aid in that jurisdiction. The mother does not speak German and would not be able to travel to Germany for hearings due to having two children of school age in this jurisdiction.
  - iii) There are at present no extant proceedings in Germany. Within this context, transfer of jurisdiction pursuant to Art 8(1) would engender further delay in proceedings that have been ongoing for nearly three years.



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- iv) There are already proceedings in this jurisdiction in which Cafcass has provided a Safeguarding letter and the parties have filed statements. With respect to ascertaining his wishes and feelings for the purposes of s.1(3)(a) of the Children Act 1989, X could travel temporarily to this jurisdiction and speak with Cafcass whilst having contact with his mother or Cafcass could interview him using remote means.
  - v) The proceedings in England and Wales predate the German Hague proceedings and will necessarily predate any welfare proceedings issued by the father in Germany. In the circumstances, Art 13 of the 1996 Convention would oblige the German Court to abstain from exercising any transferred jurisdiction it may have in respect of X whilst the English court is seised of a request for corresponding measures of protection which remain under consideration.
  - vi) X was abducted by the father and then coached for the purpose of non-welfare based proceedings in Germany. If the court transfers jurisdiction to the German courts pursuant to Art 8(1) to facilitate the determination of X's welfare, this court will be facilitating an act of 'forum shopping' by the father and acting inconsistently with the aims of the 1980 Convention.
26. Within this context, Mr Gupta and Mr Langford submit that, in contradistinction to the English court, the German court would plainly *not* be better placed in the particular case to assess the best interests of X. Within this context, Mr Gupta and Mr Langford submit that the English court should retain its jurisdiction in respect of X, reiterate the summary return order made under the inherent jurisdiction, seek the co-operation of the German authorities in respect of the enforcement of the return order and progress the proceedings under Part II of the Children Act 1989 to permit a proper assessment of X's wishes and feelings and his welfare.

*The Father*

27. Through Ms Papazian and Ms Logan Green, the father submits that the decision in *A (A Child) (Abduction: Jurisdiction: 1996 Hague Convention)* is incorrect, and that these proceedings are accordingly within the scope Art 8(1) of the 1996 Convention.
28. In this respect, Ms Papazian and Ms Logan Green point to the decisions of Poole J in *Re A and B (Children Transfer of Proceedings to Romania) (No.1) [2021] EWHC 3703 (Fam)* and *Re A and B (Children: Transfer of Proceedings to Romania) (No.2) [2021] EWHC 3702 (Fam)* and the decision of HHJ Moradifar sitting as a High Court Judge in *Re B (Children: Care Proceedings: Jurisdiction: Transfer of Proceedings) [2022] EWHC 1494 (Fam)*, in which the question of transfer of jurisdiction was addressed under Art 8(1) of the 1996 Convention, notwithstanding that in each case the English court retained jurisdiction pursuant to Art 7 of that Convention. Ms Papazian and Ms Logan Green submit that this approach is to be preferred to that taken by Arbuthnot J in *A (A Child) (Abduction: Jurisdiction: 1996 Hague Convention)* as being consistent with the need to interpret and apply the 1996 Convention purposively in a manner which supports the protection of children and their welfare interests. As noted, Ms Papazian and Ms Logan Green also seek to rely, by parity of reasoning, on the decision of the CJEU in *TT v AK* concerning the proper interpretation of Art 15 of BIIa in the context of child abduction.

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29. In the foregoing context, on behalf of the father Ms Papazian and Ms Logan Green submit that, upon the father offering an undertaking to commence proceedings in Germany, the court should request that the German court assume jurisdiction in respect of X and stay the proceedings in this jurisdiction under the Children Act 1989. In support of their submission that the German court is better placed to assess the best interests of X for the purposes of Art 8(1) of the 1996 Hague Convention, Ms Papazian and Ms Logan Green rely on the following matters:
- i) X has a clear and ongoing connection with Germany. In circumstances where X has been in Germany since August 2022, and prior to that time had spent considerable periods of time in Germany, nexus between X and the jurisdiction of England and Wales is now “slim and somewhat historic” when set against the relevance and immediacy of his current life in Germany. It is in X’s best interests for the jurisdiction proximate to his day to day life to assess his welfare.
  - ii) Within this context, it is the German court that is proximate to, and will have easier access to, the educational and health care professionals engaged with X, and the information concerning his physical, educational and emotional welfare, that will inform the assessment of X’s best interests. The majority of the up to date information relevant to the determination of questions of welfare (education records, health records, peer group and social activities) is in Germany.
  - iii) Similarly, the professionals within any German court proceedings will have far easier access to the milieu of X’s day to day life when undertaking assessments of his wishes and feelings and his wider welfare. The Youth Welfare Office has already contributed to proceedings under the 1980 Convention.
  - iv) X is used to the process in Germany and is familiar with the German court process, having met with the German judge and his procedural guardian in the proceedings under the 1980 Convention. This would render more likely, and better facilitate, his participation in proceedings concerning his welfare than compelling him to travel to England against his clearly expressed wishes pending the outcome of welfare proceedings.
  - v) X has stated in clear terms that it is Germany where he wishes to remain and that is his expectation following the decision of the German court in September 2022. In circumstances where X is settled in Germany and strongly wishes to remain in that jurisdiction, it would be in X’s best interests for the German court to assess his welfare, allowing as it would X to remain, consistent with his clearly expressed wishes, in his current stable and secure environment whilst the court assesses his best interests and determines the remaining disputes between the parents. This would plainly be in his best interest.
  - vi) By contrast to the position of a German court seised of proceedings, the English court does not have easy access to the educational and health care professionals engaged with X, and the information concerning his physical, educational and emotional welfare, that will most fully inform the assessment of X’s best interests. The Safeguarding Letter provided by Cafcass in June 2021 highlighted that little is likely to be known of the family’s circumstances by the authorities in this jurisdiction. Whilst evidence has been filed in the proceedings

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in this jurisdiction, it is out of date. Whilst directed, no report pursuant to s.7 of the Children Act 1989 has been completed in those proceedings.

- vii) In circumstances where X is settled in Germany and strongly wishes to remain in that jurisdiction, being compelled to travel to England to meet with the Cafcass officer in order to ascertain his wishes and feelings would be an artificial exercise resulting in an assessment divorced from his current lived experience. This would not be in his best interests.
  - viii) Cafcass would be required to consider at a distance X's schooling, health care, social activities and friendship groups.
  - ix) The 1996 Convention should support the operation of the 1980 Hague Convention. A transfer of jurisdiction pursuant to Art 8(1) ensures that the jurisdiction with which X has the closest link following the un-appealed decision of the German court in the 1980 Hague Convention proceedings is the jurisdiction that will assess his best interests.
  - x) The mother has demonstrated that she is able to litigate in Germany with the assistance of German lawyers. She was, and would be, provided with an interpreter by the German court. In so far as she was unable to attend hearings in Germany personally, the proceedings in that jurisdiction under the 1980 Convention make clear she is able to attend by way of video link. The mother has not filed with the court any evidence to make good her assertion that she would not be entitled to legal aid in Germany, in particular were she to make an application pursuant to Art 21 with respect to her rights of access.
  - xi) With respect to the conduct of the father in removing X from England, Art 8(1) contains no punitive element. The question asked by Art 8(1) in this case is whether the German court is better placed to assess X's best interests.
30. Within the foregoing context, and upon the father undertaking to issue proceedings in the German court, Ms Papazian and Ms Logan Green invite the court pursuant to Art 8(1) of the 1996 Convention either to request the German court to assume jurisdiction to take such measures of protection in respect of X as it considers to be necessary or to stay the English proceedings and invite the parties to introduce such a request.

## THE LAW

31. Consideration of the law governing the determination of the issues in this case begins with Chapter II of the 1996 Hague Convention.
32. Chapter II of the 1996 Hague Convention deals with the question of which Contracting State has jurisdiction to take protective measures in respect of the subject child. Within this context, Art 5 provides the primary rule of jurisdiction as follows:

### “Article 5

(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.

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(2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.”

33. The operation of Art 5(2), governing the circumstances in which jurisdiction based on habitual residence changes following a change of habitual residence to another Contracting State, is made expressly subject to the operation of Art 7. Art 7 deals with the retention of jurisdiction by a Contracting State in the event of wrongful removal or retention of the subject child:

**“Article 7**

(1) In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and

a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or

b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

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

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

(3) So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.”

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34. I pause to note that in *Re J (A Child) (1996 Hague Convention) (Morocco)* [2015] UKSC 70 at [30] the Supreme Court stated as follows with respect to the operation of Art 7 (first emphasis added, second emphasis in the original):

“Article 7 is concerned with the very specific situation where jurisdiction is *retained* in the country of *former* habitual residence because the child has been wrongfully taken or kept away from that country.”

35. Chapter II of the 1996 Hague Convention dealing with the attribution of jurisdiction also provides a mechanism for the transfer of jurisdiction from one Contracting State to another. Art 8 deals with cases in which the Contracting State having jurisdiction requests that another Contracting State assume jurisdiction, on the grounds that that other Contracting State is better placed to assess the best interests of the child. Within this context, Art 8 provides:

**“Article 8**

(1) By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either

- request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or
- suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.

(2) The Contracting States whose authorities may be addressed as provided in the preceding paragraph are

- a) a State of which the child is a national,
- b) a State in which property of the child is located,
- c) a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage,
- d) a State with which the child has a substantial connection.

(3) The authorities concerned may proceed to an exchange of views.

(4) The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests.

36. In *AM and GM v KL and VL* [2023] 2 FLR 1131 I summarised the principles governing the application of Art 8(1) of the 1996 Convention as follows:

“[24] The test for transfer under Art 8(1) is whether the other Contracting State is *better* placed to assess the best interests of the child. Where the

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Contracting State with jurisdiction is better placed to assess the best interests of the child, or where the Contracting States are equally well placed to assess the best interests, the Art 8(1) test will not be made out and jurisdiction will remain with Contracting State having jurisdiction.

[25] The Practical Handbook on the Operation of the 1996 Hague Child Protection Convention at paragraph 5.9 makes clear that a transfer under Art 8 may only be effected when three conditions are satisfied. First, that there is a connection between the child and the Contracting State to whose authorities it is permissible to transfer jurisdiction. Art 8(2) provides an exhaustive list of the factors capable of demonstrating such a connection. Second, the transfer must be in the child's best interests. Third, both Contracting States must agree to the transfer of jurisdiction. With respect to the best interests criteria, the Practical Handbook further observes as follows:

‘The authority making the request that jurisdiction be transferred must consider that this will allow for a better assessment of the child's best interests. The authority asked to assume or cede jurisdiction can only do so if it believes this is in the child's best interests.’

[26] Art 8(1) of the 1996 Hague Convention states expressly that the power to transfer jurisdiction under Art 8 is to be applied by way of an exception and, accordingly, represents an exception to the general rule of jurisdiction set out in Art 5. Further, the wording of Art 8(1) makes clear that even where the court concludes that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, the court with jurisdiction retains a discretion as to whether to effect that transfer and is not obliged to do so.”

37. With respect to the question of whether Art 8(1) of the 1996 Convention operates in circumstances where jurisdiction is retained pursuant to Art 7(1), the Convention falls to be interpreted in accordance with principles contained in Part III, Art 3 of the Vienna Convention on the Law of Treaties 1969. For the reasons I set out in *B v C (No2)(1996 Hague Convention Art 22)* [2023] EWHC 2524 (Fam), pursuant to Art 32 of the Vienna Convention it is appropriate to use the Explanatory Report for the 1996 Convention by Paul Lagarde as an aid to interpreting the 1996 Convention where necessary. The following passages from the Explanatory Report are relevant, commencing with the general aim of the jurisdictional provisions of Chapter II of the Convention:

“[6]... The general idea is that the Contracting States accept considerable limitation on the jurisdiction of their authorities. The new Convention was intended to eliminate in principle all competition between the authorities of different States in taking measures of protection for the person or the property of the child. The competent authorities are those of the State of the child's habitual residence (Art. 5), subject to significant specifications added for cases when there is no habitual residence (Art. 6) or in case of wrongful removal of the child (Art. 7). If in certain cases the authorities of other States may be led to intervene in the protection of the child (Art. 8 and 9), it is always, except for the temporary case of urgency or that of measures with strictly territorial effect (Art. 11 and 12), with the agreement or on the request of the authorities of the State of the child's habitual residence.”

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38. As to the exception to the principle contained in Art 5(2) where Art 7 applies, the Explanatory Report states as follows regarding the genesis of Art 7:

“[41] The Commission also admitted unanimously the principle according to which, except for wrongful removal, the change of the child’s habitual residence to another Contracting State has as its effect to give jurisdiction henceforth to the authorities of this other State. The change of habitual residence implies both the loss of the former habitual residence and the acquisition of a new habitual residence. It may be that a certain lapse of time exists between these two elements, but the acquisition of this new habitual residence may also be instantaneous in the simple hypothesis of a move of a family from one country to another. This is then a question of fact which is for the authorities called upon to make a decision to assess, and this is where the Commission rejected the idea of quantifying the period of time which would be necessary for the acquisition of a new habitual residence. It is only in the hypotheses of wrongful removal (Art. 7) or of displacement due to disturbances occurring in the State of the child’s habitual residence (Art. 6) that specific rules appear to be necessary.”

39. Within this context, with respect to the operation of Art 7(1) of the Convention, the Explanatory Report notes as follows (emphasis added):

[47] The first paragraph *maintains the jurisdiction* of the authorities of the Contracting State in which the child had his or her habitual residence immediately before the wrongful removal or retention, until the time when the child has acquired a habitual residence in another State and certain other conditions are fulfilled. In *maintaining this jurisdiction*, the text does not presume that the child has retained, more or less fictitiously, his or her habitual residence in the State from which he or she was wrongfully removed; it accepts, to the contrary, the possibility of a loss of habitual residence in that State, but it is intended to avoid that, during any period of hiatus between the loss of the old and the acquisition of the new habitual residence, jurisdiction might pass to the authorities of the State on the territory of which the child might be simply present in accordance with Article 6, paragraph 2 (see above). In this period of instability for the child, it is indeed desirable to avoid too frequent changes of jurisdiction. Moreover, it does not suffice, in order for the authorities of the State of the former habitual residence of the child to lose their jurisdiction, that the child has acquired a habitual residence in another State. Other conditions must yet be fulfilled, which the Convention presents in an alternative manner, following as closely as possible the substance of the conditions posed by the Convention of 25 October 1980.”

And:

“[51] The *maintenance*, so long as the conditions set out in paragraph 1 are not fulfilled, of jurisdiction on the part of the authorities of the State in which the child had his or her habitual residence immediately before the wrongful removal or retention should not hide the fact that the authorities of the State to which the child has been removed or in which the child is retained are henceforth the closest to the child. For this reason, paragraph 3 of Article 7 recognises their jurisdiction to take the urgent measures necessary for the

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protection of the person or the property of the child in accordance with Article 11 (see below). This jurisdiction however does not extend to the provisional measures with territorial effect attributed by Article 12 to the authorities of the State where the child is present.”

40. In the foregoing context the Explanatory Report confirms that, as recognised by the Supreme Court in *Re J (A Child) (1996 Hague Convention) (Morocco)* at [30], it is the *existing* jurisdiction based on habitual residence, i.e. jurisdiction under Art 5(1) of the Convention, that will be *retained* pursuant to Art 7(1) in the event of a wrongful removal or retention, unless the specific conditions prescribed by Art 7(1) are met.
41. The Practical Handbook on the Operation of the 1996 Hague Child Protection Convention also addresses the operation of Art 7(1) of the Convention. In *Re London Borough of Hackney v P and Others (Jurisdiction: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 1213, Moylan LJ was satisfied that *both* the Explanatory Report and the Practical Handbook are appropriate materials to consider for the purposes of determining the meaning and scope of the 1996 Convention. With respect to the operation of Art 7 itself, the Practical Handbook also makes clear that it is the *existing* jurisdiction based on habitual residence, i.e. jurisdiction under Art 5(1), that is *retained* pursuant to Art 7(1) following a wrongful removal or retention (emphasis added):
- “[4.20] In cases of international child abduction, the authorities of the Contracting State of the habitual residence of the child immediately before the wrongful removal or retention *retain jurisdiction* for measures aimed at the protection of the person and the property of the child until a number of conditions have been met. This is to deter international child abduction by denying any jurisdictional benefit to the abducting party”
42. With respect to the operation of Art 8(1) in the context of Art 7, and within the foregoing context, the Practical Handbook contains a worked example in which it is stated that, following a wrongful removal from State A to State B and the refusal of an application under the 1980 Convention in State B, thereafter a request for transfer of jurisdiction under Art 8(1) can be made to State B by State A, notwithstanding that in this example State A retains its existing jurisdiction based on habitual residence by operation of Art 7(1):
- “4(D)...However, if the authorities in State A consider that the authorities in State B are better placed to assess the best interests of the child and that State A is a State falling within Article 8(2) of the 1996 Convention in the particular case, they can request (directly or with the assistance of the Central Authority of State A) that the authorities in State B assume jurisdiction, or they can suspend consideration of the case and invite the father (or mother) to introduce such a request before the authorities of State B. The authorities in State B can assume jurisdiction in the case if they consider that it is in the child’s best interests.”
43. As highlighted in Ms Papazian and Ms Logan Green’s additional written submissions, the judges of the Family Division have to date taken differing approaches to the application of Art 8(1) of the 1996 Convention in cases where the court retains jurisdiction pursuant to Art 7(1) of that Convention.



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44. In *Re A and B (Children Transfer of Proceedings to Romania) (No.1)* [2021] EWHC 3703 (Fam) and *Re A and B (Children: Transfer of Proceedings to Romania) (No.2)* [2021] EWHC 3702 (Fam), Poole J was concerned with the question of whether to transfer of proceedings to the jurisdiction of Romania, where the parents had wrongfully removed children subject to care proceedings in this jurisdiction. Ms Papazian and Ms Logan Green point to the fact that Poole J was satisfied in *Re A and B (Children Transfer of Proceedings to Romania) (No.1)* that the court could have recourse to Art 8(1) of the 1996 Convention, notwithstanding that the English court retained jurisdiction by operation of Art 7(1) of the 1996 Convention. Having set out the terms of Art 8, in *Re A and B (Children Transfer of Proceedings to Romania) (No.1)* at [12] Poole J summarised the basis on which he considered that Art 8 was engaged (emphasis added):

“[12] In the present case there is no dispute that the children were habitually resident in the jurisdiction of England and Wales immediately prior to their removal to Romania at the end of August 2021, and that their removal was wrongful. Neither is there any dispute that the Local Authority had parental responsibility for the children pursuant to the interim care order made on 16 July 2021 and that the Local Authority has not acquiesced in the removal to or retention of the children in Romania. Hence, Art 7 of the 1996 Hague Convention operates so that jurisdiction is kept in England and Wales irrespective of whether the Romanian courts also have jurisdiction on the basis of habitual residence, about which I make no finding. No challenge has been made to the jurisdiction of the Family Court to have made the interim care order. *No party disputes that this court has kept jurisdiction by reason of Art. 7 of the 1996 Hague Convention, and therefore has jurisdiction under Arts. 5 and 6 of the 1996 Convention.*”

45. In *Re B (Children: Care Proceedings: Jurisdiction: Transfer of Proceedings)* [2022] EWHC 1494 (Fam), HHJ Moradifar, sitting as a Judge of the High Court, determined that the criteria under Article 7(1) of the 1996 Convention were not made out and, hence, that the English court retained jurisdiction under Art 7. Ms Papazian and Ms Logan Green again point to the fact that, in refusing to transfer jurisdiction, the court did not hold that Art 8(1) was of no application in circumstances where the court retained jurisdiction pursuant to Art 7 of the Convention, but rather applied the test set out in Art 8(1) and concluded that the Romanian court was not better placed to deal with the issues in the case.
46. By contrast to the decisions in *Re A and B (Children Transfer of Proceedings to Romania) (No.1)* and *Re B (Children: Care Proceedings: Jurisdiction: Transfer of Proceedings)*, which proceeded on the basis that Art 8(1) of the 1996 Convention continues to operate in cases where the court retains jurisdiction based on habitual residence by operation of Art 7(1), in *A (A Child) (Abduction: Jurisdiction: 1996 Hague Convention)* Arbuthnot J reached the opposite conclusion and held that the operation of Art 8(1) of the 1996 Convention is excluded where Art 7 of the Convention is engaged. Having considered the contents of the Explanatory Report and the Practical Handbook, Arbuthnot J held as follows:

“[67] There is a general power to transfer under Article 8 in the 1996 Convention if the situation comes within Article 5 or 6. Article 7 requires that jurisdiction is retained by the country of habitual residence immediately

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before the child was wrongfully removed. The lack of ability to transfer jurisdiction in wrongful removal cases is supported by a reading of the Article as well as the Explanatory Notes written by the Rapporteur M. Lagarde. The Practical Handbook is not binding on this court. It was written 20 years afterwards and although in one example it contradicts the narrow construction of Article 7 it generally supports the principle that jurisdiction is not transferred for reasons of policy.

[68] In my judgment jurisdiction cannot be transferred in the case of wrongful removal under Article 7 until the conditions in Article 7(1)(a) or (b) are met.”

47. In light of the conclusions I have reached below, I do not consider it is necessary to go on to examine the decision of the CJEU in the case of *TT v AK* [2023] 1 WLR 4028.
48. Finally in respect of the relevant law, Art 13 of the 1996 Convention provides as follows regarding the principle of *lis pendens*:

**“Article 13**

(1) The authorities of a Contracting State which have jurisdiction under Articles 5 to 10 to take measures for the protection of the person or property of the child must abstain from exercising this jurisdiction if, at the time of the commencement of the proceedings, corresponding measures have been requested from the authorities of another Contracting State having jurisdiction under Articles 5 to 10 at the time of the request and are still under consideration.

(2) The provisions of the preceding paragraph shall not apply if the authorities before whom the request for measures was initially introduced have declined jurisdiction.”

49. With respect to the question of whether a court has declined jurisdiction for the purposes of Art 13(2), paragraph 80 of the Explanatory Handbook makes clear that transfer of jurisdiction pursuant to Art 8(1) of the 1996 Convention will bring to an end the conflict of jurisdiction that Art 13 is designed to address:

“[80] Another way of putting an end to conflicts of jurisdiction consists for the authority which has been first seised to transfer the jurisdiction to the authority which was subsequently seised. It will do so if it thinks that this latter authority is better placed to determine the best interests of the child. Paragraph 2 of Article 13 indicates in this sense that the preceding paragraph does not apply – therefore that the authority subsequently seised does not have to abstain from deciding – in the case in which the authority initially seised with the request for measures has renounced its jurisdiction. This possibility gives to the solution of the conflict a greater flexibility than that which is authorised by the technique of *lis pendens*. This latter system works in favour of the authority which was first seised, while paragraph 2 of Article 13 allows precedence to be given to the most appropriate forum, even if it has been seised subsequently.”

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## DISCUSSION

50. Having considered carefully the original and the supplemental submissions of Mr Gupta and Mr Langford for the mother and Ms Papazian and Ms Logan Green for the father, I am satisfied that this case comes within the scope of Art 8(1) of the 1996 Convention. I am further satisfied that, applying the principles set out in Art 8(1), it is appropriate in this case to request that the German courts assume jurisdiction in respect of X as being better placed to assess his best interests. My reasons for so deciding are as follows.

*Jurisdiction*

51. As set out above, at the outset of the hearing the father conceded that the English court retains jurisdiction in respect of X by operation of Art 7(1) of the 1996 Convention. It is implicit in the decision of the German court in September 2023 on the mother's application under the 1980 Hague Convention that the German court was satisfied that X was habitually resident in the jurisdiction of England and Wales as at 28 August 2022 and was wrongfully removed from the jurisdiction of England and Wales on that date. Within this context, pursuant to Art 7(1) the jurisdiction of England and Wales Art will retain jurisdiction in respect of X until he has acquired habitual residence in another State, in this case Germany, *and either* the mother has acquiesced to X's removal *or* X has resided in Germany for a period of at least a year since the date on which the mother had knowledge of X's whereabouts which, on the evidence before the court, was shortly after 28 August 2022 and X is settled in Germany.
52. As conceded by Ms Papazian and Ms Logan Green, it would be difficult to argue on the evidence before the court that the mother acquiesced to the removal of X to the jurisdiction of Germany in August 2022. Whilst it is plain on the evidence before the court that X has resided in Germany for a period of at least a year since the date on which the mother had knowledge of X's whereabouts and no request for return lodged during that period is pending, the father has led no evidence before this court that would allow the court to conclude with confidence both that X is now habitually resident in Germany and that he is settled in that new environment. In these circumstances, and having regard to the conclusion I have reached regarding the scope of Art 8(1) of the 1996 Convention, I proceed on the basis of the father's concession that by operation of Art 7(1) of the 1996 Convention the English court retains jurisdiction in respect of X.

*Forum*

53. I reject the submission of Mr Gupta and Mr Langford that this case falls outside the scope of Art 8(1) of the 1996 Convention in circumstances where the court retains jurisdiction in respect of X by operation of Art 7(1) of the 1996 Convention.
54. I am unable to agree with the conclusion of Arbutnot J in *A (A Child) (Abduction: Jurisdiction: 1996 Hague Convention)* that jurisdiction cannot be transferred pursuant to Art 8(1) of the 1996 Convention in a case of wrongful removal until the conditions in Article 7(1)(a) or (b) of the 1996 Convention are met.
55. Where a child is habitually resident in a Contracting State, that Contracting State will have jurisdiction in respect of that child pursuant to Art 5(1) of the 1996 Convention. Where the child's habitual residence changes to another Contracting State then,

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pursuant to Art 5(2), jurisdiction based on habitual residence, i.e. jurisdiction under Art 5(1), will also change, subject only to the operation of Art 7(1). By the terms of Art 7(1), in the case of a wrongful removal or retention the Contracting State in which the child was habitually resident immediately before the removal or retention, i.e. the Contracting State which had jurisdiction pursuant to Art 5(1), will “keep” that jurisdiction, i.e. the jurisdiction under Art 5(1), until the criteria in Art 7(1) are met.

56. In the circumstances, Art 7 of the Convention is not a basis of jurisdiction in its own right, but rather acts simply to *retain* the existing jurisdiction based on habitual residence, i.e. jurisdiction under Art 5(1), in the event of a wrongful removal or retention. In this context, Art 8(1) will continue to apply as, by operation of Art 7(1), following a wrongful removal or retention the Contracting State of habitual residence will remain a “Contracting State having jurisdiction under Art 5” for the purposes of Art 8(1). Reference to Art 7 of the Convention is omitted from Art 8(1) not because the operation of Art 8(1) is excluded where Art 7 is engaged, but because the basis of jurisdiction where Art 7 is engaged remains that provided by Art 5(1) of the Convention until the criteria in Art 7(1) are met.<sup>1</sup> I am reinforced in my conclusion that this is the correct interpretation of the Convention by the following further matters.
57. First, in the context of the words in Art 7(1) that provide that “the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention *keep* their jurisdiction” (emphasis added), paragraph 47 of the Explanatory Report makes clear that Art 7(1) does not create a separate ground of jurisdiction but operates to *retain* the jurisdiction of the authorities of the Contracting State in which the child had his or her habitual residence, i.e. the jurisdiction pursuant to Art 5(1). Paragraph 4.20 of the Practical Handbook likewise makes clear that by operation of Art 7(1) the authorities of the Contracting State of the habitual residence of the child immediately before the wrongful removal or retention *retain* jurisdiction based on that habitual residence, i.e. jurisdiction under Art 5(1).
58. Second, the example in the Practical Handbook at 4(D) makes clear that recourse can be had to Art 8(1) where a Contracting State retains jurisdiction by operation of Art 7(1). The inclusion of that example in the Practical Handbook is not, as was submitted to Arbuthnot J in *A (A Child) (Abduction: Jurisdiction: 1996 Hague Convention)*, a mistake. Rather, the example reflects the correct interpretation of Art 7. Namely, that in circumstances where Art 7(1) of the Convention acts to retain the existing jurisdiction based on habitual residence in the event of a child abduction, i.e. jurisdiction under Art 5(1), Art 8(1) will continue to apply in such circumstances as, by operation of Art 7(1), the Contracting State of habitual residence will remain a “Contracting State having jurisdiction under Art 5” for the purposes of Art 8(1).
59. Third, the interpretation set out above reflects the approach in the domestic authorities. As I have noted, in *Re J (A Child) (1996 Hague Convention) (Morocco)* [2015] UKSC 70 at [30] the Supreme Court recognised that Art 7(1) operates so that the jurisdiction of the Contracting State of habitual residence, i.e. jurisdiction under Art 5(1), is retained. The interpretation of Arts 7 and 8 of the 1996 Convention set out above is

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<sup>1</sup> Within this context, the conclusion in *A (A Child) (Abduction: Jurisdiction: 1996 Hague Convention)* that the court cannot transfer jurisdiction under Art 8(1) of the 1996 Hague Convention until the conditions in Art.7 (1)(a) or (b) are met is in my view further unsustainable where, once those conditions are satisfied, jurisdiction is no longer retained and there is therefore no jurisdiction to transfer.

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further reflected in the approach taken by Poole J in *Re A and B (Children Transfer of Proceedings to Romania) (No.1)*, in which Poole J recognised at [12] that the result of jurisdiction being retained under Art 7(1) of the 1996 Convention is that the court continues to have jurisdiction under Art 5 of the 1996 Convention and that, therefore, the question of forum falls to be determined by reference to Art 8(1).

60. Finally, it would not be consistent with the overall aims of the Convention if a Contracting State having jurisdiction pursuant to Art 5(1) of the 1996 Hague Convention were suddenly to be *prohibited* from transferring that jurisdiction to another Contracting State pursuant to Art 8(1), under *any* circumstances, simply because the jurisdiction based on habitual residence had become a retained jurisdiction by operation of Art 7(1) following a wrongful removal or retention. As reiterated by Moylan LJ in *Re London Borough of Hackney v P and Others*, the 1996 Convention should be interpreted and applied purposively in a manner which supports the protection of children and their welfare interests. Art 8(1) of the Convention is an exception to the provisions in Chapter II that come before it that is designed to ensure fidelity to the cardinal principle that the jurisdiction with which the child has the closest connection should assess the best interests of the child. Art 8(1) recognises that this will usually, but not always, be the jurisdiction in which the child is habitually resident and that there will be cases where, to adopt the terms used in the Explanatory Handbook at paragraph 52, it is in the child's best interest for his or her protection to be ensured by authorities other than those of the State of the habitual residence. Within this context, an interpretation that places an absolute bar on the operation of Art 8(1) where Art 7 is engaged would be inconsistent with the aims of the 1996 Hague Convention.
61. I accept that both the Explanatory Report and the Practical Handbook make clear that the jurisdictional rules set out in Chapter II of the 1996 Convention seek to deter international child abduction by denying any jurisdictional benefit to the abducting party and to discourage attempts at forum shopping using the abduction of children. However, the interpretation of the 1996 Convention set out above does not, to use Mr Gupta and Mr Langford's phrase, "allow an abductor to have the option of unilaterally changing the forum" when account is taken of who is entitled to seek transfer of jurisdiction under Art 8(1). Art 8(1) *expressly* limits the entitlement to make a request for transfer, or to suspend the proceedings to permit a party to introduce such a request, to "the authority of a Contracting State having jurisdiction under Article 5 or 6". Within this context, there is no question of an abductor being able to act unilaterally to effect the transfer of proceedings under Art 8(1). Rather, it is the relevant authority of the Contracting State that must decide whether that course of action should be taken and can only sanction such a course where the criteria set out in Art 8(1) are satisfied.
62. Within the foregoing context, I am satisfied that the question of forum in this case falls squarely within the scope of Art 8(1) the 1996 Convention. In these circumstances, the court must address the question of forum by reference to the provisions of Art 8(1). I am satisfied that the German court is better placed to assess the best interests of X and that it is in X's best interests for jurisdiction to be transferred to the German court.
63. X is a dual national with German citizenship. There is a substantial connection between X and the jurisdiction of Germany given the time he has spent residing in that jurisdiction during the course of his life and in circumstances where his father is a German national. I accept the submission of Ms Papazian and Ms Logan Green that in circumstances where X has been in Germany since August 2022, and prior to that time

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had spent considerable periods of time in Germany, the nexus between X and the jurisdiction of Germany is a strong one.

64. As I noted in *AM and GM v KL and VL*, central to the general rule of jurisdiction under Art 5(1) of the 1996 Convention (in this case, the jurisdiction currently retained by the English court pursuant to Art 7(1) of the 1996 Convention) is the idea that, ordinarily, it is in a child's best interests for questions concerning his or her welfare to be decided in the place where the child is integrated into a family and social environment, the aim being that the court of the Contracting State with which the child has the closest connection will be the one to determine his or her best interests. The authorities in the country of the children's habitual residence are closer to, and will ordinarily have a greater understanding of, the children and their social and family environment. They are therefore, ordinarily, better able to assess fully the children's situation and welfare needs when reaching decisions about the children's best interests. However, and by way of exception, Art 8(1) recognises that there will be some cases where another jurisdiction will be better placed to assess the best interests of the child. Having regard to the evidence before the court, I am satisfied that that is the position in this case.
65. On the evidence before the court, the German authorities are now closer to, and will have a greater understanding of, X and his social and family environment than that available to the English authorities. In circumstances where X has now been in Germany for a period of some 15 months, and his day-to-day family and social life is centred in that jurisdiction, it is the German court that is proximate to, and will have easier access to, educational and health care professionals engaged with X, and the most up to date information concerning his physical, educational and emotional welfare, that will inform the assessment of X's best interests. Similarly, I accept that any professionals required to be engaged with court proceedings concerning X's welfare will have far easier access to the milieu of X's day to day life when undertaking assessment of his wishes and feelings and his wider welfare if those proceedings take place in the jurisdiction of Germany. Within this context, and in addition, the judgment of the German court of September 2023 makes clear that the relevant District Youth Welfare Office has already undertaken an assessment with respect to child welfare concerns raised by the mother.
66. By contrast to the position of a German court seised of proceedings, whilst the parties have engaged in proceedings in this jurisdiction concerning X's welfare, in the current circumstances, the English court would not have as easy access to the educational and health care professionals engaged with X, and the information concerning his physical, educational and emotional welfare, that will most fully inform the assessment of X's best interests. Whilst it is also the case that evidence has been filed in the proceedings in this jurisdiction, that evidence is now out of date. Whilst the English court directed a report from the Family Court Reporter, no report pursuant to s.7 of the Children Act 1989 was ever completed in those proceedings. A Safeguarding Letter was prepared by Cafcass in June 2021, but that letter highlighted that little was at that time likely to be known of the family's circumstances by the authorities in this jurisdiction. Were these matters now sought to be remedied in the English proceedings, absent compelling X's return to this jurisdiction contrary to his strongly expressed wishes, Cafcass would be required to consider at a distance X's family relationships, schooling, health care, social activities and friendship groups when seeking to arrive at a welfare assessment.

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Such evidence that has already been filed in the proceedings under Part II of the Children Act 1989 can be disclosed by order of this court to the German court.

67. I accept that it will be more difficult for the mother to litigate in Germany than in England. The ease or otherwise with which a parent can participate in proceedings concerning their child will obviously inform the question of which court is better placed to assess that child's best interests. However, I must in this case have regard to the fact that the mother has demonstrated that she is able to litigate in Germany with the assistance of German lawyers when pursuing her application under the 1980 Convention. The judgment of the German court demonstrates that the mother was provided with an interpreter by the German court. In so far as the mother contends that she will be unable to attend hearings in Germany personally, the judgment in the proceedings under 1980 Convention makes clear that the German court was willing to facilitate the attendance of the mother by way of video link.
68. Whilst the mother contends she would not be entitled to legal aid in any German proceedings, there is no evidence before the court to prove that assertion. Within this context I note that, under the current domestic regulations, the mother would likewise not be entitled to legal aid for proceedings under Part II of the Children Act 1989 in this jurisdiction. Whilst the mother, both in her evidence and through Mr Gupta and Mr Langford, levels criticisms at the competence of the German court and expressed her lack of confidence in that jurisdiction, the authorities make clear that it is not appropriate for this court to engage in comparisons between the respective laws and legal systems of the two jurisdictions in question when considering the question of transfer of jurisdiction under an international agreement (see *Re N (Children)* [2016] UKSC 15 at [4] and *Re M & L (Children)* [2016] EWHC 2535 (Fam) at [33]).
69. Mr Gupta and Mr Langford further pray in aid Art 13(1) of the 1996 Convention as preventing the German court from being better placed to exercise any jurisdiction transferred to it where, at the time of the commencement of any German proceedings, there will be a request for "corresponding measures" to the English court which is still "under consideration" for the purposes of Art 13(1), comprising the prior proceedings in this jurisdiction under Part II of the Children Act 1989. However, the Explanatory Report makes clear at paragraph [80] that a transfer of jurisdiction pursuant to Art 8(1) of the 1996 Convention operates, for the purposes of Art 13(2), puts an end to the situation of *lis pendens* under Art 13(1). Within this context, where jurisdiction is transferred to the German court pursuant to Art 8(1), the current *lis* subsisting by virtue of Art 13(1) as a result of the prior proceedings under Part II of the Children Act 1989 will come to an end. In the circumstances, I am not satisfied that Art 13 of the 1996 Convention constitutes a reason in this case for concluding that the German court is not better placed to assess X's best interests.
70. In the foregoing circumstances, I am satisfied that for the purposes of Art 8(1) of the 1996 Convention the German court is better placed to assess X's best interests than the English court. Having regard to the evidence before the court, the German court will be better able to assess fully X's situation and welfare needs when reaching decisions about his best interests. Within this context, I am further satisfied that transferring jurisdiction to the German court is in X's best interests.
71. The father wrongfully removed X to the jurisdiction of Germany in August 2022. Whilst, therefore, X is in Germany as the result of that wrongful removal, it would not

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appear that the mother took any steps to enforce the return order she secured from the English court on 31 August 2022 and which was affirmed on 6 September 2022. The mother forbore from issuing proceedings under the 1980 Hague Convention until nearly 12 months after X was taken to Germany. The result of this position for X is that he has now been back in the jurisdiction of Germany for some 15 months. Further, whilst this court has not sought to establish for itself X's current wishes and feelings, it is plain from the judgment of the German court of 22 September 2023 that X has stated in the clearest terms his strong wish to remain in Germany and does not wish to return to England. I am satisfied that these matters inform the question of whether transfer of jurisdiction to Germany is in X's best interests.

72. It is in X's best interests for the jurisdiction to which he has the closest proximity to assess his best interests. In circumstances where X has been in Germany for some 15 months, and for the reasons I have already set out above, I am satisfied that that jurisdiction is Germany. In this context, and in addition, X is already familiar with the court process in Germany, having met with the German judge and his procedural guardian in the proceedings under the 1980 Convention. I consider that this familiarity, in the context of his wish to remain in Germany, would render more likely, and would better facilitate, X's participation in proceedings concerning his welfare. Further, transfer of jurisdiction to Germany would allow X to remain, consistent with his clearly expressed wishes, in his current environment whilst the court assesses his best interests and determines the remaining disputes between the parents. I am equally satisfied that, in the context of the extended period of time X has now spent in Germany and his strongly expressed wish to remain in that jurisdiction, that seeking to compel him to travel to England against those clearly expressed pending wishes is likely to militate against his participation in proceedings concerning his welfare and to heighten his concerns regarding that process.
73. Finally, I acknowledge the submission of Mr Gupta and Mr Langford that a conclusion that the German court is better placed in this case to assess X's best interests and that it is in X's best interests for jurisdiction to be transferred, has the undesirable side effect of ratifying the position achieved by the father by way of the abduction of X in August 2022. However, whilst I accept that the policy of discouraging child abduction is relevant, the touchstone with respect to the question of transfer remains the terms of Art 8(1). Applying the principles set out in Art 8(1), I am satisfied that the unwelcome fact that transfer of jurisdiction will confirm a position achieved by way of child abduction does not act in this case to undermine the conclusion that the German court is now best placed to assess X's best interests.

## CONCLUSION

74. For the reasons set out, I am satisfied that this case falls within the scope of Art 8(1) of the 1996 Convention and that the German court is better placed in the particular case to assess the best interests of X and that it is in X's best interests for jurisdiction to be transferred to the German court. In the circumstances, upon the father providing an undertaking to commence proceedings in Germany, I will request that the German court assume jurisdiction to take such measures of protection in respect of X as it considers to be necessary. Pending the decision of the German court, I will re-impose the stay on the proceedings under Part II of the Children Act 1989 and direct that they stand dismissed in the event that the German court accepts jurisdiction. Further, and again pending the decision of the German court, I will stay the operation of the return order



Approved Judgment

made on 31 August 2022 and affirmed on 6 September 2022 and direct that they stand discharged in the event that the German court accepts jurisdiction.

75. In closing, it is again important to acknowledge that the decision of the court to transfer jurisdiction to the German court following the abduction of X by his father in August 2022 risks being seen by the father as a vindication of his actions at that time. That is emphatically *not* the case. The decision of the court is based on its assessment of which jurisdiction is better placed to assess X's best interests and whether transfer of jurisdiction is in X's best interests for the purposes of Art 8(1) of the 1996 Convention. It is not, nor should it be taken by the father to be, an endorsement of what can only be described as the blatant and cynical child abduction perpetrated by the father in August 2022.