Neutral Citation Number: [2025] EWHC 210 (Fam)

No: FD24P00154

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
IN THE MATTER OF THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION
AND IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985
AND IN THE MATTER OF K (A CHILD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 February 2025

Before:

MR DAVID REES KC

(Sitting as a Deputy Judge of the High Court)

(In Private)

B E T W E E N :

KS

Applicant

and

CS

and

K
(Through his Solicitor Guardian Laura Coyle)

Respondents

- -

Jonathan Evans (instructed by **The International Family Law Group LLP**) for the **Applicant**
Geraldine More O'Ferrall (instructed by **Star Legal Solicitors**) for the **First Respondent**
Clarissa Wigoder (instructed by **Freemans Solicitors**) for the **Second Respondent**

Hearing date: 12 November 2024

I direct no official shorthand note shall be taken of this Judgment and that copies of this Judgment as handed down may be treated as authentic
David Rees KC, Deputy High Court Judge

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

Mr David Rees KC:

INTRODUCTION

1. On 31 July 2024 Ms Victoria Butler-Cole KC, sitting as a Deputy Judge of the High Court, handed down judgment and made an order ("the Return Order") for the summary return of K to the United States of America pursuant to the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the 1980 Convention"). That order has not been carried into effect. Instead, I have before me two competing cross-applications:
   (1) On behalf of the Applicant Mother, an application for further orders to ensure K's return to the USA; and
   (2) On behalf of the Respondent Father, an application to set aside the Return Order pursuant to rule 12.52A of the Family Procedure Rules 2010.

2. Ms Butler-Cole published her judgment on an anonymised basis as *KS v CS* [2024] EWHC 2115 (Fam). I am publishing this judgment on the same basis and for ease of reference I adopt the same anonymisation convention as she did. That is to say that the Applicant mother is **KS**, the Respondent father, **CS** and the Child is **K**.

3. None of the counsel before me appeared before Ms Butler-Cole. Before me, KS is represented by Mr Jonathan Evans of Counsel and the respondent father CS by Geraldine More O'Ferrall of counsel. K was joined as a party to these proceedings by an order of Ms Barbara Mills KC dated 15 October 2024, and he is represented by Ms Clarissa Wigoder of counsel, instructed by K's Solicitor Guardian, Ms Laura Coyle. I am grateful to all counsel for their written and oral submissions in this matter.

4. I wish at the outset of this judgment to record my apologies to the parties for the significant length of time it has taken me to prepare this judgment. This has been the consequence of an extended illness on my part. I am grateful for their patience.

BACKGROUND

5. The background facts are set out in Ms Butler-Cole's judgment, and I do not propose to repeat them in any great detail. The key points for the purpose of this judgment are as follows:
   (1) K was born in 2009 in the USA. The hearing before Ms Butler-Cole took place shortly before his fifteenth birthday. At the date of the hearing before me K was around two months beyond his fifteenth birthday.
   (2) K's parents were very young when he was born and were unmarried. Their relationship ended and both have since married other people.
   (3) Until May 2023, K lived with his mother, KS, and her wife in the state of Georgia in the USA. K's father, CS lives in the UK with his wife and four other children.

(4) In May 2023 KS and her wife were involved in a serious road traffic accident in the USA which resulted in their being hospitalised. K was not involved in the accident.

(5) Following the accident, CS flew to the USA and decided to take K back to the UK. The precise events that led to this decision being taken are contentious. However, it is common ground that KS did not provide her consent for K to travel to the UK.

(6) There appears to have been an understanding (at least on the part of KS) that K would return to the USA in time for the start of the new school year in August 2023.

(7) However, he did not return, and K has now been living with his father in this jurisdiction since May 2023.

(8) KS issued an application for a summary return under the Hague Convention shortly before the first anniversary of K's departure from the USA, and the application came before Ms Butler-Cole on 30 July 2024.

(9) At that hearing the father relied on two defences to the application:

(a) That the removal of K from the USA was not "wrongful" under Art. 3 of the 1980 Convention on the basis that at the time of the removal the mother was not exercising rights of custody in relation to K; and

(b) That pursuant to Art. 13(2) of the 1980 Convention, K objected to being returned to the USA and had attained an age and degree of maturity at which it was appropriate to take account of his views.

(10) In the course of the final hearing Ms Butler-Cole heard oral evidence from Ms Demery of CAFCASS who had prepared a report in relation to K and oral submissions on behalf of both parents. The judge also had the opportunity, before preparing her judgment to have a brief meeting by way of video-link with K.

(11) In her evidence Ms Demery told the judge that K was not refusing to return to the USA. She described K as not angry or objecting but expressing a preference to remain with his father in England. Although K had told Ms Demery that he would be 'depressed' if he had to go back to the USA, she had not formed the view that he would be very upset if he was required to do so.

6. Ms Butler-Cole KC handed down her written judgment the following morning. She dismissed both of the father's defences:

(1) She concluded that the removal of K from the USA was "wrongful" within the meaning of Art. 3 of the 1980 Convention and that the mother had been exercising rights of custody in relation to K, notwithstanding the fact that she was hospitalised as at the date of removal.

(2) In relation to the Art. 13(2) defence the judge held that K was objecting to a return in 1980 Convention terms. She explained her decision on this point at paragraph [29] of her judgment:

> "I have considered whether K's wishes fall on the side of being a preference or wish, as submitted by Mr Shama, rather than an objection. I have decided that it is appropriate to treat his views as an objection. The dividing line between the two is fuzzy, in my view, and I should therefore err on the side of caution in K's favour. That approach seems to me to afford proper respect to K, who, as a nearly-15-year-old, has thought carefully about his situation and engaged with the court process to make his views known. I suspect that K would be surprised to be told that his politely expressed and reasoned wish to stay in England with his father did not count as an objection to returning to America, and that I had therefore not asked myself whether his views should prevail."

(3) Notwithstanding this conclusion the judge exercised her discretion to order a return. The judge held that K was objecting to a return to the USA within the meaning of Art. 13(2) of the 1980 Convention, but exercised her discretion under Art. 13(2) to nonetheless order a return. The judge set out at paragraph [31] of her judgment the factors that had particularly influenced that decision. These included the following:

(a) K's objection to a return.

(b) The judge considered that K had picked up a narrative from his father of negative views in relation to the mother, and that to some degree K's views were influenced by the father.

(c) The fact that it was not possible to secure a prompt return to the USA meant that "[t]he arguments on both sides are now more finely balanced as a result of the time that has passed, with the objectives of the Convention in particular being less weighty than they would have been at an early stage" [31 (ii)].

(d) The judge considered that K's experiences since his mother's accident had undermined his relationship with his mother and made it more difficult for him to trust her. The judge held "I doubt that spending short periods of time with his mother by way of visits in school holidays will enable him to carry out the reparative work that Ms Demery says he urgently needs after the past 12 months" [31 (iii)].

(e) In contrast to the negative views that the father held about the mother, and which the judge considered he was passing on to K the judge noted "I am satisfied that KS will support K's relationship with his father while the US courts make welfare determinations, as she has previously supported that relationship (for example by her sending K to England in 2019 to stay with his father) and, significantly, she is now aware of how happy K is to have finally built a strong relationship with his father, and how important that relationship is to him" [31(iii)].

(4) The judge concluded at para [33]:

> "I have found that K was wrongfully removed from the USA. He has had a very disrupted year, and while there have been some positives, CS should not have decided unilaterally that K should live in England. In my view, K's relationship with both his parents will be better promoted by his returning to the USA. The courts there can evaluate all the welfare considerations fully and decide what is best. The critical need to maintain and promote K's relationship with both his parents throughout his life, against a backdrop of wrongful removal and in the context of the wider policy objectives of the Convention, leads me to the conclusion that KS' application should succeed. I know that this is not the outcome that K wished for, and there will no doubt be some challenges for him going back to life in America, but in my judgment, these worries do not outweigh the other considerations."

7. Following the handing down of her judgment, the judge met with K over a video-link for a second time and explained her decision to him. The judge recorded K's reaction in an email which she sent to counsel later that afternoon. The key passage of that email is as follows:

> "[K] was upset and said he did not want to go back to America and would never go back. He said he felt he should have explained himself to me in the meeting yesterday as I hadn't understood his views. I said that I had fully understood that he did not want to back, but that the legal framework meant that his wishes were not automatically the answer about what should happen.
> "He was very upset and said he would refuse to go, and that he was very happy to be living with his father and did not want to go and live with his mother and 'her wife'. He wanted a male role model, and he realised now that his mother had lied to him about his father being a 'deadbeat' who wasn't interested in him. He was upset that I had not listened to what he wanted. He said he had wanted to live with his father for 10 years and he repeated some of the things in Ms Demery's report for example about his mother taking all his clothes away when he said he wanted to live with his dad."

8. Notwithstanding K's immediate reaction to her decision, the judge nonetheless made the Return Order. This required K's return to the USA by 11.59pm on 14 August 2024 and directed the parties to co-operate in obtaining emergency travel documents for K. That order has not been carried into effect.

EVENTS SINCE 31 JULY 2024

9. The father has provided a statement in which he describes that, following the judge's decision, K was "distraught and difficult to console", telling the father that he would not return to the USA. Although the father made arrangements to attend the mother's solicitors' offices on 8 August 2024 to collect K's expired travel documents and to attend the US Embassy on the same day with K to obtain new travel documents, the father's case is that K refused to cooperate with this process. K refused on a number of occasions

to have a passport photograph taken and on 8 August, refused to get out of bed to travel to London (I am told that the father's arrangements would have required a 4.00am start). The appointment was rebooked for 27 August and the father's case is that K again refused to attend. The father's evidence is that he and his wife had sought to reassure K about a return and impress upon him the importance of following the court's order.

10. In the meantime, on 13 August 2024 the father's solicitors had written to the court informing it that K had refused to attend the US Embassy and asking for the matter to be restored before Ms Butler-Cole. She was not available, and the matter was listed for hearing before another judge, Ms Nicola Davey, on 8 October 2024. Shortly prior to that hearing, on 7 October 2024 the mother applied for an order enforcing the return order. On 8 October the father applied for, and was granted, a 7-day adjournment to issue a set aside application. The same day K contacted Ms Coyle of Freemans Solicitors for assistance in putting his views before the court.

11. The father's set aside application was issued on 10 October and on 14 October a C2 application was issued by Ms Coyle on behalf of K seeking his joinder as a party and further directions. Further directions were given by Ms Barbara Mills KC on 15 October and the matter came before me for hearing on 12 November. Shortly before that hearing the father disclosed a set of text messages between the father and K from 2022 which I gave the mother permission to rely upon.

SETTING ASIDE – THE LAW

12. The Court has power to set aside a return order where no error of the court is alleged. The procedure for such an application is governed by FPR r12.52A and supplemented by PD12F para 4.1A which explains:

> "In rare circumstances, the court might also "set aside" its own order where it has not made an error but where new information comes to light which fundamentally changes the basis on which the order was made. The threshold for the court to set aside its decision is high, and evidence will be required – not just assertions or allegations.
>
> "If the return order or non-return order was made under the 1980 Hague Convention, the court might set aside its decision where there has been fraud, material non-disclosure or mistake (which all essentially mean that there was information that the court needed to know in order to make its decision, but was not told), or where there has been a fundamental change in circumstances which undermines the basis on which the order was made. If you have evidence of such circumstances and wish to apply to the court to set aside its decision, you should use the procedure in Part 18 of the Rules."

13. It is common ground among the parties that the approach that the court should take to a set aside application is that laid down in the judgment of Moylan LJ in *Re B (A Child:*

Abduction) [2020] EWCA Civ 1057 at [86] to [90]. There the judge identified four stages to the court's consideration of the application:

a. The court will first decide whether to permit any reconsideration;
b. If it does, it will decide on the extent of any further evidence;
c. The court will next decide whether to set aside the existing order;
d. If the order is set aside, the court will redetermine the substantive application.

Moylan LJ indicated that whilst it may be possible for all four stages to be addressed at one hearing, more typically there would be a preliminary hearing at which the court determines issues (a) and (b) followed by a further hearing at which it determines issues (c) and (d).

14. At [91] Moylan LJ noted:

> "I would further emphasise that, because of the high threshold, the number of cases which merit any application to set aside are likely to be few in number. The court will clearly be astute to prevent what, in essence, are attempts to reargue a case which has already been determined or attempts to frustrate the court's previous determination by taking steps designed to support or create an alleged change of circumstances."

15. Ms Wigoder on behalf of K also took me to the decision of Mr Dexter Dias QC (as he then was) in *ST v QR* [2022] EWHC 2133 (Fam). In that case at paragraphs [22] and [23] the judge held:

> "[22]. Stepping back, the court is asked to reverse what it has previously decided. It is not because what was decided was legally or procedurally wrong. Equally, this is not judicial review-type scrutiny. The available power is triggered by one thing: the facts have changed. But not every factual change is sufficient. It must be fundamental. I will come to what I understand that to mean shortly, but it involves in itself a finding of fact. The reason is that it is preferrable as a matter of principle for the court which made the original findings of fact, and which determined the return order, to decide itself if the facts have changed sufficiently to require a reassessment of its own substantive decision. In *Re W* at para.66 Moylan LJ characterised the test as:
>
> > "A fundamental change of circumstances which undermines the basis on which the original order was made."
>
> "[23] I judge that ten implications flow from this formulation:
>
> > (1) 'A fundamental change of circumstances' should not be elevated into something akin to a statutory test;
> >
> > (2) It simply asks the judge to assess whether the basis of her or his decision has so radically change that the decision cannot stand. The term "fundamental" should be understood in that light;

(3) It is more akin to foundational failure. In other words, the foundation for the decision has been swept away;
(4) It is not necessary at this step, step (c), third out of the four-point rubric, for the applicant to prove on the balance of probabilities that an Article 13(b) exception or indeed any other exception exists;
(5) That cannot be so, or step (d) would be rendered redundant. (See *Re A* at para.46.)
(6) Thus, the question I ask myself is: does the totality of evidence, old and new, that is existing at the time of the original return order and thereafter, indicate that the foundations for that order either no longer exist or are insufficiently secure to continue to support it;
(7) This is a finding of fact;
(8) The applicant must prove it on a balance of probabilities. That is because of the basic principle that she or he who asserts must prove;
(9) If proved, the court must go on to redetermine the substantive application;
(10) The court may make the same or a different decision."

PRELIMINARIES – STAGES (A) AND (B)

16. The set aside application initially came before Ms Barbara Mills KC on 15 October 2024. On that occasion the judge gave directions, joining K as a party to the proceedings and providing for the filing of further evidence. However, she did not on that occasion seek to undertake any of the steps identified by Moylan LJ in *Re B*, and her order provided that at the next hearing (that is to say the hearing that took place before me), the court would consider the father's set aside application by reference to all four of the *Re B* stages.

17. That said, it was common ground before me that the order of 15 October 2024 has led to the filing of additional evidence focussed on the set aside application and to the production by all parties of detailed position statements addressing this issue. All counsel therefore took the view that although I formally need to consider all four steps identified by Moylan LJ in *Re B*, the reality of the position is that I should in practical terms focus on stages (c) and (d). I agree. The evidence that has been lodged by all parties, and in particular the position now articulated on behalf of K by his Solicitor Guardian, means that I am satisfied that there are good reasons why I should permit a reconsideration in this case. I am also satisfied that the evidence that has been filed in accordance with the order of Ms Mills means that no further evidence is required, and I am in a position to proceed forthwith to Moylan LJ's stages (c) and (d).

STAGE (C) – SHOULD THE EXISTING ORDER BE SET ASIDE?

18. In the course of their submissions the parties referred me to a number of cases where the power to set aside a return order had been considered by the court. I approach these decisions with some caution, because each case is very fact specific. Even in

superficially similar cases, the factors which caused the court to decide to set aside (or as the case may be, not set aside) a return order may on closer examination prove to be quite different.

19. On behalf of the father, Ms More O'Ferrall and Ms Wigoder both referred me to the decision of Theis J in *C v M & Anor (No1 Hague Abduction Application for Re-hearing)* [2023] EWHC 1482 (Fam) a decision in which the judge set aside an order requiring the return of two children aged 12 and 5 to Mauritius. In her original decision the judge had found that the children objected to a return but nonetheless exercised her discretion under Art. 13(2) to order one. In setting-aside her original order, the judge held that the objections and information provided to the court at the later hearing demonstrated that they were "of a different quality and nature" than the court had considered at the previous hearing. Following the setting-aside of her original order, the judge reheard the case and declined to order a return. That decision was subsequently upheld by the Court of Appeal (see *C v M (A Child)(Abduction: Representation of Child Party)* [2023] EWCA Civ 1449).

20. By contrast in *ST v QR (supra)* the judge refused to set aside an order requiring a return of a child to South Africa. The respondent mother had unsuccessfully relied on Art. 13(b) as a defence to a return order. An application was made to set aside this order based upon what was said to amount to a change in her medical health and psychological position. This was rejected by the judge who did not consider that the mother had demonstrated a fundamental change in circumstances and who described the application as "a carefully veiled exercise in trying to reopen and reargue this case".

21. For the mother, Mr Evans took me to the decision of Sir Andrew McFarlane P in *A & B (Separate Representation)* [2024] EWHC 2834 (Fam). That was a case where the court was being asked to set aside a return order to the USA based on what was said to be fresh evidence about the strength of the children's objections to a return. At paragraph [28.a] the President emphasised that the court should be astute to prevent attempts to reargue an issue that had already been determined and rejected. He rejected an argument that because the children had not been separately represented at the earlier hearing they could not be said to be "re-arguing" a point taken by their mother at the earlier hearing holding:

> "If the case now to be put by the children was previously argued by another party or parties and determined by the court, the court should prevent it being re-argued through a set aside application. The focus must be on the need for a fundamental change that undermines the court's decision".

The President described the strength of the children's objections as having been a "known known" at the earlier hearing and held that the fact that they were still firmly of that view some five months later did not undermine the basis of the court's previous decision to order a return.

22. I note that these were all cases where the judge hearing the set aside application was the original judge who made the return order, and clearly it is desirable that wherever possible, applications to set aside a return order should be listed before the original judge. I recognise that where, as here, a different judge is hearing the set aside application, particular care is required and that there will need to be clear evidence that the basis upon which the original judge made the order has been undermined by a fundamental change in circumstances.

23. Turning then to the position in the current case. Although Ms Butler-Cole made a specific finding that K was objecting to a return to the USA, it does not appear from the judgment that the judge considered K's objection to be one of any great strength. Ms Demery's report characterised K's wish to remain in the UK as a "strong preference" rather than an objection, and whilst the judge treated K as formally objecting to a return in Convention terms, it seems clear from her description at [29] of the line between a preference and objection as being "fuzzy" and her decision to "err on the side of caution" when treating K's position as an objection, that she did not consider his objection to be a deeply rooted or adamantly held one. This is also apparent from the judge's summary of Ms Demery's evidence at [27] and [28] when she stated that K was not saying that he refused to return to the USA and that she (Ms Demery) did not think that he would be very upset to return. I conclude from the judgment that Ms Butler-Cole recognised that K was objecting to a return to the USA, but that she did not consider this objection to be an adamant one and she did not consider him to be saying that he would refuse to return to the USA.

24. By contrast, the evidential position before me today is significantly different.

25. Ms Coyle (who is a highly experienced solicitor in this area of law and has appeared on behalf of represented children in a number of reported cases) has filed two statements on K's behalf. In her second, and more comprehensive, statement she describes K as having been able "to show emotional maturity, including the ability to reflect upon information when this has been discussed with him and to put forward his views as to how he wishes his position to be advanced at Court". Ms Coyle identifies a number of matters as presenting a fundamentally different factual matrix to that presented to Ms Butler-Cole in July.

26. She identifies that K has, now through his actions, made it clear that he will not return to the USA. In this regard Ms Coyle is referring to K's actions since being informed by Ms Butler-Cole of her decision. I take these as including:
    (1) His immediate reaction to the judge's decision;
    (2) His refusal to co-operate in obtaining a passport photograph;
    (3) His refusal to attend the US embassy to renew his travel documents.

(4) His conversations with both parents subsequent to Ms Butler-Cole's decision to order his return;
(5) His instruction of Ms Coyle;
(6) His consistent and clear indication since the date of that decision that he does not wish to return to the USA;
(7) His stated position that he not only objects to a return, but that he will not return. Ms Coyle reports K as stating that "he will not go to the airport, and he will not board a plane".

Ms Coyle also refers to K being aware "of the consequences of his current actions" and that he has told her that he is concerned about what could happen if the police get involved "but that does not change his views and his position that he does not wish to return to the USA".

27. Ms Coyle records that K considers that Ms Demery failed to articulate the strength of his views to the Ms Butler-Cole. K also takes issue with Ms Demery's assessment of his comment that he would be "depressed" by a return meant that "he would be a bit fed up". K considers that the impact of the Return Order goes way beyond that, and K has told Ms Coyle that what he reported to Ms Demery was that if he was required to return to the USA, he would experience a depressive episode. K has been able to voice concerns to Ms Coyle about his mental health, and I note that he has been seeing a counsellor through his school about anxiety since before the return order was made. I am, unsurprisingly, told that the current situation is causing him further anxiety.

28. K's consistent and adamant opposition to the Return Order also appears to have been reflected in his conversations with both of his parents. In her recent witness statement KS accepts that K wants to remain living in England with his father (although she does not accept that the objection has changed or the reason for the objection has changed). K has told Ms Coyle that he is frustrated that KS is ignoring him and dismissing the strength of his feelings.

29. KS's position is that K has been empowered by what she describes as CS' "lacklustre compliance with the return order" to believe that he can ignore the court's order and override the court's will. She is critical of the steps taken by the father to comply with the court's order and to encourage K to accept the court's decision and co-operate with the return, describing him as having "gone through the motions doing the bare minimum which would have been abundantly clear to K". I do not consider this to be a fair criticism of the father, whose own witness statement sets out the steps he has taken to comply with the order (including booking two appointments at the US embassy for K, taking him to have a passport photograph taken, encouraging K to accept the court's decision, and speaking to K's school to ask for their support for K's return). It seems to me that given the apparent strength of K's opposition to the order, the father has been

placed in a difficult position between his own obligations to abide by the terms of the order and the need to provide a supportive home environment for K. Even if the father could have done more to encourage K to co-operate with the taking of his photograph and to attend the embassy, given the evidence before me as to the strength of K's objection, I do not consider that it would have led to any different outcome.

30. As the authorities that I have already referred to establish, it is not enough that there is a change in the factual matrix from the date of the original decision. What is required is that there is a fundamental change of circumstances which undermines the basis on which the original order was made.

31. Ms More O'Ferrall and Ms Wigoder both argue that there has been a fundamental change in the factual position since Ms Butler-Cole's decision. The judge's decision to order a return rested on Ms Demery's evidence that K was only expressing a preference to remain in the UK and that he would not be very upset to be returned. Although the judge treated K as objecting, she was not aware of the depth of his opposition, and that opposition has hardened further since the Return Order was made. They argue that the court now has a very different evidential picture based on consistent and adamant opposition from K to a return.

32. For the mother, Mr Evans argues that K's opposition to a return was a "known known" (to adopt the language of the President in *Re A&B* (*supra*), and that although K has consistently stuck to that position since the return order was made, there has been nothing new which fundamentally alters the position.

33. I have considered the evidence and the submissions of all parties and have concluded that there has been a fundamental change in circumstances since Ms Butler-Cole's decision in July 2024 which undermines the basis set out in her judgment for making the Return Order. Having careful regard to what the judge records in her judgment, I am satisfied that her assessment of the nature and strength of K's objection was based on what she was told by Ms Demery, both in her report and in her oral evidence – that K was not saying that he would not return to the USA but was instead "expressing a preference" (my emphasis) to remain in the UK. This is in my view reinforced by Ms Demery's further evidence, referred to by the judge at [28] that he would be "a bit fed up" if a return was ordered. Although the judge ultimately decided to categorise K's position for the purposes of the 1980 Convention as an objection, rather than a preference, it is clear that she did so to afford proper respect to K's views, rather than because she took a significantly different view of the nature and vehemence of his views to Ms Demery.

34. That is not now the position. Since Ms Butler-Cole announced her decision, K has consistently made it quite clear, through both his words and actions, that he is strongly opposed to a return to the USA. K's position, articulated through Ms Coyle, is that Ms Demery (and hence the judge) misunderstood the strength of his views. It seems to me to

be likely that events since the decision were announced (such as the arguments that K has had with his mother, and the reality of attempts being made to obtain a passport for him) have also served to strengthen K's opposition. Overall, I am satisfied that the nature and quality of the opposition now being articulated by K to a return is of a fundamentally different nature and quality to the evidential picture that was presented to Ms Butler-Cole in July. I do not consider that this is simply an attempt to reargue the same position that existed before the judge on that occasion.

35. Nor do I consider that it is possible to dismiss K's opposition to a return, as Mr Evans sought to do, as a "known known". I note that at paragraph [30] in *Re A&B*, it was the strength of the opposition to a return, and not merely the existence of opposition *per se* that the President referred to as a "known known". I am entirely satisfied that the factual matrix surrounding the nature of K's opposition and its strength has fundamentally changed since the judge announced her original decision to return K to the USA. Whilst the bare fact that K did not want to return was known to Ms Butler-Cole, the strength and consistency of his opposition, and the fact that he is expressly saying that he will refuse to return, was not.

36. Mr Evans made a further argument which I need to address. He suggested that even if there had been a fundamental change in the factual position since the delivery by the judge of her judgment, there had not been any fundamental change since the making of the Return Order, because as at the date that the Return Order was sealed (6th August 2024) the judge was aware of the true extent of K's objection, following her video-call with him on 31 July 2024 when she explained the outcome of the hearing to him.

37. I do not accept this. Mr Evans' argument, that I should look at whether there has been a fundamental change in circumstances since the date that the order was sealed rather than the date of judgment, appears to me to be wholly technical and artificial. It is, inevitably, to the judgment (which the judge had already handed down before her video-call with K) to which I must look to understand the basis and reasons for her decision.

38. Although the judge had an opportunity to observe K's reaction to her decision in her subsequent video call with him, it seems to me that there are obvious reasons why this did not prompt a reconsideration of her decision before the sealing of her order. First, this video call, like all meetings between a child and a judge, was not for the purpose of gathering evidence. The Court of Appeal has recently emphasised that the fact that a child objection's defence has been raised in Hague proceedings should not lead to a meetings between a child and judge assuming a different or greater significance than it would in domestic proceedings in respect of children (*Re P (A Child)(Abduction: Child's Objections)* [2024] EWCA Civ 1569 at [75]). Second, all that the judge had the opportunity to observe during her call with K was his immediate response to her communication to him of her decision. In the short video call that the judge had with K, there was no opportunity for him to take stock and reflect on her decision. As such the

judge could not have known whether the attitude displayed by K during that call would be sustained or whether his expressed opposition to the decision would fade away once he had had an opportunity to receive support and become used to the outcome.

39. For the reasons set out above, I am satisfied that there has been a fundamental change in circumstances which undermines the basis on which the return order of 31 July 2024 was made and I accordingly set aside that order.

STAGE (D) – RECONSIDERATION

40. Having decided that there has been a fundamental change of circumstances which undermines the basis on which the original order was made, it falls to me make the decision afresh. All counsel considered that I could do so summarily on the basis of the evidence before me (which consists of both the evidence before Ms Butler-Cole KC and the additional evidence that has been filed since) rather than holding a fresh hearing. I agree.

41. It is now common ground that the removal of K from the USA by the father was wrongful in 1980 Convention terms and in breach of the mother's rights of custody. It is also not disputed that, as at the date of removal, K was habitually resident in the state of Georgia.

42. On behalf of the father, Ms More O'Ferrall relies upon two defences under the 1980 Convention namely:

(1) Art. 13(2) – that K objects to being returned and has obtained an age and degree of maturity at which it is appropriate to take account of his views.
(2) Art. 13(b) – that there is a grave risk that K's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation.

On behalf of K Ms Wigoder stands aligned with Ms More O'Ferrall on these two defences and raises a third:

(3) Art. 20 – that a return would not be permitted by the fundamental principles of England and Wales relating to the protection of human rights and fundamental freedoms.

ART. 13(2) - THE LAW

43. Counsel are agreed on the law that applies to the Art 13(2) defence. On behalf of the mother Mr Evans referred me to the following summary from decision of Williams J in *Re Q & V (1980 Hague Convention and Inherent Jurisdiction Summary Return)* [2019] EWHC 490 (Fam) at [50]:

> "The law on the 'child's objection' defence under Article 13 of the Convention is comprehensively set out in the judgment of Black LJ in *Re M (Republic of Ireland)(Child's Objections)(Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26 (and endorsed by the Court of Appeal in *Re F (Child's Objections)* [2015] EWCA Civ 1022). In summary, the position is as follows:
>
> i) The gateway stage should be confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.
>
> ii) Whether a child objects is a question of fact. The child's views have to amount to an objection before Article 13 will be satisfied. An objection in this context is to be contrasted with a preference or wish.
>
> iii) The objections of the child are not determinative of the outcome but rather give rise to a discretion. Once that discretion arises, the discretion is at large. The child's views are one factor to take into account at the discretion stage.
>
> iv) There is a relatively low threshold requirement in relation to the objections defence, the obligation on the court is to 'take account' of the child's views, nothing more.
>
> v) At the discretion stage there is no exhaustive list of factors to be considered. The court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available. The court must give weight to Convention considerations and at all times bear in mind that the Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly.
>
> vi) Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are authentically the child's own or the product of the influence of the abducting parent, the extent to which they coincide or at odds with other considerations which are relevant to the child's welfare, as well as the general Convention considerations (*Re M* [2007] 1 AC 619)."

44. Mr Evans also reminds me of a number of further *dicta* from the decision of Black LJ in *Re M (Republic of Ireland)(Child's Objections)(Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26, reinforcing the point that an objection by a child is not determinative of the issue and that hearing a child is not to be confused with giving effect to his views (*Re M* at [46]).

45. Mr Evans and Ms Wigoder both referred me to different passages from para [46] of the speech of Baroness Hale in *Re D (A Child)* [2007] 1 AC 619. The full passage reads as follows:

> "As any parent who has ever asked a child what he wants for tea knows, there is a large difference between taking account of a child's views and doing what he wants. Especially in Hague Convention cases, the relevance of the child's views to the issues in the case may be limited. But there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views."

46. Ms Wigoder also referred me to the later comment of Baroness Hale in *Re M (Children) (Abduction: Rights of Custody)* [2008] 1 AC 1288 that:

> "[t]he 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."

She also drew my attention to the following extract from the *Perez-Vera Explanatory Report* to the 1980 Convention at paragraph [30]:

> "In addition, the Convention also provides that the child's views concerning the essential question of its return or retention may be conclusive, provided it has, according to the competent authorities, attained an age and degree of maturity sufficient for its views to be taken into account. In this way, the Convention gives children the possibility of interpreting their own interests. Of course, this provision could prove dangerous if it were applied by means of the direct questioning of young people who may admittedly have a clear grasp of the situation but who may also suffer serious psychological harm if they think they are being forced to choose between two parents. However, such a provision is absolutely necessary given the fact that the Convention applies, *ratione personae*, to all children under the age of sixteen; the fact must be acknowledged that it would be very difficult to accept that a child of, for example, fifteen years of age, should be returned against its will…"

47. Finally, Ms Wigoder referred me, by way of analogy, to the decision of Mostyn J in *SP v EB &KP* [2014] EWHC 3694, which she argued was relevant, not just to her Art 13(2) defence but also to the other defences that she and Ms More O'Ferrall were raising. That case concerned an application for the return of an older teenager, Kate, (aged 14 and 3 months) to Malta. The hearing before Mostyn J was a rehearing, an appeal against a previous return order made by Parker J having been allowed by the Court of Appeal. By

the time of the hearing before Mostyn J, Kate had been living in England for 18 months and was "well and truly settled" here. Mostyn J considered that length of time that Kate had spent in England fell to be taken into account under Art 13(2), Art 13(b) and Art 20. At paras [19] to [21] the judge held:

> "[21] The fact that over a year of the 18-month period that Kate has been here is referable to the time it took to appeal and retry the original decision of Parker J is in my judgment neither here nor there. It cannot be gainsaid that in that period, on the ground and in the real world, Kate has become very strongly established here.
> [20] I deal first with the Article 13(2) defence. … Obviously, as the words of Article 13(2) require, Kate must be of a sufficient age and maturity to voice an objection that is capable of being taken into account. … Beyond that she must express, as I stated in *B v B* [2014] EWHC 1804 (Fam), "a sound, reasoned and mature objection to being returned to her homeland for the sole limited purpose of enabling the court of that country to determine her long-term future." … This is not a case where the father has pursued his welfare case so that we can foresee a conclusive determination within a few weeks or months after her return to Malta. It has yet even to be started. It could be many months, perhaps over a year, before a final resolution. In such circumstances Kate is well justified, in my judgment, in objecting to a return for what may be a prolonged period where her whole present life including, most importantly, her education would be turned upside down."
> [21] For the same reasons I consider that the defence under Article 13(b) is made out. Normally a return for a short finite period to enable a welfare decision to be reached would not give rise to a grave risk of harm or intolerability. But where a child has established a whole new life over a prolonged period in the away state, including the adoption of an educational path in which she is prospering, it is likely to be intolerable and seriously harmful for a return to be ordered where the welfare proceedings that would ultimately decide her future have not even been commenced.
> …
> [22] And for the same reasons I consider that a return would violate Kate's right to family life under Article [8] of the ECHR 1950 (and Article 7 of the CFREU 2000), and that therefore a defence under Article 20 is established also. Kate's family life extends to her direct family, her new home, her society of friends and her education. All this would be considerably disturbed by a return for a prolonged period, as Mr Power's report and his oral testimony so vividly prove. Certainly the non-return of Kate violates, or potentially violates, the father's equivalent right to an aspect of family life namely the society of his daughter, but it is well established that if the same family rights of a parent and child are in competition the child's rights will prevail (see *Yousef v The Netherlands* [2003] 1 FLR 210). I agree with Mr Jarman that an Article 20 defence can only be established exceptionally as routine use of it would risk undermining the core purposes of the Convention in general and the scope of Article 11.6-11.8 of B2R in particular. However, the combination of the prolonged

delay coupled with the father's total inaction in the same period take this case over the threshold of exceptionality, in my judgment."

ART 13(2) - DISCUSSION

48. All counsel are agreed that the threshold for the Art 13(2) defence is met in this case, that is to say that K is objecting to a return to the USA and has attained an age and degree of maturity at which it is appropriate to account of his views and that accordingly the discretion is at large. I agree. I therefore turn to consider factors relevant to the exercise of that discretion.

49. K's views are obviously an important part of the matrix. Given his age, his views carry weight in the exercise of my discretion, although I recognise that they should not be determinative of the outcome. I take account, as Ms Butler-Cole did, that K's initial wish to stay in England may have been influenced by a negative narrative about his mother derived from his father. In support of this Mr Evans drew my attention to a number of recently disclosed messages between K and his father from 2022 which Mr Evans says shows that the father was unduly influencing K. However, I consider that Ms Coyle's evidence shows that K is capable of showing emotional maturity and an ability to reflect upon information when this is discussed with him. He has told Ms Coyle that he was frustrated that he did not get to have a closer relationship with his father when growing up, and Ms Coyle records that K is able to review the relationships with the important people in his life individually and his wish to have a closer relationship with his father does not change his relationship with his mother.

50. Even if the father has in the past provided K with a negative narrative about his mother, I do not consider that this influence is now the driving force behind K's opposition to a return. Ms Coyle is clear that from her discussions with K his current frustration with his mother is focussed on these proceedings, which are against his wishes.

51. Like Ms Butler-Cole I accept that K's wish to remain in England is an authentic one. He has articulated a set of reasons to both Ms Demery and to Ms Coyle underpinning this desire and in my judgment those reasons are mature, clear, consistent and rational. He wishes to remain with his father in England. He has established a close relationship with his father, his stepmother and siblings. He is settled in his school in England which he enjoys, and he is doing well there. He has begun his GCSE courses. K has told Ms Coyle that if he returned to the USA, it would be to a different school to the one that he previously attended as he would have progressed from middle school to high school. On the other hand he has accepted that there are things that he misses about the USA. I am satisfied that K's wish to remain in England is deeply held and is one that is based upon a considered reflection of the advantages and disadvantages, as he sees them, of a return.

52. In exercising my discretion I must also take into account the 1980 Convention and its purpose, and I bear in mind that the 1980 Convention only works, if in general, children

who have been wrongfully retained or removed from their country of habitual residence are returned and returned promptly (see Black LJ in *Re M* (*supra*) at [71]), and I take into account that this was a wrongful removal by the father. A central foundation of the 1980 Convention is that where a child has been unilaterally removed from the country of their habitual residence in breach of someone's rights of custody, then they should be swiftly returned to that country for the courts of that country to decide on their long-term future (*B v B* [2014] EWHC 1804 (Fam) per Mostyn J at [2]).

53. However, as Ms Butler-Cole identified in her judgment at [31(ii)] this is a case where K has been in this jurisdiction for a considerable period of time (almost 18 months to the date of the hearing before me) and a "prompt" return to the USA is no longer possible and, like her, I consider that as a consequence the objectives of the Convention carry less weight than they might have done at an early stage. Moreover, I note also that there are no proceedings relating to K currently on foot in Georgia, and that were I to order a return (notwithstanding his clear opposition) this is not a case where the dispute between his parents would be quickly settled by the courts of that state.

54. Independently of his wishes, the length of time that K has been in England and the degree of settlement that he has clearly obtained in that time are further factors that I must also take into account. As at the date of the hearing before me, he had been in England for around 18 months. It is clear that during this time he has integrated well into his new family life with a stepmother and siblings. He is plainly thriving at school and has built up a network of friends here. As such I find that as at the date of the hearing before me K is strongly established here.

55. Of particular weight in Ms Butler-Cole's decision to order K's return to the USA was the concern that not to do so would damage his relationship with his mother. Ms Demery told the judge that K's experiences since the mother's car accident had undermined the relationship between them and made it more difficult for him to trust her. The judge held (para [31(iii)]) that spending short periods of time with KS during school holidays would not be sufficient to enable them to carry out the reparative work needed. The judge also considered that there was a real risk that if K remained in this jurisdiction the father would not support him to renew his relationship with his mother; by contrast she was satisfied that if a return to the USA was ordered, the mother would support K's continued relationship with the father.

56. I can see precisely why the judge reached this conclusion on the evidence that was before her. However, the factual position as it exists before me is a different one, and it seems to me that the Return Order itself now stands as a substantial obstacle to the renewal of the relationship between K and his mother. K, himself, is clear that it is the source of his frustration with his mother and I agree with Ms Coyle's comment that forcing K "to return against his will is unlikely to lead to a positive outcome when he is clear this is not what he wishes to happen".

57. I am satisfied from Ms Coyle's evidence that K does not consider that he is currently being listened to by his mother and that communication between them has proved particularly difficult since the Return Order was made. The father's evidence describes telephone conversations between K and his mother in August 2024 which became argumentative and led to K becoming upset. K himself has told Ms Coyle "that he currently does not feel as if his wishes and feelings have been treated with respect by his mother and, at times, he has felt that there have been unfair words and comments made by his mother and also [her wife] which have upset him." However, I am pleased to note that K is alive to the importance of building his relationships with both of his parents. He misses aspects of his life in the USA and, if permitted to remain here, he wishes to have contact with and spend time in the USA with his mother and her wife. He has told Ms Coyle that he would be open to mediation and having an opportunity to speak directly to his mother about the way he is feeling with a professional present able to support him. In his recent statement CS has also confirmed that he and his wife have encouraged and supported K to have contact with his mother, and I consider that it is likely that if K remains here, the father will respect this commitment.

58. I am also satisfied that these proceedings have had a very significant impact on K. He is receiving counselling through school for anxiety, and he has voiced his concerns for his mental health to Ms Coyle; making clear that the impact upon him of the return order was "way beyond being 'a bit fed up'" as initially reported by Ms Demery.

59. Taking all these matters into account and bearing in mind that I am making the decision afresh on the basis of a different evidential picture, I have reached a different conclusion to Ms Butler-Cole, and I exercise my discretion to refuse a summary return under the Convention. I am satisfied that on the evidence before me that K's welfare needs align with his desire to remain in this jurisdiction.

60. That is not to say that I disagree with Ms Butler-Cole on the need for K to be supported to renew and repair his relationship with his mother. I consider this to be extremely important and I fully expect CS to make good on his assurances to encourage and support K in this regard. However, in the light of K's adamant opposition to a return, the stability that his life here has achieved, and the other factors weighing against a return, on balance I have concluded that I should exercise my discretion and decline to order his return to the USA.

ART 13(b) - INTOLERABILITY

61. Again, the law in relation to this defence is not disputed between counsel. Ms Wigoder referred me to the speech of Lady Hale in *Re D* [2006] 1 AC 619 at [52]:

> "'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'. It is, as article 13(b) makes clear, the return to the requesting state, rather than the enforced removal from the requested state, which must have this effect… No one intended that an instrument designed to secure the protection of children from the harmful effects of international abduction should itself be turned into an instrument of harm."

62. In support of this ground Ms More O'Ferrall and Miss Wigoder point to the factors that I have already outlined at paragraph [54] above and to the concerns that K himself has raised as to the effect that a forced return to the USA would have upon his mental health. Ms Wigoder also identifies that if a return is ordered, there is no timescale for the resolution of any welfare proceedings before the Georgia courts. She argues that a return to Georgia in those circumstances is something that K would find intolerable, and this cannot be alleviated by the protective measures offered by the mother. By way of analogy, she points me to the decision of Mostyn J in *SP v EB & KP* and invites me to reach a similar conclusion.

63. Mr Evans makes the point that if a return is ordered, K will be returning to the life that he enjoyed prior to his wrongful removal. Until that removal, the mother had always been K's primary carer. He will be returning to a home and a life that will be familiar to him, and that cannot be considered to be intolerable. Mr Evans accepts that K would be attending a new school, as he will have transitioned from middle school to high school, but observes that he will be with the same cohort of contemporaries that he was before his removal.

64. Taking into account the adamant opposition now being articulated by K to a return, the concerns that he has raised about the effect of a return to his mental health and the stability of the life that he has built in the period of time that he has been in England (18 months as at the date of the hearing before me), I am satisfied that to order a summary return under the Convention would place him in a situation which he should not be expected to tolerate. Whilst I recognise that there is force in Mr Evans' argument that K would be returning to a life with which he is familiar, I agree with Mostyn J's conclusion at [21] in SP *v EB & KP* that:

> "But where a child has established a whole new life over a prolonged period in the away state, including the adoption of an educational path in which she is prospering, it is likely to be intolerable and seriously harmful for a return to be ordered where the welfare proceedings that would ultimately decide her future have not even been commenced."

65. Accordingly, I would also refuse a return under Art 13(b).

ART. 20

66. Finally, Ms Wigoder argues that K's right to a family life under Art. 8 ECHR means that a defence is also established under Art. 20 of the 1980 Convention as well. I am not persuaded that this article is also engaged in the circumstances of this case. I note that in *SP v EB & KP* Mostyn J indicated that an Art. 20 defence can only be established exceptionally "as routine use of it would risk undermining the core purposes of the Convention". Whilst I am satisfied that in the circumstances of this case, K would find returning to the USA intolerable within the scope of the meaning set out by Baroness Hale in *Re D*, I am not persuaded that such a return would "not be permitted by the fundamental principles of [England and Wales] relating to the protection of human rights and fundamental freedoms". A summary return under the Hague Convention will, in many cases, involve a level of interference with a child's Art. 8 ECHR rights and in my judgment the court should be very cautious before acceding to an Art. 20 defence under the 1980 Convention based on an alleged interference with this right. I am not satisfied here that the interference with K's Art. 8 rights here is such as to bring this case within Art. 20 and would dismiss this ground of defence.

CONCLUSION

67. For the reasons set out above I set aside the Return Order of 31 July 2024 and dismiss the mother's application under the 1980 Convention for a summary return of K to the USA.

68. I recognise that this judgment will be difficult for KS to accept. However, I hope that the conclusion of these proceedings may provide an opportunity for both K and KS to start to rebuild their relationship, and I would reiterate the importance that both of K's parents now provide him with support and encouragement to do so.

69. That is my judgment.