



Case no: FD24P00473

Neutral Citation Number: [2024] EWHC 3266 (Fam)

IN THE HIGH COURT OF JUSTICE  
FAMILY DIVISION

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 16 December 2024

Before:

Mr Jonathan Glasson KC sitting as a Deputy Judge of the High Court

Between:

M

Applicant

- and -

B

Respondent

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Mr Richard Little (instructed by Switalskis Solicitors) for the Applicant  
Mr Giles Bain (instructed by Fosters Legal Solutions Ltd) for the Respondent

Hearing dates: 28 and 29 November 2024  
Draft judgment circulated to the parties 12 December 2024  
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**Approved Judgment**

**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 and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.**

**Mr Jonathan Glasson KC sitting as a Deputy Judge of the High Court:**

Introduction

1. The application before the court, dated 3 October 2024, is brought under the Child Abduction and Custody Act 1985 (incorporating, by Schedule 1, the 1980 Hague Convention on the Civil Aspects of International Child Abduction: the “1980 Hague Convention”). The application seeks the summary return to the Czech Republic of two children: [B] (born 14 April 2013, and so aged 11) and [N] (born 21 January 2019, and so aged 5). The Applicant is the children’s mother (“the Mother”), the Respondent is their father (“the Father”).
2. In advance of the hearing, I was provided with an agreed bundle as well as a small bundle of authorities. Both parties also submitted helpful skeleton arguments.
3. The parties attended the final hearing in person. The Mother was screened throughout.
4. At the hearing Ms Callaghan, the Cafcass officer who had reported on the children’s wishes, attended and gave oral evidence. Both parents gave oral evidence confined to the defence of consent that had been raised by the Father. At the conclusion of the evidence, both parties made oral submissions expanding on their skeleton arguments. I am very grateful to both counsel for their assistance as well as to Ms Callaghan whose written and oral evidence I have found particularly helpful. The hearing itself took the full two days that had been allocated and at the end of the hearing I indicated to the parties that I would reserve judgment.
5. The judgment is structured as follows:
  - a) The issues to be determined
  - b) Factual overview and procedural history
  - c) Preliminary issue and application for oral evidence
  - d) The evidence from Cafcass
  - e) The evidence in relation to consent
  - f) The parties’ submissions
  - g) The legal framework
  - h) Discussion and conclusions

The issues to be determined

6. Both children were born in England. They moved to the Czech Republic in 2020. The Mother has rights of custody under the Czech Law Act no 89/2012 Coll Civil code sections 865 – 870. It is common ground that the children were habitually resident there prior to their travelling to England on 9 June 2024 and have been wrongfully retained here.

7. The Father defends these proceedings on the basis he says that:
  - (a) The Mother consented to the relocation of the children from the Czech Republic to England (Article 13(a) of the 1980 Hague Convention).
  - (b) The children are at grave risk of harm or will be otherwise placed in an intolerable situation were they to be returned to the Czech Republic (Article 13(b) of the 1980 Hague Convention).
  - (c) The children’s objections to a return to the Czech Republic (Article 13 of the 1980 Hague Convention).

Factual overview and procedural history

8. The Mother (aged 43) is of Czech nationality and the Father (aged 44) is British. The parties met in the UK and married on 19 July 2014. Both children were born in the UK but lived in the Czech Republic from 2020 until travelling to the UK in June 2024.
9. There were difficulties in the parties’ marriage in 2017 and Children Act 1989 proceedings were issued by the Father after the Mother allegedly assaulted him. The parties resumed their relationship however in December 2017. The parties agreed to relocate to the Czech Republic permanently and made the move in the summer of 2020. At first, they lived with the children’s maternal grandfather and then moved to their own new home in mid-August 2020.
10. Between 2020 and 2024 the Father travelled back and forth to the UK for his work and the Mother was the primary carer of the children.
11. By December 2023, the marriage seems to have broken down and the parties agreed to divorce. The Mother claims that the Father was a “*controlling bully and took advantage of her*”. Initially, the parties agreed that the children would remain with the Mother in the Czech Republic and the Father would continue his visits to see them. What happened thereafter is the subject of sharp dispute, the detail of which I analyse below when determining the consent issue. By way of summary, the Father states that the Mother repeatedly said that the children wanted to move to live with their Father in the UK. The Father says that he continuously checked with the Mother that this was what the Mother wanted during April and May 2024. The Father says that she reiterated that that is what she wanted. The Mother says that she only referred to the children moving to the UK in heated arguments.
12. The Father travelled to the UK with the two children on 9 June 2024 and they have subsequently remained in the UK. Contact between the Mother and the children was only resumed after these proceedings were issued.

*Procedural history*

13. On 6 September 2024, ICACU requested the Mother’s solicitors to act on her behalf. The 1980 Hague proceedings were issued on 3 October 2024.
14. At the hearing before Macdonald J on 9 October 2024, the Father was ordered not to remove the children from England and Wales and to lodge his and the children’s

passports with his solicitors pending further order. The Father was ordered to provide his and the children's address to the court, to be kept on file as confidential and not disclosed to the Mother without permission of the court. The condition that it was not to be disclosed to the Mother as imposed at the Father's request. The proceedings the Father had issued in the family court under case number WD24P70490 were stayed. A Cafcass report was ordered, and the matter was timetabled to PTR and final hearing.

15. At the PTR before Ms Naomi Davy, sitting as a Deputy Judge of the High Court, it was ordered that the Mother's objection to the recordings exhibited to the Father's witness statement should be determined as a preliminary issue at the final hearing.

#### Preliminary issue and application for oral evidence

##### *The preliminary issue in relation to the recordings*

16. The Father exhibited to his statement a number of audio and video recordings. The video recordings were primarily of conversations between the Father and the Mother, two were taken from CCTV footage at the parties' house in Czech Republic and one was of a WhatsApp video call. The audio recordings were of the Father speaking with his daughter [N]. The Mother objected to these recordings being admitted. I had asked the parties whether I should consider the recordings in advance of the hearing, but the Mother's representatives objected and argued that they should only be considered once I had heard argument as to whether or not they were admissible. At the start of the hearing I therefore heard the parties on the issue.
17. Mr Little on behalf of the Mother explained that the objection was brought on the ground of proportionality, and he submitted that the Court would not be helped by the recordings bearing in mind the extent of the documentary material that was already before the Court. He said that the recordings were obtained without the Mother's consent and without the consent of [N]. He invited the court to consider the suggested probative value of the recordings; the completeness of the recordings; and whether admission of the evidence achieved the overriding objective of ensuring cases are dealt with justly and proportionately. He relied on the observations of Peter Jackson J (as he then was) in *Re M and F (Covert Recording of Children)* [2016] EWFC 29 that “[i]t is almost always likely to be wrong for a recording device to be placed on a child for the purpose of gathering evidence in family proceedings, whether or not the child is aware of its presence.”
18. Mr Bain argued that the recordings had been obtained with the Mother's consent. The Mother was aware that there was a CCTV camera in the garden in their house and the Mother was aware that the WhatsApp video call was being recorded. In any event the recordings were relevant to the defences that had been raised by the Father. Bearing in mind that the Mother's objection was one of proportionality, Mr Bain argued that the two-day listing of the case would accommodate consideration of the recordings.
19. Both parties submitted that if I determined that the recordings should be admitted then they would wish to put them to Ms Callaghan as well as potentially putting them to the parents.

20. Having heard the parties I indicated that the recordings should be admitted. There was no objection in principle to the recordings by the Mother, the objection was solely one of proportionality. The two-day listing would accommodate consideration of the recordings, and I would in due course consider the probative value of the recordings. The recordings had been exhibited to the Father’s witness statement and so the Mother had had sufficient notice of them.

*The application for oral evidence*

21. Relatedly, the parties asked for permission for the parents to give oral evidence.
22. I noted that there had been no direction for oral evidence, contrary to the *President’s Practice Guidance on Case Management and Mediation of International Child Abduction Proceedings* (2023) which at para 3.14 provided that “*any party seeking to rely on oral evidence should raise the issue at the earliest available opportunity and no later than the pre-hearing review.*” That paragraph also indicated that “[*t*]he ordinary rule in proceedings under the 1980 Hague Convention is that the court will be very slow to make a direction for oral evidence to be given. Any party seeking such direction for oral evidence will need to demonstrate to the satisfaction of the court that oral evidence is necessary to assist the court to resolve the proceedings justly.”
23. There is no right to call oral evidence which should only be allowed “*sparingly*”, with the threshold for the court giving permission a “*high one*”: *Re B (Children) (Abduction: Consent: Oral Evidence) (Article 13(b))* [2022] EWCA Civ 1171, paras 57-65. That threshold is more likely to be crossed where binary issues of fact are involved, such as whether consent has been given for the purposes of Article 13(a) as Moylan LJ pointed out in *Re B*. The court must nonetheless decide whether it is necessary to hear oral evidence in order to be able fairly to determine central issues of fact in the context of what is a summary process and in the context of the available documentary and written evidence: *Re. B*, at para 64.
24. In my judgment it was necessary for a fair determination of the issue of consent for there to be oral evidence from the parents. I made plain that the oral evidence was to be focused on that issue and was not to stray into other disputed aspects of the case. I therefore acceded to the parties’ application.

The evidence from Cafcass

*The Cafcass report from Ms Callaghan*

25. Ms Callaghan met with the two children on 11 November 2024. At the outset both children confirmed that they wished to speak to Ms Callaghan together and that they were aware of the reason for the meeting. [B] said that he had been to three different schools in the Czech Republic and that “*my third school was not nice*”. He said that there was a language problem at first. They said that [N] had been happy at her school in the Czech Republic and [B] said that his sister had had lots of friends at her school and had been very popular. [B] said that “*my school in England is really nice, I have lots of friends and the teachers are nicer. I do not have as much problems, but I do worry about being able to catch up with learning things.*”

26. [B] said that when they lived in the Czech Republic “*we lived with mum and dad but that dad was at work so only came over to stay not that often but like at Christmas he stayed for three weeks*”. They had a dog and a cat in the Czech Republic and [N] said that the dog looked “*sad now*” and had a “*sad face*”.

27. Ms Callaghan asked the children whether they talked to their mother since coming to England:

“[B] stated ‘we talk to mum every day now because the Judge said we have to between six and seven for thirty minutes’. [B] then went on to say, ‘I was happy at first to see mum and talk with her but now I don’t want to because she was lying to [N]’. At this point [N] was nodding her head saying, ‘he does not want to talk to mum, I talk to mum’. I explored this further, asking what [B] thought his mum was lying about and [N] said, ‘I told that mum had bashed my head on the breakfast table, we were at breakfast and I didn’t want to eat and then mum said I had to have some and then she hit my head three times’. I asked when that had happened and [N] said, ‘it was a long time ago’. [B] then added, ‘it was not that long ago, about one year and I saw it happen’. [B] then said, ‘mum was talking rubbish and lying, she was saying to [N] we can go to the park when I come over, but she doesn’t know if she is going to come over and also she said that if you come back, I will never smack you, but she has said that before”.

28. Ms Callaghan asked the children to tell her about their parents:

“[B] told me, ‘when mum said that I needed help, we went to a psychologist and when I talked to her she told me that mum needs a therapist more than me’. I asked [B] whether the Psychologist had said that to him and he replied that ‘dad told me’. He then said, ‘mum said before that dad does not let us speak to her but that is not true, dad always asked us, and we said that we did not want to talk’. Talking about his father, [B] stated, ‘he is good and really nice, he never smacks me or shouts at me, and he never smashes up my stuff. Mum has smashed up three tablets and a Nintendo switch. One tablet was smashed over my bum, which she purposely smashed’. [N] was listening to what her brother was saying however did not make any comment at that point.”

29. Ms Callaghan asked [B] about his comment that he had no friends in the Czech Republic and he said:

““I had a friend once in Czech and he came over to my house for a sleepover. My mum got angry with me over something, I can’t remember what and she said to me, ‘are you blind’. I then said to her, ‘are you blind’ and she began shouting. My friend started to cry, asking me if it was their fault. He never came to my house again after that’. [B] continued, ‘once when I was doing my homework, mum said to me to pack my bags because I was going to the orphanage. Twice she told me to pack my bags and go. Then she would say to me, ‘so you want to go’ and I said to her, ‘but you told me that I should go’.”

30. Ms Callaghan asked [B] about what had happened with his tablet devices and he explained:

“we were in the playroom and mum said no more tablet when I was playing on it. She took it and put it on a high surface, and I went to get it back because I was too naughty. Then she started smacking me with it across my bum until it broke’. [N] added, ‘I saw it, I was there and saw what mum did, she was angry’. [B] continued, ‘afterwards mum said it was worth breaking it because I spent too much time on it. I said to her, what else could I do because I had no friends’. Both [B] and [N] told me that their mother used to get very angry at times, with [B] saying, ‘*dad has never* smashed anything up or got angry and shouted at us or smacked us. Mum didn’t care about smashing up my things’.”

31. Ms Callaghan had sent the children an introduction letter which had set out some of the questions that she might be asking him. In answer to the question, “*what is the best, most special thing about you and your family*”:

“[B] had written ‘back in England, together with dad, play games and spend time together’. I asked him if he could explain this, [B] stated, ‘because most of the time in Czech mum had to do everything, working as a teacher and cleaning the house and she didn’t have time to spend with us’. I pointed out to [B] that his father also works, and he replied, ‘he works at home on Monday and Friday and on the other days nanny looks after us’. [B] then went on to say, ‘once when nanny was visiting us in Czech, [N] got her finger stuck in the window when I closed it. I was crying because [N] got hurt and I was scared that I would get the blame because every time I did something bad mum would shout at me or smack me’. [B] continued, ‘another time she asked me to put [N]’s socks on and I was having trouble because she kept moving. Mum came over and took my arm and leg and threw me across the room’. [N] was smiling and said, ‘I think she was just playing around with you’, to which [B] was shaking his head in disagreement. [B] told me, ‘before I had not said that I wanted to live with dad, but mum was saying to me that I had to make a decision, that I had to make a choice so I said I wanted to live with dad’. When asked how they thought that their mother would feel if they stayed living in England. [B] replied, ‘*she will cry because* she can’t see her children. [N] then said, ‘she cried on the phone when I told her the truth. If I say to mum the truth, I am scared that she will get angry, like the truth that she smashed my head’. [B] added, ‘I feel scared of mum when she gets angry and hits me’.”

32. Ms Callaghan asked the children about their wishes and feelings regarding a return to the Czech Republic. N said that she wanted a new home and a “*baby dog and baby cat*”. N added that they would prefer to have their dog from the Czech Republic and that he had “*cried for him because I miss him so much*”. Ms Callaghan noted:

“[N] ..said ‘I think mum wants me to go back but I want to stay. But if I did go back, I could get mum’s toys, she has bought me new toys and a new nail set. So, it is okay if I stay or if I go back’. [B] told me, ‘If I have to go back, I would not be happy, I have friends now’. [N] then said, ‘and by the way, mum told me that she would get me a kitten, and a surprise’, to which [B] remarked, ‘she ([N]) doesn’t care, she just wants a kitten’.

33. Ms Callaghan asked the children if they had talked to their mother about what they wanted to happen. [N] said that she had forgotten to say anything, and [B] said, “*I told my mum that I wanted to stay here and she said that is fine, but for some reason now*

*she wants us to go back'. [B] went on to say, 'I want to stay in England, we were both born here, and [N] was about two or three when we went to Czech'."*

34. [B] told Ms Callaghan that he would be worried about *going to Czech to visit because I think that I would have to stay for ever and not be able to return to England and I wouldn't want that'*. B continued:

“ “[B]efore we came to England mum said ‘you don’t have a mum anymore’. She said to me, do you want to live with your dad and I said yes. Then I cried because of leaving [the pet dog] and at first [N] cried every time after she talked to mum. I think if the Judge said we had to go back, then we both would have to go as dad said that we cannot be separated. I don’t think we should be separated, but I think [N] is only saying she would like to go because she wants to get a kitten’. [B] stated, ‘If I had to go I would feel very emotional, I would be sad and be crying’. [N] said, ‘I would be happy if I have to go and happy if I had to stay’. When I asked [B] to consider on a scale of 1 being happy to return to the Czech Republic and 10 being unhappy to return, how he felt, he replied, ‘definitely 10, I don’t want to go back’.”

35. Ms Callaghan thought that the children’s level of development maturity was “*at least consistent with their chronological ages. N presented as “happy little girl, unfazed by what her brother was saying.”* Ms Callaghan wrote that [B]:

“made good eye contact with me throughout the interview, however the views he expressed were overwhelmingly related to his mother and his description of her emotionally and physically abusing him. [B] struggled to provide a balanced view of life in the Czech Republic, referring to England in very positive terms and apart from liking the snow in the Czech Republic, his narrative was very negative. Aside from negative comments about living with his mother when she became angry and smacked him, [B]’s views on the Czech Republic related to not liking school and Halloween being boring there as people did not leave their home to do trick or treat, which indicated a less mature outlook.

31.[B] was able to reflect on how his mother may feel if he and [N] remained in England however I got a sense that he has been exposed to adult conversations relating to his parent’s relationship. Whilst I considered that [B]’s narrative about his mother’s treatment of him to be his justification of why he does not wish to return to live with his mother, I believe that his view about not wanting to return to the Czech Republic to be his authentic view. The children had both stated that they did not wish to speak separately to me, preferring to remain together in the room and I got a sense that they have quite a close relationship. Towards the end of our meeting, [N] was playfully pulling at [B]’s arm, and he told me that she can be bossy, to him and to their father. During the time I spent with the children I considered them both to have had the opportunity to speak freely and to express differing views at times.”

36. After the meeting Ms Callaghan received a message from the Father to say that [B] had asked to speak to her again. When Ms Callaghan phoned:

“ [B] stated, ‘I just wanted to tell you that my mum, she is not well, not well in the head and also that nanny lives with us’. I asked [B] what he meant by his mum “not



being well in the head”. He replied, ‘sometimes she shouts at me and smacks me for no reason and when I was at the psychologist, she told me that my mum needs treatment’. I asked [B] if the psychologist had actually said that to him. He replied, ‘yes, she said that my mum needs to have help before I do’. [B] did not tell me when it was that he had seen the psychologist.

I asked [B] if there was anything he wanted to say to me about his grandmother. He replied, ‘that she lives with us. My mum doesn’t like my nanny because she is kind to us and plays with us. I think that my mum is jealous and that is why she is not nice to my nanny’. I explained to [B] that sometimes the Judge might be worried if they thought that a child was saying things that one of their parents had told them to say. [B] immediately said, ‘no-one has told me what to say’. I asked [B] if he thought that his mum was unwell because she shouts and smacks him, could he think of a time when his mum started to become unwell. [B] explained, ‘well, she has always done it since I was little and even when we lived in England, she has always smacked me and my sister sometimes’. I asked [B] how he would feel if his mother did get help and if she did not shout or smack him. He replied, ‘I would be happy then’.”

37. Ms Callaghan then asked B whether there was anything else that he was worried about and he said, *“just that I don’t want to go back to Czech because I was unhappy there and I was bullied by other kids”*.

38. Ms Callaghan concluded her report by setting out her professional assessment bearing in mind the defences relied upon by the Father. In relation to the child objections defence, Ms Callaghan said that whilst [N] *“stated that she would be happy to remain in England or to return to the Czech Republic, I do not consider her to have the maturity to understand the implications of her expressed preferences.”*

39. In respect of [B], Ms Callaghan said:

*“The court will wish to consider the strength of [B]’s expressed views, wishes and feelings to a return and examine whether this was a maturely reasoned and independently held view. [B] stated that he does not want to return to the Czech Republic and although he explained that this mostly related to him not wishing to live with his mother. [B] talked of probably ‘hating Czech’ however this was with regard to his school experience, and he told me that even if his father wished to live there, he still would not want to attend school in the Czech Republic. [B] confirmed to me that the main reason for him not wanting to return was because he does not want to live with his mother. [B] presented as being angry toward his mother and he was unable to say anything positive about his relationship with her, whereas his view of his father was entirely positive.”*

40. Ms Callaghan then went on to consider the Article 13(b) defence raised by the Father:

*“38. Whilst [the Mother] denies that she has ever been physically or emotionally abusive toward the children, both [N] and [B] told me of incidents when their mother had been very angry shouting at them and that she had used physical discipline on them. [N] described an incident in which her mother had ‘smashed’ her head on a breakfast bar worktop, adding that it had been a long time ago. [B]*

said that the incident had occurred about one year ago, adding that he was angry with his mother because she was denying that it had happened.

39. The comments made by [B] and also by [N] are concerning, if they are recalling incidents that occurred whilst in their mother's care. Whilst I am aware that [the Mother] denies that she ever behaved in an abusive manner toward the children, it is my view that should the children return to their mother's care that a referral to the local Children's Services (via ICACU) be made so that appropriate support can be put in place and to assess [the Mother's] parenting and ability to manage the children's behaviour.

40. [The Mother] will need to appreciate that if the court make a Return Order, that it is likely that [B] will have a lot of resentment and may display angry defiant behaviour as he will perceive this to be a forced move against his wishes. [The Mother] may therefore need to seek additional support for him, and for herself whilst the children readjust and therefore this would need to be arranged prior to any return, if ordered."

*The oral evidence of Ms Callaghan*

41. In answer to Mr Little, Ms Callaghan confirmed that she had listened to the three audio recordings of [N]. The first recording was made when the Mother had stayed in the garage asking the Father to look after the children. Ms Callaghan said her first thoughts on listening to the recording was why it was being recorded. She was surprised given the context that [N] did go downstairs.
42. Ms Callaghan thought that the Father was being highly suggestive and was leading N in the second recording. She thought by saying that the Mother "*could not find us*" the Father was instilling fear. The Father seemed to be telling [N] things rather than [N] explaining what had happened. It seemed as though the Father was trying to get [N] to say things.
43. Ms Callaghan was asked about the fact that there had been no contact between the Mother and the children from 12 June until 9 October, a period of 4 months. She was asked whether that fact together with the recordings indicated alienating behaviour. Ms Callaghan said that she could not comment on whether it was alienating behaviour but she felt that what was on the tapes seemed staged and she assumed staged for the purposes of this hearing.
44. Ms Callaghan confirmed that [N] presented a different view from her brother and reported happy memories of the Czech Republic.
45. Ms Callaghan was asked about the fact that [B] had contacted her after her initial interview. She explained that she always gave the child an option of contacting her again after the meeting in case there was anything that they had forgotten. [B] wanted to say that his paternal grandmother was living at home with him. He also wanted to clarify that he had heard for himself that the psychologist had said that his Mother was not well in the head. [B] had told her that his Mother had hit him for reasons. Ms Callaghan asked him how he would feel if his Mother got help and he said he would be happy then. Ms Callaghan thought that this showed that he could think differently about

going back to the Czech Republic. She added that she was very sceptical that any psychologist would have discussions with a child about their mother having treatment. She suspected that [B] had overheard this comment.

46. She said that she was concerned that [B] was unable to say anything positive about his mother but added that it was not unusual for a child to pick a side when a marriage broke down. However she added that it was striking that [B] had said that he would be happy if his Mother had help and if she did not smack him. The other aspect that was striking was that he had said his Mother had to work and did not have time and that she thought he was appreciating the attention he was now receiving from his Father.
47. Ms Callaghan said that [B] understood why he was seeing her and saw it as important to get out everything he wanted to say. He was angry and quite cross with his Mother. He believed his Mother had agreed for him to come to England.
48. Ms Callaghan said that [B]'s views about returning to the Czech Republic seemed mainly to do with his Mother, but even if he went to Czech Republic he did not want to go back to his school there. She confirmed that the only protective measures that she would recommend were those that she had set out in her report.
49. In reply to questions from Mr Bain, Ms Callaghan said that [B] had spoken positively about his current school in England. He recognised though that he had some catching up to do. He had said that in the Czech Republic he had been at three different schools. He did not have any friends and that he had a language problem at first. He said that his third school was not nice. He did not say that it was at that school that he had been bullied.
50. Ms Callaghan thought that both children had probably been exposed to acrimonious conversations between their parents. She was asked whether she had gained any impression of obvious alienating behaviour by the Father. Ms Callaghan explained that she had not gained that impression at the time of her report. She stood by the comments that she had made about the recordings of [N].
51. Although at the meeting [B] had initially spoken over [N], it quickly became apparent that N was able to express her views. That was the reason why she had referred to [N] being quite bossy in her report. It was clear to Ms Callaghan that both children were expressing their own views of their experience and life now.
52. Ms Callaghan said that when [B] had said he did not want to return to the Czech Republic he was expressing his own view that he had come to himself. She said that [B] had said that he would be worried about going to the Czech Republic because he thought he would never be able to come back to England to see his father. That was a big reason for him not wanting to go back. He spoke about his Mother telling him to pack his bag and go to the orphanage. He felt that his Mother did not want him to be there. [B] thought that his Mother spoke differently to [N] than to him,
53. Ms Callaghan said that [B]'s views were consistent with his chronological age.

The evidence on consent

54. It is necessary to set out the evidence on this issue at some length, but I should emphasise to the parties that what follows is what appears to me to be the key evidence on the issue of consent. I have read the parents' statements and all of the documentary carefully in relation to all aspects of the case.
55. The Mother's initial instructions in these proceedings were set out in a witness statement from her solicitor dated 2 October 2024. In it her solicitor says that on 1 June 2024 the Mother had said that the Father "*should try taking the children and see how he dealt with things*". Her solicitor explained:
- "I am instructed that this was a comment made by the Applicant in the course of an argument, and other comments were also made by both parties. After the argument, the Respondent took the children out and sent her a message which referred to the Applicant saying all week for him to take the children to the UK, and that he was constantly saying "*It doesn't have to be this way*", so he said he was going to buy flight tickets to do so. During the course of that afternoon, told the children that he was taking them to the UK with him, and by the time he returned, he had booked the flights. When the Respondent returned with the children, they were excited about going to the UK and stated that they wanted to go with their father. The Applicant confirms that she was at the end of her tether, and said to the children "*well so you have no mother any more*", which they responded to and were clearly upset about. The Applicant was extremely distressed by what had happened and how quickly the Respondent had dealt with matters, to the extent that she became aware that this had been planned by him all along. She was very upset but did not know how to handle this and cause the children disappointment, however went and stayed in the garage overnight until the next day to ensure that the children did not see her reaction."
56. The Mother's solicitor goes on to say that "*when the parties were together the next day, I am instructed that the situation had calmed down and they had a reasoned discussion where the Respondent confirmed that he was taking the children for the purposes of a holiday, and he promised that he would return them on his next planned journey on the 28th June 2024. He also within the course of the conversation stated that he would do it when the children wished to return, however the Applicant got him to confirm that the children were returning on the 28th June 2024, and on this basis she agreed to him taking the children for the purposes of a holiday.*"
57. The Mother's solicitor says that three days later the Father said that because of the costs of a return flight he was changing the time of return to 29 July. She says that "*believing the Respondent would meet his obligations, and due to the excitement that the children were showing, the Applicant agreed to them being removed from the jurisdiction for the period from the 9th June 2024 until the 29th July 2024.*"
58. The Mother's solicitor says that her instructions are that the Father made it "*very clear upon arriving in the UK that his intention was to retain the children and was critical of the mother's behaviour to the children and him and was coercive and emotionally aggressive and threatening to the extent that at one stage she agreed to the children remaining with him however within a 3 hour window had retracted this as she realised the error she had made and the impact of the Respondent's behaviour*".

59. Exhibited to the statement of the Mother's solicitor are a number of text messages between the parties. I have considered them all and they have required some disentangling as they are not ordered chronologically. Of particular relevance to the issue of consent are the following messages:
- a) 5 May 2024 from the Mother to the Father at 00:02: *"Exactly, they don't want to go back to England + you see them just when you visiting us, which is going on for 4 years already, so it will be no change for them when we separated. Anyway I still think this should be on the paper, with the lawyer present...just in case. Don't want to be worried after divorce, that one day you may change your mind and do something stupid and I won't be able to do anything about it..."* (p.105 of the bundle).
  - b) 12 June 2024 from the Mother to the Father at 18:29: *"You said you will bring them back in summer are they still coming?"* Then at 18:35: *"I'll call the police when the situation calm down a bit, don't want to stress"* (p.108 of the bundle).
  - c) 13 June 2024 from the Mother to the Father at 21:24: *"I just need some break, change I don't know. I can't do this anymore [sad emoji]. I'll be of (sic) for some time. Please tell them I always loved them from all of my heart [sad emoji]. I'm so sorry to you all for hurting you so badly [sad emoji]."* (p.96 of the bundle).
  - d) 13 June 2024 from the Father to the Mother at 22: 25: *"No you didn't just say out of argument, you told me the week before I turned up back home in Czech very calm and normally. I asked you clearly do you want them to leave and go to the UK. You told me that they are both happy to be going. I get back to Czech and you are still saying they want to and are happy to go and they don't want to be with me anyway! A day later we get ready to go swimming, again you get aggressive, slam doors shout at the kids and me. I text you after we left when we get to the swimming pool to calm down I'm sure we can talk about it and sort things out...You reply THEY DON'T WANT TO BE WITH ME...then it's Take them and leave me alone, Stick it on Facebook. Then I tried talking to you again during the week and you again said what's to talk about they want to go and they don't want to be with me anymore! Then the evening before we left I was talking to you in the garden sat on the stairs. I said clearly it doesn't need to be this in way (sic), you again repeated its best for them anyway and that they will anyway have a better life in England especially the schools. I reminded you we had previously agreed that they would be there with you in Czech but you still carried on. This was over a two week period so I can't see how you are saying it was purely all just emotional. You gave me their passports, you drove us to the train station and said goodbye. I have done nothing wrong but think about the kids, their best interests and did exactly what you wanted and what both the kids wanted. I went and bought the tickets because you told me to do so on more than one occasion. But again I gave you every opportunity (sic) to sort things, you didn't want to, and kept to the line of them leaving with me, so tell me what else am I supposed to do when you give me 1 week to sort everything out, don't say anything else but for them to go. [N] is absolutely fine we were playing earlier and she was happy and laughing. You pushed this and them away. I gave you every opportunity to talk about it but you didn't want too (sic), you even told the schools they were leaving the country I didn't make you do that, you helped pack clothes, you took us the train station and said goodbye. Everything that happened*

*was pushed and consented by you for them to leave with me so please don't tell me it's just an emotional reaction, do you understand that?"*(P.91-93 of the bundle).

- e) 13 June 2024 at 23:09 (in reply to the preceding message): *"Because I was jealous that every time that you came they didn't know me and [B]'s constant complains that he has no friends and how England is so great, I'm sorry I couldn't to (sic) listen to that anymore. I was trying to help him the best I could, constant calls, changing schools, teachers, language, friends Nothing was ever enough, I was never enough [sad emoji]. I did need the break, some space... it was overwhelming [sad emoji]. I know you gonna tell me I've had more than enough time. And us....detaching week by week...I did spoiled it (sic) but I certainly don't want to lose them forever [crying emoji]. I thought it could be a good idea for them to find out it's not as great as they think. [N] was happy here and we both now (sic) [B] won't be happy anywhere as soon as the school starts, happiness will be gone. ....I pushed it too far and I'm truly very sorry"*. (Pages 94-95 of the bundle)
- f) 14 June 2024 at 12:00 from the Mother to the Father: *"So now then you're having the kids. Have I all lost you forever?? [sad emoji]"*. (Page 97 of the bundle).
- g) 17 June 2024 from the Father to the Mother at 20:03: *"I haven't stopped you (like when you blocked my number numerous times) to try calling my phone or [B]'s phone, you didn't try once or message all weekend"*. The Mother replies at 20:24: *"Yes, you did take them from me! I'll never be able to love you anymore"*. (Page 100 of the bundle) The Father replies at 20:30: *"No you told me to take, read your messages or do you have amnesia?"* (Page 90 of the bundle).
- h) 19 June 2024 at 20:03: *"They are still sign in (sic) at school an nursery, doctor, they have a permanent residence in Czech, you can't make such a decision just 'cos I said 'them them' aut (sic) of emotional drainage from you!"*. (Page 88 of the bundle).
- i) 19 June 2024 at 20:39 from the Father to the Mother: *"I said I would help you, you didn't want my help and said [V] will help with everything. You packed their bags, told them they have no mother that is not on me! You told me I have 1 week to sort everything out for them and book their flight to UK when I go!"* (Page 71 of the bundle).
- j) 19 June 2024 at 22:41 from the Mother to the Father: *"This all happened because I was crazy worried that you gonna try to take them away from me as you did when [B] was 4 [crying emoji] unfortunately it's happened anyway [crying emoji]"*. (Page 74 of the bundle).
- k) 20 June 2024 at 01:25 from the Mother to the Father: *"I DON'T WANT THEM TO LIVE IN ENGLAND."* (Page 77 of the bundle)
- l) 23 June 2024 (timing unclear but probably 20:39) from the Father to the Mother: *"I did everything and spoke with you numerous times before we left but you carrywd (sic) on and told me to sort everything out as they are gooig (sic) with you when you fly back to the UK. You gave me no choice but to take them and you just kept saying you best get everything sorted out in the UK and their flights....The other week you messages (sic) and said everything is packed ready to be picked up for*

*you and the kids.... I've asked for photos so I can get a quote for the removal cost, you have also denied me and our stuff. If you recall you told me during the week I was in Czech that I should move everything that was in the loft down stairs and to pack as much as I can ready to take. I did all of that accept (sic) some of the kids stuff. You said if it wasn't packed then you was (sic) going to sell everything! Neither of them want to go back at the moment.*” (Pages 112-113 of the bundle)

- m) 23 June 2024 from the Mother to the Father: *“I didn't mean for them to stay forever [sad emoji]. I thought [B] will try the school and will wants (sic) to come back.”* (Page 115 of the bundle).
- n) 27 June 2024 from the Father to the Mother: *“It was my suggestion (not yours) and intention before we left Czech to come back so you could see the kids during August as you said you won't come to UK to see them. I mentioned we could piggyback of [sic] my existing purchased plane ticket in August, of which I told you before leaving Czech. However, since you have unnecessarily threatened me with Police action and any other authority my lawyer has advised not to leave the UK.”* (Page 120 of the bundle)
60. In the Father's “statement of evidence” dated 21 October 2024 he says that he brought the children to live in the UK with the Mother's consent and that the events leading up to that needed to be seen in the context of a number of years of *“emotional and psychological harm being caused by their mother towards them, as well as myself”*. He refers to an incident in August 2017 when the Mother threatened to take [B] to the Czech Republic and *“assaulted”* the Father. He says that the Police were called and he took [B] temporarily to live with him in their second home in Hertfordshire. Cafcass were involved, however the parties reconciled.
61. In his statement he refers to discussions that he had with the Mother about him relocating with the children to the UK from 2022 onwards.
62. On 18th January 2022 (exhibit BC/4) the Mother said that he should take the children to the UK and that *“I told [B] already”*. There were messages between June 2023 and May 2024 also referring to the children living with their Father
63. In March /April 2024 the Mother accessed the Father's phone and deleted their messages. She later sent a “.txt” version of those messages.
64. In early May 2024 the Mother became upset and locked herself in the garage. The Father says that [N] was upset that the Mother was ignoring her. The Father recorded [N] for 11 minutes when she cried because the Mother was not giving her a hug.
65. The Father exhibits to his statement a recording of a WhatsApp video call between him and the Mother that took place on 30 May 2024. I have watched this a number of times. There is no transcript of the call, but I have endeavoured to set out an accurate note of salient aspects of what is said. I invited the parties to correct any errors when the judgment was sent in draft under embargo and no errors were noted by them.
66. At about 1110 in the call, the Mother says, *“listen to this call again”* and the Father says *“yes I will”* which he says indicates that the Mother was aware that the call was being recorded. At the beginning of the recording the Mother says *“[B] is not very*

happy [N] is going as well. What sort of consequences there are going to be. That's up to you." The Father says, "So you actually mean it do you for the kids to come to the UK" and the Mother replies "Yes, I mean it". She goes on that this "is your chance to prove to everyone how amazing you are." The Mother says that maybe she will be more useful somewhere else not with the children. She says to the Father for him to show with "your super duper family what you can do". She says that the children are going to be like a guinea pig. The Mother says, "Let's see in 10-15 years how you have done." The Mother says "if they want to come back one day then more than happy. At the moment they both seem to want to go with you. Even if stupid to get decisions from them but otherwise it would never ever get anywhere." She says [B] is unhappy here and that from now on she will do what the Father has done, just send some money for them and that will be "her care". The Mother says that the children "are looking forward to it. [N] is talking about it" and she says, "[B] is keeping a secret diary that he is going to lock [N] in a room and she is going to be "forever gone" and how he is "going to kill pupils at school". She goes on to say that they had gone to see a psychologist who had told her that she should "put herself together" and that then they do something with [B]. Later the Father says that he doesn't understand why she has flipped 180 degrees.

67. On 30 May 2024 the Father applied for the children to enrol in schools in the UK.
68. On 1 June 2024 the Father says "that the children were getting ready to go swimming between 10:15 and 10:30. [The Mother] comes downstairs and lost her temper. She approached us all in the porch, started shouting: 'well you 'F'in' have everything now', slamming the porch door in front of the children. She was about to proceed to lock us out of the house so I had to force the door back open as some of our swimming stuff was still inside along with car/house keys." He exhibits some CCTV recording from the exterior of the house that shows some of the argument.
69. The Father also exhibits messages that were sent between the parties between 10:38 and 10:39 (p.168 of the bundle). In the messages the Father says that he is "not forcing anything on you whatsoever. You can still have them here and I can come during weekends...There's absolutely no point me taking them to the UK for you to only just cause trouble, waste everyone's time and energy which is all unnecessary." The Mother replies "Why are you fucking doing this all the time...THEY DON'T WANT TO BE WITH ME". The Father asks the Mother to "calm down and we can sort it out normally without you flying off on a tangent." The Mother replies at 12:18 "Take them and leave me alone." At 12:20 she messages, "STICK IT ON FACEBOOK PAGE." At 12:56 she messages, "We need chopped tomatoes." At 13:24 she messages "Noodles for soup". Later that afternoon there is a message from the Father to the Mother in which he says "So as you said then I'll now go and book the flights for the kids back to the UK....So you don't want to be part of [N] and [B]'s lives anymore or have them for holidays?".
70. On 2 June 2024 the Father booked the flights. He exhibits the itinerary for a flight from the UK to Prague on 29 July and a return flight from Prague to the UK on 18 August 2024. He says that this was so that the children could come back from the UK for a holiday with the Mother. On 5 June 2024 he confirmed the rental for a property for him to live in England with the children.
71. In his statement the Father says:



“In the days leading up to myself and the children leaving the Czech Republic, [the Mother] gave me their passports, UK and Czech health records, helped pack their bags, advised the schools the children were moving to the UK and drove us to Policka Train Station at 6am, to enable us to get the train to Brno Airport. She said goodbye to the children at the train station.”

72. The Father exhibits to his witness statement messages between him and the Mother on 9 June 2024 (exhibit BC/18, p.173 of the bundle). Some of the messages were subsequently deleted by the Mother but a screenshot shows those that were deleted. The messages indicate the Mother saying “*Hope you have a good safe flight without delays.*” The Father says that they are at the airport (to which the Mother replies with a thumbs up emoji, a response she later deletes). The Father later confirms that they have landed (to which the Mother replies “*Good thank you, let me know when you’re safe in the hotel please [smiley emoji]*”, a message she later deletes). The Father messages to say that they are finally “*checked in at the hotel*” to which the Mother replies with a thumbs up emoji and “*thank you*” (again a message she later deletes).
73. On 11 June 2024 the Mother confirmed in a message (BC/20,p.176 of the bundle) that:
- “Everything for you and kids is packed. Let me know when van is coming. Will send contract for selling this house by post. Unfortunately I can’t have kids just for holidays, so I’ve decided to stay away, don’t want any contact...too painful.. I hope you will be finally happy. Any stuff regarding of propertys (sic) by mail please. Bye”.
74. The Father replies to the message saying “*OK, so can you please send me photos of everything to get a quote for removals and arrange the van to come and collect everything. As soon as I have a date I’ll let you know*”. Some of the messages from the Mother were deleted by her and the Father was unable to obtain a screenshot to show the deleted messages.
75. The following day, 12 June 2024, there was an exchange of emails between the parties. The emails started with a message from the Mother at 1:42 and was headed “Collection of stuff”. In that email the Mother says:
- “I don't want our kids to live in toxicity, feels like I can't live without them most probably cos of my selfishness. I think I will never be able to forgive myself, which means those things will never end. ....gave up anyway. I know you will take care of kids the best you can, I'm sorry I left it all on you, but we both know it's best for them.  
I know you will be all happy soon as you deserve.  
I also know they don't miss me at all [sad emoji] can feel it [sad emoji]... no surprise of course.  
Best would be if they just forget about me. I will miss them indescribably though  
Sorry you have to read this shit [sad emoji].  
I do promise I won't bother you anymore, just take it as an apology, unfortunately that's all I can do .”
76. At 14:01 the Father sent an email response saying “*I did not do this to you, you did this to yourself and it was all your decision on the basis for the kids to go and for us to split*

*up. If we weren't splitting up clearly this situation wouldn't be happening either. We already agreed that they were staying with you but it was again your decision for me to take them back to the UK I didn't force this."*

77. In an email at 15:20 the Mother replies saying:

"Here we're again. Just throw it all on me, just cos I said horrible things, yes I did and I'm very sorry about it. But I'm not the only person who said something bad under the pressure and constant stress and you were pushing me as well, every time I was saying how hard it is, you were just repeating " so give them to me, give them to me"

I was the one who had to deal with everything, building property, schools, health, emotional stress from massive change, bills, work and of course all housewives job."

78. The message went on:

"You always make sure everything is written down and you have proof of what I said. I see you now, you're just trying to get what you want in a horrible manipulative and strategic way. Hiding your true colours behind the mask of kindness and generosity.

And as you said, you have done nothing but loved me, couldn't cope with the fact that I don't love you anymore.

But that doesn't mean I have to lose my children. You made the decision during the arguments, within few hours just booked the tickets and of you go, they were gone. You have no right to take them just like that. I stayed with you just cos I new (sic) I could lost (sic) [B]and didn't have money and strength to fight against you.

But now it's different.

And you know what? I've actually changed my mind [smiley emoji]

I won't give you my half of money for the properties.

I will fight for them, even if I should spend all money I have.

I'll pay the lawyer as I'm myself interested about the judgment.

And I'm not scared of you anymore, I have nothing to lose anymore. I haven't pushed my kids away, I love them more than myself and anyone in this world, you know it and I think most people will understand, it was just worries that you do what you did, again!

So I don't care about your WhatsApp messages anymore, your proof.

So as I said, not sending the kids stuff to England as nothing is decided yet. I won't sign the devorse (sic) paper till kids are sorted by the court.

For now I'll contact the police about how you to taken the kids just like that, especially after them living here for 4 years, so let's see. I don't think you have a right to do that, no matter what I said."

79. The Mother ends the email saying "*So have a nice day and see you at the court. I will keep informing you about the police advice or any other authorities*".

80. The Father exhibits a message from him to the Mother sent on 20 June 2024 (exhibit BC/22, p.181 of the bundle) in which he says "*You've ruined everything again because of your selfishness, and to now blame [B] not being happy in Czech is wrong. Again*

*nobody has made you do and say all the things you have done to both the kids and me*". He goes on to say that *"this is not something that just happened in the past few weeks"*.

81. The Father exhibits to his statement recordings he made in August 2024 of [N] saying amongst other things that she is scared of her mother hitting her head again.
82. The Mother signed a statement dated 30 October 2024 responding to the Father's statement. In that statement she says that she did not want the Father to relocate to the UK permanently and had not agreed to that happening. The Mother says that over the course of 2022- first half of 2024 she did "make a few comments" to the Father "that he should try taking the kids to see if he could dal with them being difficult". She says that this was only out of frustration. She says, "I did not actually want him to take the children full time".
83. The Mother says that on 1 June 2024 the Father took the children to the swimming pool and when they returned the children said that they did not want to stay in the Czech Republic.
84. The Mother commented on the Father's account of the first week of June and at paragraph 27 said:

"I do not accept [the Father's] version of events contained in Paragraph (44). During the first week of June, I went to talk to my husband, apologised for all the difficulties, and asked if he really intended to take the kids to the UK. [The Father] responded that my behaviour was "unacceptable" and said [B] did not want to stay in the Czech Republic. I agreed that the children could go back to the UK for a trip, and made absolutely clear that they needed to return home to the Czech Republic during the summer. I told [the Father] I hoped we could discuss the situation further when they came back from the trip and we had both had time and space to think things through. [The Father] told me not to 'panic or make drama,' stating that they would be coming back with him on his next trip to the Czech Republic which was scheduled on 28 June 2024. [The Father] promised me that if either of the children wanted to come home to the Czech Republic before this he would honour this and leave them in the Czech Republic with me. We never talked about [N] remaining in the UK against her wishes."

85. The Mother said that when the Father explained that he had needed to change the dates of the plane tickets and would return on 29 July she *"made clear to [the Father] that they needed to be returned on this date"*. She goes on to repeat that she did not know that it was a permanent relocation, commenting that there *"were some silly messages sent during arguments but I never told [the Father] to keep the children permanently in the UK."*

#### *The Father's oral evidence*

86. The Father explained each of the exhibits. He said that he had pulled the video footage from the CCTV after his divorce lawyer in the Czech Republic had told him to gather evidence. He had recorded [N] because he did not know that Cafcass would be involved and he thought without the recordings what [N] had told him would not be believed by the court.

87. The Father said both he and the Mother were to blame for having conversations that should not have been overheard by the children.
88. The Father said that the Mother's agreement that he should take the children to live in England had been building up over years. At the end of 2023, it was agreed that she would remain with the children in the Czech Republic. Then in March 2024 she changed her mind. She had said on the phone that it was going to be ok for him, he would not have to worry about the children, he would just have to pay maintenance. The Father replied that it could be the other way round. He said that conversations continued about where the children would live up until the end of May on a continual basis. He came to the Czech Republic beginning May and the Mother had said that the children wanted to live with him in the UK. He said the 31 May 2024 WhatsApp message confirmed the position of what would happen with children.
89. He said that there had no been suggestion that the children would be going to the UK for a holiday. The only reference to a holiday came from "*a position of kindness*" from him in returning to the Czech Republic in August.

*The Mother's oral evidence*

90. The Mother said that she had not made a complaint to the police concerning the children's retention in the UK. Mr Bain asked whether she had said to the Father to take the children to live with him in the UK. She replied that she had said that, but it was when she was angry. In regard to [B], she said that they had had many discussions about him going back to live in the UK but that they had not discussed it in relation to [N]. She said that they did not want the children to be separated although it was an option.
91. The Mother was asked how those answers could be squared with paragraph 27 of her statement when she said that "*I agreed that the children could go back to the UK for a trip, and made absolutely clear that they needed to return home to the Czech Republic during the summer.*" She replied that there was no difference between that statement and saying that they were going to the UK for a trial period of living there. She said that they had not agreed that the children should permanently return to the UK. She accepted that she had told the Father to take the children and to try looking after them for himself, but that was when she was upset. She did not expect him to do that.
92. The Mother then said that she wanted a half and half solution: for [B] to try living in the UK as he was lonely in the Czech Republic, but for [N] to stay as she was happy. Mr Bain asked the Mother to reflect on this change in her evidence. The Mother replied that she had not agreed permanent relocation and that they had talked about a "*half and half solution*". She thought that [B] should try school in England and see whether he liked it better. It might be the same although there would not be the language barrier. She accepted that [B] was not happy in the Czech Republic. She said her relationship with [B] was difficult and that she found it hard to see him struggling. The Mother was asked what was supposed to happen with [N] and she replied that she would stay in the Czech Republic because it would be too big a change for her in the UK.
93. The Mother was asked about a message she had sent to the Father on 18 January 2022 in which she had said "*Just wanted to say, it would be great if you could take kids back to the UK and start a new life with them, at least just think about it, for now. I would*

*just keep one flat in Usti, everything else you can sell. Will help you as much as I can. I'm serious. Sorry. I told [B] already.*" She said that [B] had been emotional during the night and she had asked him whether he would be happier in England. She was not sure exactly what she had told [B]. The Mother said she was upset and struggling at the time.

94. Mr Bain suggested that the impression from the messages was that the Father was pushing back against taking the children to the UK. The Mother said she was not constantly saying to take the children to the UK, it was because the Father was provoking her and that she was very busy with reconstruction work on the house, cooking and looking after the children. She had no help.
95. Mr Bain said that there was no evidence in the bundle about only [B] staying in the UK. She accepted that that was the case. She said that she agreed for [N] to go because the Father was going to bring her back. Mr Bain asked whether the Father had said that he would just bring [N] back. The Mother said, not both of them: N would come back but B would try to live in the UK. She said that on 1 June 2004 she had had an argument with her husband where she had said words to the effect you to take them and try yourself. She said, "*you don't want [N] to become like a second [B].*" It was agreed that if [N] wanted to come back the Father would bring her back and she was sure that [N] would want to come back. Mr Bain asked why this was not in her witness statement or referred to in the bundle. The Mother said that she could prove that is what had happened, and it is what she had told her lawyer in emails to them.
96. Mr Bain asked the Mother whether she agreed that in the messages in the bundle she had generally communicated about "*the children*" and not referred just to one of them. She agreed. The Mother also agreed that she had given a clear message to the Father to take the children to the UK. She agreed but said that she didn't think he would do it and that he had not followed through before. There was no further discussion with the Father after the argument.
97. The Mother agreed that by December 2023 the marriage was breaking down. She added that the Father was being very nice in January 2024. The Mother said that at the beginning of 2024 the Father had said he would apply for a divorce but up until June 2024 he had done nothing. She accepted that there was no evidence of him bullying her or controlling her, but she said that what he was doing was bullying because it was a betrayal. The Mother said that she thought that the Father was worried that she would apply for a divorce in the Czech Republic.
98. Mr Bain asked whether the messages in fact showed that the Father was being supportive to her. She was taken to the messages in November at p.157 when she had written: "*It's not you, it's just the whole life system*". The Mother agreed that in the messages he was being supportive. Mr Bain suggested that on a number of occasions they talked about the option of children coming to the UK. The Mother replied, "*not children, mainly [B]*".
99. Mr Bain suggested that the agreement was that the children would come to the Czech Republic between July and August for a holiday. The Mother said that it was not agreed that they would be coming back for a holiday. Mr Bain suggested that the Mother was now giving a very different account of what had happened. She disagreed. The Mother said that after their argument on 6 June the Father had taken the children to the

swimming pool and they returned very excited about going to the UK. It was suggested to her that she knew that B was going permanently. The Mother said that the “*door was left open*” and that was why his place at the Czech school was kept open. She thought that [B] might realise it was no different in the UK.

100. Mr Bain suggested that by the end of May/ the beginning of June the clear focus was on the Father bringing both children to live in the UK. He referred to the video recording of the WhatsApp call between the parents. The Mother replied that the recording was not complete and she did not know she was being recorded. She was asked about the CCTV where she discussed the arrangements for them going to the UK. The Mother replied that that conversation was more about not bringing them, particularly [N]. She said that the arrangements to take the children to the UK were made by the Father over several days but were not discussed with her. She accepted that she pressed him before to make arrangements but she did not believe he was going to do it. She accepted that she had said “*you try it, see how you get on*”. She accepted that she had said “*you take them*” but it was when she was upset. It was after that conversation that she had locked herself in the garage.
101. The Mother said that at after the argument on 1 June 2024 there was a subsequent discussion that day in the Father’s office at the house when the Father had said that he would bring the children back if that is what they wanted. She said that she was sure that [N] would want to come back. Mr Bain asked again why that had not been referred to in her statement. Mr Bain suggested that that after the previous discussions about the children going to live in the UK that is what happened. She said that she had meant the 1 June, not the 6 June.
102. The Mother was asked about the messages between her and the Father on 9 June, the day that the children had flown to the UK. She accepted that she had deleted some of her messages. She had deleted the message where she had sent a thumbs up emoji in response to the Father messaging that they had arrived at the airport. She had also deleted the message in response to the Father saying that they had landed safely and she had replied “*Good, thank you, let me know me when you’re safe in the hotel*”. She said that she had deleted the messages because she was scared that the Father was playing games. She was alone in a big house without her children. She said that although the children had not been taken against her will they had been kept against her will.
103. The Mother was asked about the message she sent to the Father on 11 June 2024 where she said “*Everything for you and the kids is packed. Let me now (sic) when van is coming. Will send contract for selling this house by post. Unfortunately, I can’t have kids just for holiday, so I’ve decided to stay away, don’t want any contact...too painful. I hope you all will be finally happy. Any stuff regarding properties by email please. Bye*”. The Mother said that she did not know what to write or to think. She said that she was lying to the Father when she said that a van was arranged. She was very suspicious of the Father. She had lied that the children’s stuff was packed. The Mother accepted that it was wrong to communicate in this way.
104. The Mother was asked about the email of 12 June 2024, headed “*Collection of Stuff*”. Mr Bain suggested that this showed that she knew that the Father had taken the children permanently to the UK. The Mother said that the email was sent after the Father had blocked her calls. She said that she had repeatedly asked whether the Father was going

to bring them back. She told him that she was going to call the police although she had not in fact done so. Mr Bain asked about the reference in that email to “*I know you will take care of kids the best you can, I’m sorry I left it all on you, but we both know it’s best for them*”. She said that she hoped that the Father would feel sorry and understand that she loved the children and had not meant for them to go. Mr Bain asked her about the Father’s reply when he had written “*it was again your decision for me to take them back to the UK I didn’t force this*”. The Mother said it was not a decision, it was said in an argument, and they had not discussed it any further.

105. The Mother was asked about her email of 12 June 2024 at 15:20 and said that at this stage she was trying to accept what had happened because she thought she might not be able to fight it. Though she said at the end of that email “*see you at the court. I will keep informing you about the police advice or any other authorities*” she had not in fact contacted lawyers. Mr Bain said it was clear that she had intended for the Father to take the children permanently. The Mother said that she realised she had said many silly things and had said to take the children.
106. Mr Bain asked the Mother about the email of 12 June 2024 at 15:20 where she had written “*And you know what? I’ve actually changed my mind*”. The Mother said that she was referring to changing her mind about giving him her half of the properties. She had not yet contacted lawyers. Mr Bain suggested that the reality was that she had been clear that the Father should take the children permanently. The Mother accepted that she said to take the kids and had said “*many silly things*”.

The parties’ positions

107. 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’s position*

108. Mr Little submitted that the child objection and Article 13(b) defences had not been made out to the requisite standard. Even if it had been made out then there were powerful policy and welfare reasons why the discretion should be exercised to order the children’s return. The Article 13(b) defence required the court to be satisfied that there was a “grave risk”: something really serious that was more than the dislocation and inconvenience of relocation. The court had to look at the situation that would meet the children on their return to the Czech Republic. Aside from one unparticularised allegation of [N] banging her head there was only a vague allegation of emotional harm. In any event the Mother had offered protective measures that ameliorate any Article 13(b) risk. The protective measures were set out in the Mother’s statements:

- “(a) To cover the cost of their return flight.
- (b) To ensure that they have a suitable place to live with me when returned.
- (c) I will ensure that they have contact with their father
- (d) That I will instigate Court proceedings immediately for the determination of what should happen with the children’s living arrangements.”

109. Following the report from Ms Callaghan, the Mother had also said that she wished to confirm that that “*I would not take any steps to prosecute [the Father], if he and the*

*children were to return to the Czech Republic*". Mr Little said that the Mother was open to involving the authorities in the Czech Republic to help with the soft landing on return. She would arrange to see a psychologist to obtain the support for her and [B] on return. There were already proceedings in the Czech Republic regarding both the divorce and the children. Any protective measures could be made orders under article 11 of the 1996 Hague Convention.

110. Mr Little emphasised that the Mother was keen to ensure that contact between the children and the Father would be continued and that he could come and stay at the house. He argued that this pointed to a telling difference between the parties as the Father had tried to cut off the Mother from contact.
111. When considering the child objections defence it was important to take into account the Mother's concerns that the Father had adversely influenced the children. The audio recording of him speaking to N clearly showed the Father leading N. He was unapologetic about having recorded [N]. If I accepted that [B] objected to return then it was open to the court to make a decision refusing summary return in [B]'s case but ordering [N]'s return. Although that was not the Mother's first choice it may be appropriate and proportionate. Mr Little accepted however that the separation of the siblings might lead to a situation that would come within the definition of Article 13(b).
112. As to consent, Mr Little said that the context of the messages needed to be considered. All the references to taking the children were in the course of heated disputes. There was no clear-headed planning for the children to relocate to the UK. He referred to the message sent by the Mother on 5 May 2024 when she suggested that they should put everything down "*on the paper, with the lawyer present...just in case*". There was no formalised planning in contrast in June 2024 in terms of the children going to the UK for a holiday. There was an element of the removal that was clandestine and he pointed to the fact even now the Mother does not know where the children are living in the UK. As to what the Mother had said in her oral evidence, it was important to remember that the Mother was not giving evidence in her first language. He accepted that the Mother had given different accounts and submitted that perhaps something had been lost in translation. In any event Mr Little pointed out people may lie for different reasons.
113. Mr Little said that when assessing the parents' oral evidence the court should note that the Father was unapologetic in his oral evidence and had struggled to answer straightforward questions.
114. Mr Little argued that when considering the exercise of the court's discretion in relation to the consent and child objection defences, welfare consideration would best be met by return. The relationship between the Mother and the children had been eroded and that would be restored with the children returning to the house where they had lived for the last 4 years. The Mother would promote the children's relationship with the Father. I should step back and look at everything in the round. Finally, Mr Little accepted that if the court concluded that the Article 13(b) defence had been made out then the discretion was very unlikely to be exercised to order return.

*The Father's position*

115. Mr Bain submitted that it was a formidable challenge to match up the Mother's oral evidence with her witness statements and the documentary material. He argued that it was difficult now to see what the Mother's actual case was on consent. The conclusion



must be that the Mother has been lying. Her oral evidence was remarkably different from her statement. Her oral evidence was inconsistent: at some points she said that she agreed for the children to go the UK for a trial period, at other times for a holiday and at other times agreed for permanent relocation. Mr Bain said that the evidence fairly analysed showed that by 9 June there was clear agreement for both children to go and live in the UK.

116. Mr Bain argued that there was no evidence that the Father was bullying or controlling. He had continually wanted to check that the Mother agreed to what was going to happen. That was apparent from March 2024 when the Mother had been asking the Father to take the children. The fact that the Father had booked tickets for the children to come back to the Czech Republic for a holiday was inconsistent with the notion that he had only taken the children to the UK for a holiday.
117. Mr Bain submitted that the contrast between the Mother’s dishonesty and the Father’s approach was stark. The Father accepted that it was inappropriate for him to record [N]. He accepted that there were concerns about those recordings. Mr Bain accepted that the Father had not said that in his evidence but those were his instructions. The WhatsApp video call had been recorded with the Mother’s knowledge – that was apparent from the conversation at 11:06 in the call. The Father was not leading the Mother in that video call. The Father had only blocked contact when he had been told that there had been a complaint to the police and because [B] did not want to speak to his Mother.
118. Mr Bain argued that the Article 13(b) defence was based on evidence given independently of the Father. There was a risk of physical harm as well as psychological harm. [B] had given an authentic and truthful account. He was clear to Ms Callaghan that he was not happy in the Czech Republic. The protective measures would not address the problem that the Mother had in addressing [B]’s needs. The Father did not want the children to be separated.
119. As to discretion, welfare considerations strongly pointed to non-return. [B] had not been happy in the Czech Republic for some time.

## The Law

### *The Hague Convention 1980*

120. One objective of the Hague Convention 1980 is set out in the preamble:

*“Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,”*

121. As explained by Baroness Hale and Lord Wilson in *Re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144:

“[14] ... This objective is, of course, also for the benefit of children generally: the aim of the Convention is as much to deter people from wrongfully abducting children as it is to serve the best interests of the children who have been abducted.

But it also aims to serve the best interests of the individual child. It does so by making certain rebuttable assumptions about what will best achieve this: see the Explanatory Report of Professor Perez-Vera, at para 25.”

122. Article 12 of the 1980 Convention provides:

“Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.”

123. Article 13 provides:

“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) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
- 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 (a) - consent*

124. Consent does not fall to be considered for the purpose of establishing the wrongfulness of a removal or retention pursuant to Article 3 of the 1980 Hague Convention but is considered under Art 13(a) (see *Re P* [2004] EWCA Civ 971 and the observations of Wilson LJ in *Re P-J (Abduction)* [2009] EWCA Civ 588).

125. In *Re G (Children: Abduction: Consent: Discretion)* [2021] EWCA Civ 139 [2021] Fam 239 Peter Jackson LJ observed that “*consent is an exception that is infrequently pleaded and still less frequently proved*”. He went on to summarise the principles to be applied:

“[25] The position can be summarised in this way:

- (1) The removing parent must prove consent to the civil standard. The inquiry is fact-specific and the ultimate question is: had the remaining parent clearly and unequivocally consented to the removal?
- (2) The presence or absence of consent must be viewed in the context of the common sense realities of family life and family breakdown, and not in the

context of the law of contract. The court will focus on the reality of the family's situation and consider all the circumstances in making its assessment. A primary focus is likely to be on the words and actions of the remaining parent. The words and actions of the removing parent may also be a significant indicator of whether that parent genuinely believed that consent had been given, and consequently an indicator of whether consent had in fact been given.

(3) Consent must be clear and unequivocal but it does not have to be given in writing or in any particular terms. It may be manifested by words and/or inferred from conduct.

(4) A person may consent with the gravest reservations, but that does not render the consent invalid if the evidence is otherwise sufficient to establish it.

(5) Consent must be real in the sense that it relates to a removal in circumstances that are broadly within the contemplation of both parties.

(6) Consent that would not have been given but for some material deception or misrepresentation on the part of the removing parent will not be valid.

(7) Consent must be given before removal. Advance consent may be given to removal at some future but unspecified time or upon the happening of an event that can be objectively verified by both parties. To be valid, such consent must still be operative at the time of the removal.

(8) Consent can be withdrawn at any time before the actual removal. The question will be whether, in the light of the words and/or conduct of the remaining parent, the previous consent remained operative or not.

(9) The giving or withdrawing of consent by a remaining parent must have been made known by words and/or conduct to the removing parent. A consent or withdrawal of consent of which a removing parent is unaware cannot be effective.

[26] All of these matters are well-established, with the exception of the last point, which did not arise for consideration in the reported cases. As to that, there are compelling reasons why the removing parent must be aware of whether or not consent exists. The first is that as a matter of ordinary language the word 'consent' denotes the giving of permission to another person to do something. For the permission to be meaningful, it must be made known. This natural reading is reinforced by the fact that consent appears in the Convention as a verb ("avait consenti/had consented"): what is required is an act or actions and not just an internal state of mind. But it is at the practical level that the need for communication is most obvious. Parties make important decisions based on the understanding that they have a consent to relocate on which they can safely rely. It would make a mockery of the Convention if the permission on which the removing parent had depended could be subsequently invalidated by an undisclosed change of heart on the part of the other parent, particularly as the result for the children would then be a mandatory return. Such an arbitrary consequence would be flatly contrary to the

Convention’s purpose of protecting children from the harmful effects of wrongful removal, and it would also be manifestly unfair to the removing parent and the children.”

126. In *Re G* it was argued that consent needed to be “*informed consent*” by analogy with a medical procedure it was argued that consent could not be valid unless it is given in full k. Peter Jackson LJ rejected that argument at para 30:

“The question is whether the consent is real in the sense that it relates to the removal that is contemplated. Which side of the line a case falls will depend on a factual assessment grounded in the varied realities of family life and not on concepts from different legal contexts.”

*Child’s Objections: the law*

127. The leading authority on the child’s objections exception is *Re M (Republic of Ireland) (Child’s Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26.
128. The applicable principles in *Re M* were helpfully summarised by Cobb J in *Re W and E (Habitual Residence)* [2024] EWHC 2596 at para 50:

“i) It is appropriate to break down the exercise into two parts – the “gateway stage” and the discretion stage (§18);

ii) the gateway stage has two parts in that it has to be established that (a) the child objects to being returned and (b) the child has attained an age and degree of maturity at which it is appropriate to take account of his or her views (§18); the gateway stage represents a fairly low threshold (§70);

iii) the gateway stage is 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. Sub-tests and technicality of all sorts should be avoided (§69);

iv) whether a child objects to being returned is a matter of fact, as is his or her age (§35);

v) the degree of maturity that the child has is also a question of fact (§35); it is now recognised that children as young as 6 can be of sufficient maturity to have their objections taken into account (§67);

vi) the child's views have to amount to objections before they can give rise to an Article 13 exception (§38); there must be more than a mere preference expressed by the child (§39);

vii) the child has to object to returning to the country of habitual residence rather than to returning to particular circumstances in that country, although it has been clear from early on that there may be difficulty in separating out the two sorts of objection (§42);

viii) the objection must be to returning to the country, although it may be difficult to extricate that from a return to the parent; the wording of article 13 does not inhibit a court from considering the objections of a child to returning to a parent (§44);

ix) the fact that a child objects to being returned does not determine the application (§46); the child's views are *not* determinative of the application or even presumptively so (§63);

x) The child who has suffered an abduction will very often have developed wishes and feelings to remain in the bubble of respite that the abducting parent will have created, however fragile the bubble may be, but the expression of those wishes and feelings cannot be said to amount to an objection unless there is a strength, a conviction and a rationality that satisfies the proper interpretation of the Article (§54);

xi) 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 is to be discouraged (§77).”

*Harm and Article 13(b): the law*

129. The Father relies on the harm exception set out in Article 13(b) of the Hague Convention 1980. The law in respect of the defence of harm or intolerability under Article 13(b) was considered by the Supreme Court in *Re E* (cited above) and *Re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257.

130. In *Re E*, the following principles were set out:

- (a) Factual disputes regarding allegations of domestic violence are likely to be better able to be resolved in the home country of the family (para 8).
- (b) Nowhere does the Convention state that its objective is to serve the best interests of the adult person, institution or other body whose custody rights have been infringed by the abduction. The assumption underlying the Hague Convention is that the best interests of the child will be served by a prompt return to the country where the child is habitually resident (para 15).
- (c) The Courts of the requested state are not expected to carry out a ‘*full-blown examination of the child’s future ... which it was the very object of the Hague Convention to avoid*’ (para 22):
- (d) There is no need for Article 13(b) to be “*narrowly construed*”. By its very terms, it is of restricted application. The words of article 13 are quite plain and need no further elaboration or gloss (para 31).
- (e) The burden of proof lies on the person who opposes the return. The standard is the ordinary balance of probabilities. “*But in evaluating the evidence the court will, of course, be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under Art 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination.*” (para 32)

- (f) The risk to the child must be “grave”. It is not enough, as it is in other contexts such as asylum, that the risk be “real”. It must have reached such a level of seriousness as to be characterised as “grave”. Although “grave” characterises the risk rather than the harm, there is in ordinary language a link between the two. (para 33)
- (g) “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*”. “*Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent.*” (para 34)
- (h) Art 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to 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 secure that the child will not be called upon to face an intolerable situation when she gets home. (para 35)
- (i) There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risk that the child will face if the allegations are in fact true. 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 place in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. (para 36).
- (j) The clearer the need for protection, the more effective the protective measures must be (para 52).
131. In *Re S* Lord Wilson held that the methodology articulated in *Re E* formed “*part of the court’s general process of reasoning in its appraisal of a defence under the article*” (at para 22), which process will include evaluation of the evidence before the court in a manner commensurate with the summary nature of the proceedings. It follows that when evaluating the evidence, the court will be mindful of the limitations involved in the summary nature of the Hague Convention process.
132. It is preferable for the judge to adopt this two-stage process under Article 13(b). As Moylan LJ stated in *Re C (Article 13(b))* [2021] EWCA Civ 1354 at para 58:
- “...unless the court properly analyses the nature and severity of the potential risk which it is said will arise if the child is returned to the requesting State, the court will not be in a position properly to assess whether the available protective measures will sufficiently address or ameliorate that risk such that the grave risk required by Article 13(b) will not have been established. As set out in *Re E*, at [36], the question the court is considering is “how the child can be protected against the risk” (my emphasis). The whole analysis is contextual and forms part of the court's process of reasoning, as referred to by me in *Re A*, at [97], adopting

this expression from *Re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257.”

133. This second stage requires a proper evaluation of the sufficiency and efficacy of any protective measures with a view to determining whether the nature and extent of those measures addresses or sufficiently ameliorates the risk(s) which the allegations potentially create (*Re. B (Children)* [2022] EWCA Civ 1171 at paras 71-72). Moylan LJ explained at para 96 of *Re A* [2021] EWCA Civ 939 that the question of how “*how the child can be protected against the risk*”

“is a broad analysis because, for example, the situation faced by the child on returning to their home state might be different because the parents will be living apart. But, the court must carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to a grave risk within the scope of article 13(b). And, to repeat what was said in *In re E*, at para 52: ‘The clearer the need for protection, the more effective the measures will have to be.’”

134. In assessing the efficacy of any such orders or undertakings, the fact that they are enforceable in the requesting state under the terms of the 1996 Hague Convention is a relevant consideration: *Re. Y (Abduction: Undertakings)* [2013] 2 FLR 649 (see also Cobb J in para 53(v) in *Re T* [2023] EWCA Civ 1415).

135. The HCCH 2020 Good Practice Guide states at para 44 that in some cases protective measures may need to be put in place in advance of the return of the child:

“Protective measures may be available and readily accessible in the state of habitual residence of the child or, in some cases, may need to be put in place in advance of the return of the child. In the latter case, specific protective measures should only be put in place where necessary strictly and directly to address the grave risk. They are not to be imposed as a matter of course and should be of a time-limited nature that ends when the state of habitual residence of the child is able to determine”

136. In *Re Moylan LJ* endorsed what MacDonal J said in *G v D (Absence of Protective Measures)* [2020] EWHC 1476 (Fam) at para 39, namely:

“Finally, it is well established that courts should accept that, unless the contrary is proved, the administrative, judicial and social service authorities of the requesting State are equally as adept in protecting children as they are in the requested State (see for example *Re H (Abduction: Grave Risk)* [2003] EWCA Civ 355, [2003] 2 FLR 141, *Re M (Abduction: Intolerable Situation)* [2000] 1 FLR 930 and *Re L (Abduction: Pending Criminal Proceedings)* [1999] 1 FLR 433 ). In this context I note that Lowe et al observe in *International Movement of Children: Law, Practice and Procedure* (Family Law, 2nd edn), at para 24.55 that: ‘Although, as has been said, it is generally assumed that the authorities of the requesting State can adequately protect the child, if it can be shown that they cannot, or are incapable of or, even unwilling to, offer that protection, then an Art 13(b) case may well succeed. It seems evident, however, that it is hard to establish a grave risk of harm based on speculation as opposed to proven inadequacies in the particular cases.’”

*Discretion*

137. If a point is reached at which the court has to consider whether to exercise its ‘discretion’ whether to order a return, the approach is that set out by Baroness Hale in *Re M (Abduction: Zimbabwe)* [2007] UKHL 55 at para 42:

“[42] In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the contracting states and respect for one another’s judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the contracting states.

[43] My Lords, 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

[44] That, it seems to me, is the furthest one should go in seeking to put a gloss on the simple terms of the Convention. As is clear from the earlier discussion, the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will vary enormously. The extent to which it will be appropriate to investigate those welfare considerations will also vary. But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be.

[45] By way of illustration only, as this House pointed out in *Re D (Abduction: Rights of Custody)* [2006] UKHL 51; [2007] 1 AC 619, para 55, “it is inconceivable that a court which reached the conclusion that there was a grave risk that the child’s return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate.” It was not the policy of the Convention that children should be put at serious risk of harm or placed in intolerable situations. In consent or acquiescence cases, on the other hand, general considerations of comity and confidence, particular considerations relating to the speed of legal proceedings and approach to relocation in the home country, and individual considerations relating to the particular child might point to a speedy return so that her future can be decided in her home country.

[46] 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."

138. In *Re G (Abduction: Consent/Discretion)* [2021] EWCA Civ 139 Peter Jackson LJ reviewed the authorities on the exercise of discretion and considered in particular how it should be exercised in a consent case and concluded:

"41. To sum up, the exercise of the discretion under the Convention is acutely case specific within a framework of policy and welfare considerations. In reaching a decision, the court will consider the weight to be attached to all relevant factors, including: the desirability of a swift restorative return of abducted children; the benefits of decisions about children being made in their home country; comity between member states; deterrence of abduction generally; the reasons why the court has a discretion in the individual case; and considerations relating to the child's welfare.

42. In a consent case, the better view is that the weight to be given to the policy considerations of counteracting wrongful removal and deterring abduction may be relatively slight, while the weight to be attached to home-based decision-making and comity will depend critically on the facts of the case and the view that the court takes of the effect of a summary return on the child's welfare."

139. In considering the judgment under appeal, Peter Jackson LJ held that the trial judge had committed an error of approach in the exercise of discretion: his discretion was at large and he was required to identify the relevant factors and attribute to them the weight that they bore in the particular circumstances of the case: that could not be done at the level of theory (see para 45).

### Discussion and conclusions

#### Consent

140. The burden of proof is on the Father to establish that the Mother consented to both children being taken to the UK to live with him.
141. In my judgment the Father has discharged that burden. On the balance of probabilities, I find that the Mother clearly and unequivocally consented to the removal. I reject her evidence that she had agreed for the children only to be taken there on holiday. I also reject her evidence that it was only a "half and half" agreement (i.e. only for [B] to come to the UK). My reasons are as follows.

142. *First*, I place considerable weight on the documentary evidence produced by both parties including the WhatsApp messages passing between them and the WhatsApp video call. In making findings of fact, contemporaneous documents carry a particular weight in the forensic exercise. The advantages of such contemporaneous documents have been repeatedly stressed in the caselaw, helpfully summarised by Warby J (as he then was) in *R (Dutta) v GMC* [2020] Med. L.R. 426 at para 39. That is particularly so here where the primary focus is on the actions and words of the Mother, the remaining parent (see *Re G* at para 25(2), cited above). In circumstances where the Mother has given contradictory evidence in her statements and in her oral evidence contemporaneous documentary evidence of what she said and did are of particular value.
143. The messages and the WhatsApp call between the parties leading up to the travel to the UK indicate that the Mother agreed that the children should go to live with their Father. I cannot discount the WhatsApp messages as “*silly messages*” as suggested by the Mother in her oral evidence. Whilst some of the messages were sent in the course of arguments others were not. In any event, it is clear that the Father was responding to a series of discussions and messages with the Mother rather than a single one off heated exchange.
144. In my judgment the following messages and the WhatsApp all support a conclusion that the Mother clearly and unequivocally consented to the children moving to the UK:
- a) The WhatsApp call on 30 May 2024 (set out above at paragraph 66) demonstrates that by this stage both children knew that they were going to live in the UK and that they were looking forward to it. The Mother clearly viewed this as a permanent move (“*let’s see in 10-15 years how you have done*” and “*if you want they can come back one day*”).
  - b) The messages between the parties on 1 June 2024 (summarised at paragraph 69) indicate that the Mother is clear that the Father should take the children to the UK as they do not want to be with her. Contrary to the Mother’s suggestion that she was being bullied into this position, the exchanges show the Father asking her to deal with the decision calmly. In fact, the Mother’s response veers from anger (“*take them and leave me alone*” and “*STICK IT ON FACEBOOK PAGE*”) to the mundane (“*We need chopped tomatoes*” and then “*Noodles for soup*”).
  - c) The messages between the parties on 9 June 2024 (the day the children travelled to the UK) indicate that the Mother did not in any way disagree with the travel. Whilst her messages asking for updates on the travel to the airport and arrival at the hotel could be compatible with the Mother’s assertion in her witness statement that she had agreed only for the children to travel to the UK for a holiday, the fact that the Mother subsequently deleted some of her messages is not consistent with such an interpretation. That is for two reasons. First, that interpretation is inconsistent with the Mother’s oral evidence which variously indicated that rather than a visit for a holiday it was a “half and half” agreement (i.e. for [B] permanently to go to the UK and for [N] to return) or for them to go to the UK and to see how they each settled. Secondly, there was no reason for the Mother to delete those messages if in fact the agreement had been for the children to go to the UK on holiday. It is implausible that she deleted them because she changed her mind that they should go there on

holiday. What is far more likely is that she deleted them when she subsequently changed her mind about the children going to the UK to live with their Father.

- d) The message sent by the Mother on 11 June (set out at paragraph 73 above) is inconsistent with the Mother only agreeing for the children to go to the UK for a holiday. Such a visit would not necessitate a van coming to collect their things. The Father's reply where he refers to obtaining a quote for removals "*to collect everything*" also supports the view that at this stage the Mother was referring to an agreed plan for the children to relocate to the UK. Moreover, the Mother's reference to her not being able to have the children for holidays is also inconsistent. That reference in fact supports the Father's evidence that the children were going to come back to the Czech Republic in the summer for a holiday – something which in this message the Mother seems to be rejecting.
- e) The email exchanges on 12 June 2024 (set out at paragraphs 75-78 above) were all under the heading "*Collection of stuff*" written by the Mother. She talks about missing them indescribably (which is more consistent with a permanent relocation rather than them being away on holiday). The messages indicate that the Mother subsequently changed her mind (see the message at 15:20, at paragraph 78 above). Contrary to the Mother's suggestion in her oral evidence that this was referring to the money for the properties the surrounding context strongly suggests that the Mother was in fact referring to changing her mind about the children relocating to the UK.
145. *Secondly*, the Mother's written evidence was significantly inconsistent with her oral evidence. The unequivocal assertion in her witness statement that "*I agreed that the children could go back to the UK for a trip, and made absolutely clear that they needed to return home to the Czech Republic during the summer. I told [the Father] I hoped we could discuss the situation further when they came back from the trip and we had both had time and space to think things through*" is fundamentally inconsistent with what she said in her oral evidence. Such inconsistency is not explicable by the fact the Mother was speaking in her second language. The Mother speaks English fluently and in any event the difference between her written evidence and her oral evidence is so stark that it could not be reasonably explained by the fact that she was not speaking in her first language. The instructions she gave to her solicitor and then the account that she gave in her detailed witness statement were completely at odds with her oral evidence. In her written evidence she had made no reference to the agreement being a "*half and half*" agreement such that [B] would go to live in the UK and that they would see how [N] took to living there. The Mother had also made no reference to "*the door being left open*" for the children to return and that was why the places at the schools were kept open. As the Mother herself accepted in her oral evidence there was no evidence in the bundle that the plan was only for [B] to stay in the UK (see above at paragraph 95).
146. I accept Mr Bain's submission that at the end of the Mother's oral evidence it was difficult to see what the Mother's actual case was on consent. There were a number of differing accounts given, sometimes being given interchangeably in her oral evidence:
- a) That the agreement was only for the children to go to the UK on holiday. This was the account in the Mother's witness statement and in the witness statement of her solicitor which in turn was reflected in Mr Little's skeleton argument.

- b) That the children went to the UK as a trial period (of undefined duration) for them living permanently in the UK.
  - c) That it was an agreement for [B] to go to live in the UK and for [N] to go with him but then return to the Czech Republic (the “*half and half*” agreement).
  - d) That she had told the Father to take the children to live with him in the UK on a number of occasions although she had not meant that, and it was said in anger.
  - e) That after the argument on 1 June 2024 there was a subsequent discussion that day in the Father’s office at the house when the Father had said that he would bring the children back if that is what they wanted.
147. The Mother gave written evidence confirmed by a statement of truth which was then entirely inconsistent with her oral evidence. The inconsistencies in the Mother’s evidence are such that I conclude that she is an unreliable witness.
148. *Thirdly*, the Father’s oral and written evidence are consistent with the documentary material. The lengthy message at 22:25 on 13 June 2024 from the Father to the Mother, and which the Mother’s solicitor exhibited to her statement (set out at para 59(d) above) is consistent with his other messages as well as his evidence to the court in writing and orally. The Mother has implied that the Father was “building a case” and that she was being manipulated. Clearly both parents were aware that their respective messages could be relevant (as demonstrated by the Mother deleting the Father’s messages on a number of occasions). Equally, the Father’s actions in recording [N] and securing footage from the external CCTV (apparently on the advice of his English lawyer) indicates on his own account that he was building a case. The Mother herself though has sought to support her application to the court by extensive reliance on her messages (as indicated by the exhibits to her solicitor’s initial statement.) When looked at in the round, the contemporaneous evidence in the forms of messages and the WhatsApp video call lend considerable credence to the Father’s evidence to the court.
149. *Fourthly*, the submission that the Mother’s agreement that the children should move to the UK was a result of bullying by the Father is undermined by the Mother’s own oral evidence. When questioned by Mr Bain she accepted that in some messages the Father was being supportive. Moreover, she said that there had been many discussions about the children living in the UK (particularly [B]). Those discussions stretched back to January 2022 when the Mother sent the message “*Just wanted to say, it would be great if you could take kids back to the UK and start a new life with them, at least just think about it, for now. I would just keep one flat in Usti, everything else you can sell. Will help you as much as I can. I’m serious. Sorry. I told [B] already.*” (see above at paragraphs 62 and 93).
150. *Fifthly*, part of [B]’s anger at his Mother is because she had changed her mind and wanted him and his sister to return to the UK. I take into account the fact that the Father may have influenced [B] but when evaluated against the documentary evidence it is likely that [B] is genuinely aggrieved that his Mother has changed her mind.
151. *Sixthly*, I do not accept that there were clandestine elements to the removal as suggested by Mr Little in his skeleton argument. The messages I have quoted demonstrate that the removal itself was fully known to the Mother who drove the children and the Father

to the airport. Thereafter the messages indicate that she knew that it was a permanent relocation (hence the reference to the van and packing up the children's clothes and the "collection of stuff").

152. *Seventhly and finally*, I have stepped back and considered the totality of the evidence from the parties. I have asked myself whether the consent from the Mother for the children to live in the UK was "real in the sense that it relates to the removal that is contemplated". I have looked at the reality of the family's situation and considered all the circumstances. I have focused on the words and actions of the Mother as the remaining parent (see *Re G* at para 25 (2), cited above). There was no material deception by the Father (*Re G*, at para 25 (6)) – in fact the documentary material repeatedly stating his understanding of what was agreed and what he in turn would then do. Having stepped back and considered the approach set out in *Re G*, I have reached the clear conclusion on the balance of probabilities that the Mother consented for the children to move to the UK.

#### Harm and Article 13(b)

153. The burden is on the Father to demonstrate that this defence has been established.
154. The Mother denied that she had hit [N]. In her witness statement she said:
- "[B] has accused me of repeatedly bashing [N]'s head against the breakfast bar one morning. This is absolutely untrue and I am shocked and deeply saddened to hear such an accusation. The only time I have used physical chastisement towards [N] was a few weeks before [B] took the children to the UK in June 2024 when [N] was being naughty at the dining table and I gave her a little slap. [N] dropped her chin so it touched the dining table. She was not hurt and there was no red mark. Physical chastisement is normal in the Czech Republic culture but I had never done this before so I felt immediately guilty. I apologised and hugged her straight away afterwards. [B] and [the Father] were both present at the time and therefore this is all I can think of. I believe [the Father] has grossly over- exaggerated the incident and has spun a narrative to the children which they have started to believe."
155. The Mother's written evidence was served before the Cafcass report was served and so she did not address the account given by [B] to Ms Callaghan of being smacked. When giving oral evidence in relation to the "half and half" agreement she said that she had struggled in her relationship with [B].
156. I take into account the risk that the Father has unduly influenced the children. The audio recordings of [N] made by the Father are very concerning for all the reasons given by Ms Callaghan in her oral evidence. Nonetheless despite the Mother's denials and the risk that the Father has influenced the children, the allegations made by [N] and also by [B] cannot be discounted as lacking validity or cogency on their face. [B] told Ms Callaghan that his Mother has smacked him when she had been angry with him (para 31 of her report). He told her that she had done it since he was "little and even when we lived in England." (para 33 of her report). [B] told Ms Callaghan about an incident when his Mother had smacked him with a tablet with such force that it broke. He said that his Mother had broken three tablets and a Nintendo switch (para 18 of the report).

157. Recognising the tension between the summary nature of these proceedings and the court’s inability to resolve factual disputes between the parties and the risks that the children if will face if in fact they are true I take them at their highest. Having done so, the question is whether they represent a “grave risk” that the children would be exposed to a physical or psychological harm or otherwise place the children in an intolerable situation. Taking the allegations at their highest, in my judgment there would be such a grave risk. If the Mother continued to be physically abusive to [B] and to [N] then it would undoubtedly lead to a situation that they should not be expected to tolerate. In evaluating the risk, it is significant that Ms Callaghan considered that of a return order was made [B] would have a lot of resentment and might display angry defiant behaviour.
158. I turn then to consider the protective measures that have been proposed and whether they would be sufficient to ameliorate the grave risk. I note that Ms Callaghan’s view that the Mother would require additional support for both herself and for [B] was accepted on behalf of the Mother by Mr Little. Moreover, he accepted that that should be put in place in advance of any return (consistent with para 44 of the HCCH 2020 Good Practice Guide, cited above at paragraph 135). Furthermore, the protective measures proposed by the Mother in her statement and amplified and expanded in submissions by Mr Bain can be incorporated into orders under article 11 of the 1996 Hague Convention which is a relevant factor – see the authorities cited above at paragraph 134). Ms Callaghan did not consider that there were any protective measures required in addition to those offered by the Mother and the need for additional support for the Mother and for [B]. The Father did not seek to argue that additional protective measures were required.
159. I am satisfied that the protective measures are sufficient so as to ameliorate the Article 13(b) risk.

Child Objections

*The gateway stage*

160. I have considered Ms Callaghan’s evidence carefully as well as the evidence from the parents.
161. Having regard to the evidence before the court as set out above, I am satisfied that a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied demonstrates that [B] “objects” to the return to the Czech Republic. I remind myself that “[i]t is not necessary to establish that the child has “a wholesale objection” to returning to the country of habitual residence and “cannot think of anything positive to say about that other country”. The exception is established if the judge concludes, simply, that the child objects to returning to the country of habitual residence” (Black LJ at para 35 of *Re F (Abduction: Acquiescence: Child’s Objections)*, [2015] EWCA Civ1022 [2016] 1 F.C.R. 168 at para 35).
162. [B] said that if he had to go back, he would “*very emotional, I would be sad and crying*”. On a scale of 1 to 10 with 1 being happy to return to the Czech Republic he said, “*definitely 10, I don’t want to go back*”. Indeed, such is the strength of his objection that Ms Callaghan advised that if a return was ordered [B] would have “*a lot of resentment and might display angry defiant behaviour*”. I cannot discount the

possibility that at least some of the strength of [B]’s opposition to returning to the Czech Republic has been influenced by his Father. But the Mother herself in her oral evidence stated that [B] had been unhappy in the Czech Republic and that both parents had considered whether he might be happier in the UK. Furthermore, Ms Callaghan’s said that she believed [B]’s “*view about not wanting to return to the Czech Republic to be his authentic view*”.

163. Although, as Ms Callaghan indicated in her report, a significant part of [B]’s objection was that he did not wish to live with his Mother there was also a significant component that was driven by his school experience. He told Ms Callaghan that even if his Father wanted to live in the UK he did not want to go to school in the Czech Republic. [B] is now aged 11 and, having considered Ms Callaghan’s report, I am satisfied that he has attained the age and maturity for the court to take into account his views. The gateway stage is therefore passed in respect of [B].
164. In relation to [N], she told Ms Callaghan that she would be happy to remain in England or to return to the Czech Republic. I accept Ms Callaghan’s evidence that [N] does not have the maturity to understand the implications of her expressed preference.
165. The objections of [B] are not determinative of the outcome of these proceedings but rather give rise to a discretion, which discretion is at large. As invited by the parties, I will consider discretion as part of an overall analysis.

*Discretion*

166. In considering whether or not to exercise my discretion to order a return notwithstanding my findings on consent and [B]’s objections, I have considered a number of factors.
167. *First*, having found that the Mother consented to the children moving to the UK, the weight to be given to the policy considerations of counteracting wrongful removal and deterring abduction are relatively slight (per Peter Jackson LJ in *Re G* at para 42, cited above).
168. *Secondly*, [B] has expressed strong objections to returning to the return to the Czech Republic. The views he expressed to Ms Callaghan were assessed to be authentically his own. Ms Callaghan expressed concerns at the impact on [B] should be forced to return and advised that additional support would be needed. Part of the strength of his view is because he considers that the Mother had previously agreed for him to live in the UK. [B] is now aged 11 and is of an age where his views should carry weigh.
169. *Thirdly*, although Mr Little submitted that there was the option of returning [N] but not ordering the return of [B], such an order would create a grave risk of [N] being placed in an intolerable situation because of the separation from her only sibling. [N] did not object to returning to the Czech Republic. She said that she was happy to stay in the UK. Furthermore, I have found that the Mother consented to both children coming to the UK and have rejected the evidence that she gave orally that she had only agreed to a “*half and half*” solution.
170. *Fourthly*, there are competing welfare considerations. There are serious concerns as to the children’s treatment by their Mother in the Czech Republic (discussed above in relation to the Article 13(b) defence). [B] has on all accounts been very unhappy in

the Czech Republic. Aspects of the evidence indicate that he is troubled (see for example the Mother's reference to him keeping a secret diary, paragraph 66 above). Ms Callaghan reports that the children have both settled well in the UK. Nonetheless the Father's conduct in leading N in the audio recordings (in such a way so as to "*instil fear*" in [N] as described by Ms Callaghan) and in blocking the Mother strongly indicate that the Father is opposed to the children maintaining a healthy relationship with their Mother. Those welfare considerations cannot be fully assessed in summary proceedings such as these but clearly need to be addressed fully and promptly, whether in the existing English proceedings (currently stayed) or in the proceedings that I am told are also on foot in the Czech Republic.

171. *Fifthly*, the children have lived in England for part of their lives. [B] lived the first 7 years of his life in England whilst [N] was born in England and lived for her first year in England. The children have wider family in England. There are already proceedings in this country in relation to their welfare (which have been stayed pending the determination of the Hague application).
172. *Sixthly and finally*, I have stepped back and assessed the application overall. Having done so and for the reasons already given, I have concluded that I should not exercise my discretion to return the children to the Czech Republic notwithstanding my findings on the consent and child objections defences.
173. I accordingly refuse the Mother's application and invite the parties to agree a draft order.
174. I cannot leave this judgment without urging the parties to put aside their disagreements and to work together to promote the welfare of [B] and [N]. Whatever difficulties that there have been and continue to be in their relationship with one another, their priority should be their children. [B] and [N] each need to have a strong relationship with both their parents, and the Mother and Father should do all that they can to ensure that that happens.