



Neutral Citation Number: [2021] EWCA Civ 139

Case No: B4/2020/1914

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(FAMILY DIVISION)
Nicholas Cusworth QC (sitting as a Deputy High Court Judge)
FD20P00434

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 February 2021

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE BAKER
and
LORD JUSTICE NUGEE

Re G (Abduction: Consent/Discretion)

Dorian Day and Sarah Tierney (instructed by Hecht Montgomery Solicitors) for the
Appellant Mother
Christopher Hames QC and Alistair Perkins (instructed by Makin Dixon Solicitors) for the
Respondent Father

Hearing date : 28 January 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Tuesday, 9 February 2021

Lord Justice Peter Jackson:

1. This is an appeal in proceedings under the 1980 Hague Convention on the Civil Aspects of International Child Abduction ('the Convention'). By an order of 13 November 2020, Mr Nicholas Cusworth QC, sitting as a deputy High Court Judge, ordered that two children (I, aged 6, and P, aged 3) should be summarily returned to Romania. The proceedings had been brought by their father, who lives in Romania. The effect of the order would be that their mother, who lives in England close to her own mother, would return with the children to await the outcome of proceedings in the Romanian court.
2. An unusual feature of the case is that, although the Judge found that the father had consented to the mother bringing the children to England in February 2020, he nevertheless exercised his discretion to make a return order. The mother appeals primarily from that exercise of discretion. By a Respondent's Notice, the father challenges the Judge's conclusion on the issue of consent.

The background

3. The Judge's findings about the history were based on matters agreed between the parents, supplemented by their oral evidence in relation to consent. Where there was a conflict between them, he unhesitatingly preferred the evidence of the mother.
4. The parents and children are Romanian citizens. The parents married in 2013 and their first child I was born in 2014. In 2015, the family relocated to England for five months but returned to Romania. In 2017, P was born there and in March 2018 the family again moved to England, where the mother worked as a nurse. In October 2018, the father returned to Romania alone and the mother and children remained here for the next year, with the father visiting from time to time. In February 2019, the mother visited Romania and the parents agreed to divorce.
5. The Judge found that in Romania a divorce can be progressed through lawyers if all is agreed, and otherwise through the court. Because the parents were agreed, they wanted to take the first route. The mother travelled alone to Romania and on 14 March 2019 she and the father entered into a notarised agreement by which she was permitted to travel out of Romania with the children, without the father, for a period of three years. Before a divorce could be granted, there needed to be a social welfare assessment. During that assessment, which took place on 18 March 2019, the parents explained that the children would live with the mother in England. They then discovered that if they wanted a formal record of their proposal that the children would live abroad, they would have to have a court divorce. To avoid this, at the time of their divorce on 15 April 2019 they entered into a notarised agreement that parental authority would be exercised by both parents and that after the divorce the children would live with the mother in Romania. Despite that, the parents had in fact agreed that the girls would continue to live with their mother in England, and this is what actually happened. In June 2019, the children spent four weeks with their father in Romania before returning to their mother, and the father then visited for I's birthday in August 2019.
6. Not surprisingly the parents agreed, and the Judge so found, that as at September 2019 the children were habitually resident in England, where they had lived for the previous 18 months.

Events between September 2019 and February 2020

7. For this period of twenty weeks, the children were in Romania, apart from a brief visit to England at Christmas. On 18 September 2019, the mother brought the children there and on 4 October 2019, she left them in the care of their father. It was common ground that the parents had decided that they might reconcile and the mother's account, which the Judge accepted, was that this amounted to a trial of the father caring for the children. She was concerned about his ability to manage at the same time as working as she had always been their main carer and she did not want to give up her own job and move back without being sure that the arrangement would work. She visited Romania in November and December and the father and children spent Christmas with the mother in England. At that point, the Judge found, the parents agreed that it would be better overall for the children to return to live with the mother in England in late January/early February 2020.
8. On 23 January 2020, the mother sent a text message to the father about documents that the children would need for travelling, namely the permission to travel documents and the children's birth certificates. On 27 January she booked tickets to come over on 5 February and to return with the children the following day, and she informed the father of that. She duly travelled to Romania on 5 February. She met the father between 2 and 3 p.m. During the meeting she told him that she had formed another relationship, which upset him. However, he gave her the travel documents and the birth certificates. At 5 p.m. she collected I from nursery. The staff said that I had been excited all day. They knew it was her last day at nursery and they gave the mother her belongings. The father then took the mother and I to his own parents' home, where he and the children had been living, to pick up P. While there, he gave her the children's passports and they packed travelling cases with the children's belongings. The parents agreed that it would be best if the mother and children stayed overnight at her family home, where her brother was living, and the father drove the mother and children there. At 4.30 a.m. the next morning the mother and children set off to catch the 6.00 a.m. return flight to England, where they have remained.
9. Unbeknownst to the mother, on 5 February, after their meeting the father had visited a notary and executed a document revoking his March 2019 agreement to her travelling with the children. He gave the document to his Romanian lawyer, who appears to have sent it to the border authority, which registered it on the following day, but after the mother and children had departed. The document records that the father bound himself to bring the document to the mother's attention, being aware that the revocation was only effective from the moment of its communication to her. His account was that he showed the document to the mother when they first met on 5 February. But the Judge found that while the mother was in Romania the father neither gave her the revocation document nor informed her of its existence, and he accepted that she had only learned about it when she saw it on the family's shared photo drive five days after she returned to England.

Proceedings

10. The first proceedings were begun by the mother in Romania on 16 March 2020 seeking an order that she did not require the father's permission for the children to travel. She has since made further applications and the proceedings are ongoing, with an awareness of the Judge's decision and this appeal.

11. On 17 July 2020, the father’s proceedings were issued in England, seeking the children’s summary return. The mother defended on the basis that the children were not habitually resident in Romania on 6 February 2020 so that their removal was not wrongful, that the father had consented to the removal, and that the older child objected to return.
12. In August 2020, the court directed Cafcass to prepare a report on the children’s wishes and feelings in relation to returning to Romania, and that was filed on 10 September. The reporter described the children as having lived through two attempts by the family to relocate to England and then having experienced the demise of their parents’ relationship, an attempted reconciliation, and the divorce. With some fervour, the older child I expressed a clear wish not to return to live in Romania, but she expressed no fears about returning or about any of her family there. In the light of this, the child’s objections defence was scarcely pursued and the Judge rightly rejected it.

The judgment

13. After a hearing on 3 and 4 November 2020, the Judge delivered a reserved judgment on 13 November. He expressed regret that it had taken so long for the matter to be heard and explained why, unusually in Convention proceedings, he had heard oral evidence. After making his findings of fact, which are unchallenged on this appeal, he addressed in turn the issues of habitual residence, consent and discretion, directing himself in accordance with the terms of the Convention and the leading domestic authorities.
14. The Judge expressed his conclusion about habitual residence in this way:

“33. The... emphasis [is] firmly on the situation of the child as at the date of removal, as opposed to a weighing of comparative connections between competing jurisdictions.

34. The father’s assertion to me that the children’s stay with him in Romania was intended to be permanent from the outset was not accurate – I accept the mother’s account that the children were there on a trial basis. However, when considering the stability of their residence over the period, there can be no doubt that both children were from September 2019 settled in Romania with their father, visited by their mother, but integrated into local society, attending nursery and ballet school and with contact with their grandparents on both sides of the family, and their cousins. The father has produced brief statements from his cousin, his sister-in-law and a family friend all evidencing the contacts with family and friends which the girls had whilst in Romania, and I have no reason not to accept their evidence.

35. Whilst I accept that from December 2019 the mother was asking for, and the father was, contrary to his evidence, at least openly acquiescing in a return to England, the girls’ day to day lives continued as before, from Christmas until February, with the agreement of both parties. By 5 February, leaving out of focus their parents’ plans, the day to day lives of the children

certainly showed significant elements of integration in Romania, where their father who was then their primary carer was certainly habitually resident throughout. That is important, especially given the relatively young ages of the girls, in particular [A]. Whilst the whole of the period during which the girls were in Romania covered less than 5 months before their return to England, a focus on their habitual residence on the day of their departure must, I consider, yield the factual assessment that they were then both habitually resident in Romania.”

15. In consequence of his decision about habitual residence. the Judge then found, applying the decision of this court in *Re P (A Child)(Abduction: Acquiescence)* [2004] EWCA 971, that the removal of the children had been a prima facie wrongful removal in breach of the father’s rights of custody. The agreement at the time of the divorce that the children would be living with the mother in England had been superseded by their return to Romania and it was therefore for the mother to prove that the father had subsequently consented to the move in order to avoid an automatic return order.
16. As to consent, the Judge carefully considered the father’s unusual actions during the time that the mother was in Romania to collect the children:

“43. Here, the balance is a particularly difficult one. There can be no doubt, given the findings that I have made, that the mother acted reasonably in taking from the father’s behaviour that the consent which I find he had previously evinced had not been withdrawn. ... This is especially so when he subsequently delivers both girls to her, with passports and the necessary permission document. So the mother was entitled to think that his prior consent was still very much operative.

44. But is that enough? Mr Perkins makes the case for the father that, because it is the subjective state of mind of the left behind parent which is important, as I accept it is, I should still not be persuaded that he consented at the moment of departure because he appears to have changed his mind soon after parting from the mother on 5 February...

...

46. ... There is clearly some evidence here in the obtaining of the revocation that the father had changed his mind at some point after the mother told him of her new relationship, but at the same time, he has not taken any of the straightforward steps that he might have done to inform her of this. He could simply have knocked on her mother’s door that evening and asked for the passports back.

47. Ultimately, I am driven to the conclusion on the balance of probabilities that the father was suffering from a host of mixed emotions that evening, and whilst he evidently took steps to obtain the revocation, he equally determined not to notify the

mother that he had changed his mind. ... I am satisfied that when he met the mother that afternoon he was consenting to her returning to England with the children the next day. The best guide that I have to his eventual state of mind by the end of the day must lie in his actions subsequent to his conversation with the mother, towards the mother and the girls – in allowing them to depart as I find that he did, he at that point decided that whatever his misgivings he would not yet withdraw his consent.”

17. Having found consent to be established, the Judge had a discretion as to whether to make a summary return order. He directed himself with reference to *Re M (Children)* [2007] UKHL 55 and continued:

54. Of course, in this case, I have found that the mother’s removal of the children was one that she was entitled to undertake by virtue of the consent indicated by the father. Mr Day is right to stress that this was not a ‘clandestine removal’ on the basis of the findings that I have made. But the fact remains that children’s habitual residence immediately before that removal I have found to have been Romania. And although much more time than is desirable has now elapsed since the removal before this decision has come to be made, that is in large part down to the impact of the pandemic. There is evidence that the father did in the first instance act fairly soon after the mother had left – this is not a case where I can find he has acquiesced after the removal on the evidence before me, notwithstanding his consent at the point of departure.

55. Unlike a case where a defence is made out on the basis of a child’s objections, or because of a grave risk of harm, there are not in this case pressing welfare concerns which would tend to override Convention considerations. I also bear in mind that the girls have now been resident in this jurisdiction with their mother for the past 9 months, as they were for 2 prolonged spells prior to their return to Romania in September last year. But these are children who are well used to travelling between these 2 jurisdictions as they have several times already.

56. *[The Judge referred to I’s views, as recorded in the Cafcass report.]*

57. Ultimately, I am satisfied that Romania is the jurisdiction in which the welfare issues in relation to these children should be determined, and there are no compelling welfare reasons why the girls should not be present in that country whilst those decisions are being taken. It is greatly in their interests that the mother has agreed in the event that a return order is made that she will return with them and continue as their primary carer there whilst those decisions are being taken. She should be able to make an application for permission to move the girls permanently to this

jurisdiction, on the basis that her previous removal was one to which I have found that the father at the time consented.

58. Plainly, it will also be greatly in the girls' welfare interests for regular face to face contact with their father to recommence as soon as possible.

59. I am fortified to in my decision ultimately to make a return order that the father has also proposed the standard protective measures, as the CAFCASS reporter recorded, and on the basis of which I will make the order...

60. However, I stress that I make this order having found that the father did consent to the original removal, and thus that the order I make is in the exercise of the discretion afforded by the Convention, and having taken into account all of the factors outlined above. That return should take place soon given the time that has already elapsed since the original removal, but clearly taking into account the current lockdown conditions and so as to be consistent with the safety of all concerned."

18. The Judge ordered that the children were to be returned to Romania by 30 November.

The appeal

19. The mother sought permission to appeal on three grounds. She asserted that the Judge was wrong (A) in his assessment of habitual residence, (B) in relation to the removal having been wrongful, and (C) in his exercise of discretion. Moylan LJ stayed the return order and granted permission to appeal on two grounds in these terms:

"There is no real prospect of the Court of Appeal revisiting the established jurisprudence in respect of Ground B. It is well-established in this jurisdiction that the issue of consent is addressed under article 13(a) and not under article 3 and this case does not provide any justification for that position being reviewed.

Although Ground A would appear to have less substance than Ground C, I give permission in respect of both Grounds."

20. On 22 December, the father issued a Respondent's Notice, seeking to uphold the Judge's decision on the additional basis that the judge was wrong to find that the father had consented to the removal and had thereby wrongly invested himself with a discretion. Mr Day submitted that this was in reality a cross-appeal for which permission would be needed. That is not so: by a cross-appeal a respondent seeks a different order, but here the father seeks to uphold the same order for additional reasons.

Habitual residence

21. Mr Day and Ms Tierney argue that the children were fully integrated in England in September 2019 and that the Judge should have found that the trial period in Romania, with the mother visiting and the family then spending Christmas in England, was

insufficient for a finding of habitual residence. The father had failed to prove that the children had sufficiently integrated to reverse their previous status. The court should have looked at matters in the round and taken account of the totality of the periods in which the children had lived in each country. More weight should also have been given to the parents' intention that this was a trial period.

22. I do not accept these arguments. The Judge directed himself correctly by reference to the summary of principle contained in *Re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174 (Fam) at [16-19], as approved with one significant amendment by this court in *Re M (Children) (Habitual Residence: 1980 Child Abduction Convention)* [2020] 4 WLR 137; [2020] EWCA Civ 1105 at [63]. His task was to assess the degree of the children's integration in their Romanian social and family environment, and in doing so to focus firmly on their actual situation as opposed to weighing their comparative connections with the two jurisdictions. The overall family history is of course relevant to any assessment of habitual residence, so that the result might have been different had the children moved for a trial period to a third country with which they had no previous connection. But here they had oscillated between two countries with which in both cases they had strong social and family connections. Up to 5 February they were living with their father and grandparents under arrangements that might, had their parents reconciled, have continued along similar lines. The conclusion that they were significantly integrated, and accordingly habitually resident, in Romania is one that was clearly open to the Judge. I would reject this ground of appeal.

Consent

23. Article 13 of the Convention provides exceptions to the obligation under Article 12 to order the return forthwith of a child who has been wrongfully removed from the place of his or her habitual residence. One exception is consent:

“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... had consented to or subsequently acquiesced in the removal or retention; ...”

24. Consent is an exception that is infrequently pleaded and still less frequently proved. The applicable principles were considered by this court in *Re P-J (Children) (Abduction: Consent)* [2009] EWCA Civ 588 [2010] 1 WLR 1237, drawing on the decisions in *Re M (Abduction) (Consent: Acquiescence)* [1999] 1 FLR 174 (Wall J); *In re C (Abduction: Consent)* [1996] 1 FLR 414 (Holman J); *In re K (Abduction: Consent)* [1997] 2 FLR 212 (Hale J); and *Re L (Abduction: Future Consent)* [2007] EWHC 2181 (Fam); [2008] 1 FLR 914 (Bodey J). Other decisions of note are *C v H (Abduction: Consent)* [2009] EWHC 2660 (Fam); [2010] 1 FLR 225 (Munby J); and *A v T* [2011] EWHC 3882 (Fam); [2012] 2 FLR 1333 (Baker J).

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.

Consent in this case

27. Here, the unusual facts led to wide-ranging argument about aspects of the law relating to consent. In the end, however, I consider that the issue raised by the Respondent's Notice is resolved by the Judge's findings of fact. The father's evidence was that, aside from the general permissions that had been agreed at the time of the divorce (which the Judge accepted had been superseded by the children's move to Romania in September 2019), he had not consented at any time. The Judge firmly rejected that account. He found that during the Christmas holiday the father had consented to the children returning to England a few weeks later. He also rejected the father's case that, if he had given consent, it had been withdrawn when the mother came to collect the children. In particular, he disbelieved the father's evidence that he had shown the revocation document to the mother. He accepted that the father had developed misgivings, as seen in his obtaining of the document, but he rejected his account of a change of mind and held that his decision not to show the revocation document to the mother and his behaviour later that evening showed that he had not in fact withdrawn his consent. The father's case was therefore fatally compromised by the wholesale rejection of his evidence and in particular by the fact that he had delivered the children and their passports to the mother on the eve of travel. The Judge's primary findings of fact are not challenged on appeal, nor could they be.
28. Faced with this formidable difficulty on the facts, Mr Hames QC and Mr Perkins submitted to us that the Judge applied the law wrongly in a number of ways. He had reversed the burden of proof when referring to times when the father did not do something to show his lack of consent; he had not been clear about the sequence of consent and withdrawal that was in issue; he had insufficiently analysed the evidence about the oral agreement that the mother claimed had been made at Christmas; he had not considered that the father was thrown into turmoil by learning of the mother's boyfriend and that he had never in reality consented to a removal with the boyfriend playing a role in the children's lives; he had confused consent and acquiescence; he had focused on the mother's state of mind and not the father's; on the proven facts he should have found that consent had been withdrawn and he should not have ignored events after the parents' meeting on 5 January. The consequence is that the burden was placed on the father to inform the mother that he did not consent to the children's removal instead of the court asking itself whether the father had clearly and unequivocally consented to the removal.
29. The Judge's first task, which he performed with care, was to determine what had happened. When considering the criticisms of his subsequent analysis, it should not be forgotten that the father's case had been based on an entirely different narrative. Even so, the Judge's reasoning on this issue is clear. Read as whole, the judgment shows that he found that consent was given at Christmas 2019 against a background of earlier but superseded agreements, and that it had not been withdrawn by the time the children left. In pointing out that he had not taken obvious steps to communicate a withdrawal of

consent while the children's departure was in progress, the Judge was not reversing the burden of proof but pointing to evidence of continuing operative consent. That conclusion was securely based on the accepted evidence of the mother. It was never asserted that the father's consent was conditional upon her being single and the Judge was not asked to make any such finding, as would be necessary if an appeal was to succeed. He did not use the mother's state of mind as the yardstick for consent. As he said, the best guide to the father's eventual state of mind was to be found in his own actions. It is true that he did not attach weight to the sending of the revocation by the lawyer to the border authority, but as that was done without the mother's knowledge he was not obliged to do so.

30. Mr Hames then made two broader submissions of principle. The first was that the reason why the emergence of the boyfriend invalidated any prior consent was because it could no longer be described as *informed* consent. By analogy with a medical procedure, consent should not be valid unless it is given in full knowledge of the facts. I do not find the analogy helpful. 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.
31. More fundamentally, Mr Hames was driven back onto the submission that a withdrawal of consent is effective even if it is uncommunicated. He initially based this submission on the assertion that consent is a purely subjective matter and that a person can change their mind without telling anyone. He then modified this to say that a change of mind could only be effective if it was objectively verifiable, even though the beneficiary of the original consent was unaware. So here, it was verifiable because of the obtaining of revocation document and its transmission by his lawyer to the border authorities.
32. This submission cannot succeed on the basis of the Judge's findings, which were that the father had havered but had not changed his mind and had not in fact withdrawn his consent. But it is no more sustainable at the level of principle, for the reasons I have given above at paragraph 26. Consent under the Convention is more than a private state of mind. Even if the father had in fact decided to withdraw his consent, it was necessary for the mother to have been made aware of that before the children departed. Mr Hames posited circumstances in which a parent had undoubtedly changed his mind before departure but was unable to communicate it because the other parent had deliberately gone to ground, but I suspect that in that scenario the court might draw the inference that the departing parent knew that consent was lacking.
33. For all these reasons I would uphold the Judge's finding in relation to consent.

Discretion

34. In consequence of his conclusion on consent, the Judge was not bound to order the summary return of the children to Romania. As noted above, he directed himself to the leading case of *Re M (Children)*. That was a settlement case in which Baroness Hale surveyed discretion in the context of the Convention generally, with some remarks about the approach to its exercise in the context of the different exceptions.

“39. Thus there is always a choice to be made between summary return and a further investigation. There is also a choice to be

made as to the depth into which the judge will go in investigating the merits of the case before making that choice. One size does not fit all. The judge may well find it convenient to start from the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there. A case against his doing so has to be made. But the weight to be given to that factor and to all the other relevant factors, some of which are canvassed in *Re J*, will vary enormously from case to case. No doubt, for example, in cases involving Hague Convention countries the differences in the legal systems and principles of law of the two countries will be much less significant than they might be in cases which fall outside the Convention altogether.

40. On the other hand, I have no doubt at all that it is wrong to import any test of exceptionality into the exercise of discretion under the Hague Convention. The circumstances in which return may be refused are themselves exceptions to the general rule. That in itself is sufficient exceptionality. It is neither necessary nor desirable to import an additional gloss into the Convention.

...

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. I would, therefore, respectfully agree with Thorpe LJ in the passage quoted in para 32 above, save for the word "overriding" if it suggests that the Convention objectives should always be given more weight than the other considerations. Sometimes they should and sometimes they should not.

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.”

46. 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.”

35. In her decision ten years earlier in *Re K* (above), Hale J had declined to make a return order in a consent case. In doing so, she expressed a different view to what she said in *Re M* in the latter part of paragraph 46. In *Re K* at page 220 she said this:

“The final thing which I have to weigh in the balance is the purpose of the Convention. This is something to which the courts attach the greatest possible importance. We all want children to be returned as soon as possible to the place from which they have been wrongfully removed. The reasons why the Convention exists to secure this are partly that it is bad for children to be uprooted from one jurisdiction to another and partly to fulfil the obvious proposition that if there is a dispute between parents as to the future of their child it is better dealt with in the courts of the country where the child has hitherto been habitually resident because that is where the best information lies.

However, I have to bear in mind in particular that that factor has a different weight in a case in which consent to the removal or retention has been established. Indeed, in cases of consent, all of those factors carry a rather different weight. But if it has been agreed between parents that a mother may bring her child to another country and, if she so chooses, remain here with the child, then frustrating those two purposes of the Convention scarcely comes into question.”

36. Of this difference, Munby J made these obiter observations in *C v H* (above):

[46] Discretion in every Hague case is at large and unfettered: see in particular the recent judgments of the House of Lords in *Re M (Abduction: Zimbabwe)* [2007] UKHL 55, [2008] AC 1288, [2007] 3 WLR 975, [2008] 1 FLR 251 and in particular the speech of Baroness Hale of Richmond. There was a certain amount of debate before me as to the extent to which the learning in *Re M* requires a re-visiting and re-appraisal of the earlier learning encapsulated in particular, as it happens, in the judgment of Hale J (as she then was) in the case of *Re K (Abduction: Consent)* [1997] 2 FLR 212 in 1997: see in particular her observations in the penultimate paragraph of her judgment. I am inclined to think that the approach which Hale J there set out remains good and wise learning notwithstanding the subsequent elaboration of her thinking as Baroness Hale of Richmond in *Re M*. I am inclined to think that it will be an unusual case in which consent having been established, it is nonetheless appropriate to order a return. But, as I have said, that question does not arise. It is sufficient and dispositive of this case that, in my judgment, for the reasons I have given, the mother has failed to establish the positive and unequivocal giving of consent by the father, which alone is relied upon as the only defence to this claim.”

37. The establishment of the consent exception is of course no bar to an order for summary return. In one of the cases referred to above (*Re L*) consent was not established, but a return order would have been made if it had been, while in another *Re D (Abduction: Discretionary Return)* [2000] 1 FLR 24, Wilson J did order the return of two children to France despite their mother having consented to their father bringing them to England. At page 36, he said this:

“Under the Hague Convention, the father's proof of consent opens the door for me to exercise a discretion as to whether to order the children to return to France. My perception of where their welfare lies is important. But their welfare is not my paramount consideration.

Mr Setright says that, where a defendant establishes other defences allowed by Art 13, so that where, for example, the children object to a return to the foreign country or where there is a grave risk that a return would expose them to harm or place them in an intolerable situation, it is more likely that those same grave impediments to a return will dictate the result of the discretionary exercise which follows, namely that the children should not be returned; whereas, says Mr Setright, where the defence established is consent, or presumably also acquiescence, such grave impediments would not be present to influence the discretionary exercise. Miss Jakens, on the other hand, might say that the spirit of the Convention is always an important factor in the discretionary exercise; that the spirit of the Convention is that

wrongfully abducted children should be returned to the country of their habitual residence; and that, where there has been consent to the removal, then, in effect, the abduction is not wrongful, with the result, that the spirit of the Convention a less potent a factor in favour of return than in other cases under Art 13.”

That was said in a case that actually turned on the exercise of the discretion in the context of consent. In the end, Wilson J found that the arguments for the children’s return to France were “so powerful” that summary return was the only proper order. The children’s connection with France was much stronger than with England. The French court was obviously the more convenient court to decide contentious welfare issues that existed in France and a refusal to return the children would conflict with a French order and make contact impossible.

38. In his decision in *A v T* (above), My Lord, as Baker J, found that a father had agreed that a mother could bring the children from Sweden to England if she wished. The children were not returned to Sweden even though they were Swedish nationals who had lived there all their lives.
39. In their leading work, *International Movement of Children International Movement of Children: Law Practice and Procedure* (Lowe, Everall and Nicholls, 2nd edition, 2016) at 23.36, the authors note these decisions and refer to Baroness Hale’s observation in *Re M* about discretion in consent cases:
- “Notwithstanding the above comment, once consent is established it will be relatively difficult to persuade the court to order a return.”
40. The observations on discretion in consent cases in paragraph 45 of *Re M* therefore need to be read with care. They were made when drawing a contrast with cases of grave harm, where policy considerations in favour of return may be weak and welfare considerations against return are likely to be particularly strong. They do no more than say that the relevant considerations “might” point to a speedy return so that future decisions can be made in “the home country”. However, they carry a different emphasis to the earlier analysis in *Re K*, which was not cited in *Re M* and where the decision actually turned on the exercise of discretion.
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.

Discretion in this case

43. I start by identifying the principles upon which the Judge acted. He quoted from paragraphs 42 to 45 of *Re M* and continued:

“53. In similar vein, Black LJ in *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children As Parties To Appeal)* [2015] EWCA Civ 26 also made clear, in a case focused upon a child's objections, at [130], that: ‘Hague Convention considerations are also a vital consideration at the discretionary stage.’ ”

That was a case where this court found that children aged 13, 11 and 6 objected to return to Ireland, where they had lived for all of their lives and from where they had been surreptitiously abducted by their mother. The sentence cited is extracted from Black LJ's discussion across 17 paragraphs of the many factors relevant to the exercise of the discretion in that case. Ultimately Convention policy was a factor that was given no specific weight and a return order was refused.

44. The Judge further directed himself in this way:

“55. Unlike a case where a defence is made out on the basis of a child's objections, or because of a grave risk of harm, there are not in this case pressing welfare concerns which would tend to override Convention considerations.”

and

“57. Ultimately, I am satisfied that Romania is the jurisdiction in which the welfare issues in relation to these children should be determined, and there are no compelling welfare reasons why the girls should not be present in that country whilst those decisions are being taken.”

45. It is therefore clear that the Judge approached the balancing exercise in this case by attaching significant weight to what he described as Convention considerations favouring return to the extent that he looked to see whether there were pressing or compelling welfare reasons that might override them. That was an error of approach. 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.
46. I turn then to the Judge's case-specific reasoning. He did not systematically identify the advantages and disadvantages of each outcome before reaching his decision, but it is possible to extract the competing factors that he took into account.
47. On the one hand he noted that the removal was one the mother was entitled to undertake and that it had not been clandestine. He observed that a considerable time had passed since the removal and that the children were now resident here, as they had been for two prolonged spells previously.

48. But on the other hand, he said “the fact remains” that children’s habitual residence immediately before the removal was Romania, the father had not acquiesced after the removal, delay had in part been caused by the pandemic, and the children were “well used to travelling”. Fortunately for the children the mother would return with them and remain their primary carer and she would be able to apply to relocate on the basis of the previous removal with consent. It was greatly in the children’s interests to be able to resume contact with their father as soon as possible. The standard protective measures proposed by the father fortified the decision.
49. I am alive to the cautionary words of Baroness Hale in *Re J (A Child) (Custody Rights: Jurisdiction)* [2006] 1 AC 80 at [12]. If there is a discretion in which various factors are relevant, the evaluation and balancing of those factors is a matter for the trial judge and this court may only interfere if the decision is so plainly wrong that he must have given far too much weight to a particular factor. I have nonetheless reached the conclusion that this court is bound to intervene in this case for these reasons:
- (1) As explained above, the Judge approached the balancing exercise incorrectly.
 - (2) He then gave significant, indeed predominant, weight to policy considerations without explaining why he was doing so. He noted that the mother had been entitled to remove the children but he did not take into account that there was in consequence no reason for restorative or deterrent action. As to comity and home-based decision-making, he gave no weight to the fact that England is at least as much their “home country” as Romania – apart from the interrupted period of 20 weeks, these young children aged 6 and 3 had lived here for the last 2½ years. Nor did the Judge explain why it would be beneficial for the children to be in Romania while the Romanian court made its decisions. On the information now available, that can happen wherever the children are living, and there was no contrary information before the Judge. Moreover, as the leading proposal for the children’s future is for them to live with their primary carer in England, it might be thought that there was some advantage in the assessment being made while the children are here.
 - (3) In contrast, the Judge gave no identifiable weight to the reason for his being invested with a discretion, namely that the father had agreed to the removal, nor to the inherent unfairness of his then succeeding in summoning the mother and children back.
 - (4) The only other positive reason for a return order was that the children could have contact with their father in the interim, but that had to be balanced against the other consequences of summary return and the fact that it had been the father’s original decision to live in a different country to the children. The other matters (that some delay had been due to the pandemic, that the children are used to travelling, and that the mother would return with them) were not reasons in favour of a return, but factors that might mitigate its disadvantages. The Judge also accepted the father’s offer of protective measures at face value, even though his evidence had been fundamentally untruthful and he had already shown himself to have taken legal measures behind the mother’s back.
 - (5) The welfare analysis did not address the negative impact of a summary return at all. The children appear to be settled in the colloquial sense and the fact that they

have been backwards and forwards in the past is not a reason why that should continue. The Judge noted that the mother would return and could apply to relocate, but he attached no weight to the limbo in which the children would meanwhile be living, or to their important relationship with their maternal grandmother, or to the disruption caused to their mother, who is resident in England and upon whose employment the children depend, or to the prospect of the children being sent to Romania only to return to England if the mother was given permission to relocate, or to I's wishes. All in all, an effective summary survey of the welfare issues in this case was not carried out; had it been, it would have pointed strongly towards maintaining the interim status quo.

50. This is therefore a case where child-centred welfare considerations greatly outweigh policy considerations. The removal of the children was wrongful in name only, the children's current situation gives rise to no obvious concerns, and there is no advantage (and considerable disadvantage) in them being moved from where their father had agreed they should be in order for a decision to be taken about their future. The Judge's exercise of discretion cannot stand and I would remake the decision in favour of refusing an order for summary return.
51. I nevertheless acknowledge the Judge's overall handling of this unusual case. His findings of fact and his conclusions about habitual residence and consent were solid ones. It is only in the exercise of discretion that he fell into error, but on that ground I would allow this appeal and set aside the order for return.

Lord Justice Baker

52. I agree.

Lord Justice Nugee

53. I also agree.
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