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No: FD25P00282

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985
AND IN THE MATTER OF THE SENIOR COURTS ACT 1981
AND IN THE MATTER OF B (A CHILD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 August 2025

Before:

MR DAVID REES KC

(Sitting as a Deputy Judge of the High Court)

(In Private)

B E T W E E N :

PB

Applicant

and

JV

Respondent

- -

Ms Geraldine More O'Ferrall (instructed by Eskinazi & Co, Part of GT Stewart Solicitors) for the **Applicant**
Ms Victoria Green (instructed by International Family law Group) for the **Respondent**

Hearing date: 11 August 2025

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. B is a three year old boy. He was born in New Zealand in 2022 and lived there until 2 September 2024 when his mother, JV, (who is a British Citizen) brought him to the UK for a family wedding with the father's consent. She (and B) did not return to New Zealand after the wedding and in May 2025 B's father, PB, brought proceedings 1under the 1980 Hague Convention for the summary return of B to New Zealand. Those proceedings now come before me for determination.

2. The father has attended the final hearing remotely from New Zealand; the mother attended in person. The father was represented by Ms Geraldine More O'Ferrall of counsel; the mother by Ms Victoria Green. I am grateful to both counsel for their helpful skeleton arguments and oral submissions.

3. By way of background, the mother was born in the UK, and moved to New Zealand in 2010 for work. She lived in New Zealand from 2010 until September 2024. The father is a New Zealand national. The parents met in 2014; married in 2019 and B was born in 2022. B has dual British and New Zealand citizenship.

4. There are significant areas of factual disagreement in this case. The mother has made allegations of domestic violence and emotional abuse. These are contested by the father and I return to them in more detail below. A further point of factual dispute that is key to the issues that I have to decide, is the question of whether the father has acquiesced in B remaining in England and Wales. Both parents have filed lengthy witness statements on this issue (the father's significantly exceeding the page limit set by the relevant practice direction) and the mother, in particular, relies on a series of text messages exchanged between the parties as well as transcripts of telephone conversations between her and the father which she recorded without his knowledge.

5. I permitted both parties to give oral evidence, limited to the issue of acquiescence.

Evidential Disputes

6. It is common ground that when the mother and B travelled to England on 2 September 2024 they did so (a) with the father's consent and (b) for a limited period of time. Although no return air ticket had been purchased or express date for return had been set, the father's evidence is that they had agreed that the mother and child would be in England for about a month. The mother's evidence was that they had agreed a longer period of time – she suggested a couple of months in her oral evidence.

7. In any event, towards the end of September 2024, the mother clearly formed an intention that she did not wish for her and B to return to New Zealand for the time being and this was communicated to the father.

8. I do not have a complete set of the conversations and messages that passed between the parents. There is no contemporaneous record of their telephone conversations at this stage. I also have an incomplete set of the Facebook messenger text messages that passed between them at this stage as, in about February 2025, the father sought to delete the text conversations that had taken place. Many messages have survived as the mother had taken contemporaneous screenshots of a large number of text messages that the parties exchanged. Ms More O'Ferrall sought to criticise the mother for this, suggesting that she had sought to compile a selective set of messages, supportive of her case. This was denied by the mother, and I do not consider this criticism to be fair. Ultimately, it was the father who chose to delete the messages, and he did so at a time when he was starting to contemplate bringing proceedings under the Convention. I do not consider that the father can now complain that the record of messages is incomplete, when it was his own actions, taken at a time when the proceedings were within his contemplation that has led to this state of affairs.

9. As I have already mentioned, towards the end of September 2024, the mother clearly formed an intention that she did not wish for her and B to return to New Zealand for the time being. This is apparent from a set of messages that were exchanged between 26 and

28 September. The mother's initial statement to the father is not recorded, but his reaction is, and it is clear that he had been told that the mother and B were not planning to return to New Zealand within the time frame that the parties had previously agreed for the mother's trip. Thus the set of messages begin with comments from the father such as:

> "I trusted you to come back… You destroyed my trust in you and your family… You promised me day one you'd never cut me out of his life…Please come home".

10. The father's reaction to the news that the mother was not intending to return to New Zealand as originally planned was clearly an emotional and angry one. He sent her a picture of a mug that he had broken, made unpleasant and hurtful comments about the mother's parents (including her father who had died in 2017) and talked about stripping down their car and house. The mother sought to make clear that she was not saying that she would not necessarily return, but that at this stage she was considering her options. The father however, continued to send pictures of the mother's possessions which he indicated that he was throwing them out. These included a picture of a broken glass and a picture of a fire in a woodburning stove with the comment "Reckon I could keep this going all day on your stuff alone". In his oral evidence the father explained that he had wanted the mother to believe that he was damaging or destroying her property, but that in reality only some paperwork was burnt.

11. During this period the father also sent the mother a message with a screenshot of a website from the New Zealand Ministry of Justice website entitled "Return a child to or from Aotearoa New Zealand" with the message "There are still moves that I can make", and in cross-examination the father accepted that he was aware that if the parents were unable to reach an agreement between themselves that there was a legal route that he could adopt, although he was not aware of the intricacies of the 1980 Convention.

12. Something then happened. There is a break in the messages of a few days, and the mother's case is that after she had provided the father with some space to calm down, they were able to have a telephone discussion in which it was agreed that the mother and

B would remain in the UK; it being envisaged that the father would make arrangements to join them at a later date. The father's case is that he never agreed to B staying in the UK and that he was emotional and deeply distressed during this period and his messages need to be read in that context.

13. By 4 October the father was messaging the mother in the following terms:

> "I've calculated a few paths and what I'm proposing works better for you and [B]. He inherits the house. You get what you want. I accept my fate and move on." And
>
> "The suns been shining. The birds been singing. I've had a chance to replenish. Think things over. Promise no hate. We just do what needs to be for [B's] sake… I promise I will set this up to rent for the new year. It's his future. I want nothing in return.".

The reference to rent is to the family home in New Zealand being rented out. The following day he messaged:

> "You staying in England and renting this place for [B's] future 100% is happening. Wheels are in motion. At some point I'll discuss what I'm doing… But I think you and I are done at this point and if I did come to England it would be to be by him I'd only stay with you to start with so I can establish myself. But there would be no hate. Just move forward for [B's] sake".

The next day he messaged about a collection of photos he was getting rid of.

14. On 22 October the mother messaged that she considered that staying in England was best for B, and the father indicated that he would be staying in New Zealand. He stated:

> "You keep the boy I keep the house we go on separately. No hard feelings. You're welcome to come back and be a family of course. But I'm not coming. Should you chose to stay. Lawyers agreement gets put in place around house and we communicate only in regards to house through email. I won't be part of [B's] life unless he seeks me out later in life."

15. On 28 October the father messaged "I want separation. I hope this was all worth it for you. You have been a massive disappointment to me. Good luck for the future."

16. On 7 November the mother provided the father with some updates about her and B's life in England. She told him that she had some UK job interviews coming up and that as her New Zealand employer would not agree to continued remote working, she would be resigning from that job at the end of the week. She also indicated that she had some properties to view and that she had two daycare / preschools lined up for B which she would be viewing the following week.

17. On 9 November the father messaged:

> "Do you want me to move to England and stay married? "

To which the mother replied:

> "I want to give it our best shot if we can. But we have a lot to work on. I worry that you will come here with anger and I don't want that for [B], or for me."

18. On 20 November the mother told the father that she had been offered a job interview, to which he replied "That's great news. Well done". He wished her good luck and commented that their future depended on it. The following day, after the mother had been offered the job, he replied: "Congratulations on the job. Moving forward." He also made comments about saving for a visa.

19. On 22 November the father texted the mother about the sale of various of their possessions in New Zealand including her work desk and B's child seat and on 2 December the mother transferred some money to the father which he indicated he would use to obtain a passport. On 4 December the father messaged: "I'm leaning towards wait a year and it sets us up over there. Its our original plan. We do everything on our end to make visa happen.". Other exchanges around this time show that the parents were looking at the cost of the father obtaining a family visa.

20. By January 2025 discussions had become more fraught and the father was messaging that if the mother would not speak to him then he would "start plan b". The mother responded stating that "…since agreeing that we would stay here, I've got a job (a good job), I've got our son enrolled at school, I've secured us a home, I've furnished that home… Nothing I have done has been opposed to what we have agreed." The father does not appear to have challenged the mother's view that there had been an agreement that she and B would stay in England.

21. A few days later, the father asked whether they were separated and then stated that he would be "moving forward as separated" and in a separate message stated "Clearly you don't care and our marriage is done".

22. Matters then seemed to have improved and a few days later, the father sought to make a fresh start in messaging and explained that he had agreed a rent of $700per month for their New Zealand property, and then referred to him "walking away from everything". I understand that around this time, the father moved for work from New Zealand's North Island, where they had lived as a family, to the South Island.

23. Then on 3 March, the father changed tack and sent a message "None of this is acceptable. I want my son home". On 13 March, the mother asked the father why he had deleted the messages and stated "If you put in a false claim that you didn't agree, then we will end up wasting so much energy and money on legal proceedings…". By 21 March, the father was stating "Court proceedings are happening…"

24. By this point, the mother had decided to record some of the telephone calls that she was having with the father. This was done without the father's knowledge and I treat the transcripts of these calls with some caution as both parents would have known that court proceedings were a possibility.

25. I have given less weight to the telephone conversations and to the messages from March

2025 onwards. They clearly took place within the matrix of intended proceedings, and although there are references in the transcripts to the father having agreed to the mother and B remaining in England he does not unequivocally say that this was an unconditional agreement unconnected to his own future.

26. A further issue arises from more recent messages about contact between the father and B. The father complains that the mother has sought to deny him contact; the mother's position is that he was not respecting the arrangements that had been agreed. More recently, contact has been conducted pursuant to the terms of a court order.

The 1980 Convention

27. The application falls to be determined by reference to the provisions of the Convention. As Article 1 makes clear, one of the objects of the Convention is:

> "to secure the prompt return of children wrongfully removed to or retained in any Contracting State."

The wrongfulness of a removal or retention is governed by Article 3, which provides that:

> "The removal or the retention of a child is to be considered wrongful where –
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, or under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

28. The substantive obligation to return is provided for by Article 12 of the Convention. This provides that:

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

29. It is common ground that at all relevant times, both parents were exercising rights of custody in relation to B and that prior to his travel to the UK, B was habitually resident in New Zealand. For the father, Ms More O'Ferrall's case is that although the father had agreed to the mother bringing B to the UK for the family wedding, it had been intended that they should only stay for a few weeks (although no return ticket had been purchased) and that by about early October there was a wrongful retention by the mother.

30. For the mother, Ms Green takes the primary position that the Convention does not apply in this case as there was no wrongful retention of B. This is, she asserts, because the father had expressly agreed with the mother, before any retention had taken place, that B and the mother would not return to New Zealand. She also argues that even if there was a wrongful retention, the obligation to return does not arise because, as at the date of the wrongful retention, B had acquired an habitual residence in England and Wales.

31. In the alternative, Ms Green also relies on two of the exceptions to the obligation to return provided for by Article 13 of the Convention:

This provides as follows:

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

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal

or retention, or had consented to or subsequently acquiesced in the removal or retention; or

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

32. So, in summary, the mother relies upon four lines of defence:

(1) There was no wrongful retention; alternatively

(2) B was habitually resident in England at Wales at the date of retention; alternatively;

(3) That the father has acquiesced in the retention; alternatively

(4) That there is a grave risk that B's return would expose him to physical or psychological harm or would otherwise place him in an intolerable situation.

I deal with each of these grounds in return.

No Wrongful Retention

33. I can deal with this issue relatively briefly. It seems to me clear from the messages that I have seen, and in particular the set of messages exchanged between 26 and 28 September 2024 that the mother told the father that she would not be returning to New Zealand with B within the time frame that had been agreed between them when she left. Whilst I note the mother's message sent during this period that she was not saying that she would not necessarily return but was considering her options, given the severity of the father's reaction demonstrated in these messages, I am satisfied that the mother must have sought to abrogate to herself alone, the decision as to whether and when she and B would return. It is clear that it is possible for a parent, by their actions, to effect a repudiatory retention even before the agreed date for a return has arrived (*Re C (Children)* [2018] UKSC 8), and this is what I consider must have taken place here.

34. In such circumstances, I do not consider that it is open to the mother to argue that this is not a case where there was no wrongful retention at all, and that the decision to remain in

England was, from the start, one jointly taken by both parents. In my judgment, the mother's actions in indicating that she would not be returning with B within the time frame previously agreed is sufficient to amount to a wrongful retention in breach of the father's rights of custody. I therefore do not consider that this is a case where the Convention has no role to play, and I consider that the subsequent discussions between the parents must be considered through the lens of the Article 13(a) acquiescence defence as set out below. I therefore find that there was a wrongful retention no later than 28 September 2024.

Habitual Residence

35. Having, determined that this is a case which potentially falls within the Convention, I must then consider the question of B's habitual residence. A helpful summary of the law governing the determination of a child's habitual residence was recently provided by Moylan LJ in *Re F(A Child) (Habitual Residence)* [2025] EWCA Civ 911 at [58] to [59]:

> "[58]In conclusion, I start by reiterating part of what Black LJ said in *Re J*, namely first that there is no "prescribed route" and not "only one way in which to approach the making of a finding of fact about habitual residence" and secondly that "the scope of the enquiry depends entirely on the particular facts of the case" with the nature and extent of the analysis depending on the circumstances of the particular case. As with any judgment, what is important it that there is a sufficient analysis and explanation of the court's determination.
>
> [59] The determination of habitual residence is not a formulaic exercise because it requires a broad consideration of the child's and the family's circumstances and because different factors will be present in different cases with the same factor being more significant in one case than another. Accordingly, as was said in the case of *HR*, at [54], "guidance provided in the context of one case may be transposed to another case only with caution". With those caveats, I set out the following elements (which are not intended to be exclusive) drawn from the cases:
>
> (a) "The identification of a child's habitual residence is overarchingly a question of

fact": *Re B*, at [46]. It is "focussed on the situation of the child": *Re A*, at 54(v) and *Re R*, at [17]. It is an issue of fact which requires the court to undertake a sufficient global analysis of all the relevant factors. There is an open-ended, not a closed, list of potentially relevant factors;

(b) As set out, for example, in *Proceedings brought by HR*, at [41]: "In addition to the physical presence of the child in the territory of a [member] state, other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent";

(c) Factors of relevance, as set out in *Proceedings brought by HR*, at [43], and reflected in many other domestic cases, include: "the duration, regularity, conditions and reasons for the child's stay in the territory of the different [member] states concerned, the place and conditions of the child's attendance at school, and the family and social relationships of the child in those member states";

(d) The intentions of the parents are also a relevant factor and there is no "rule" that one parent cannot unilaterally change the habitual residence of a child: *Re R*, at [17];

(e) As set out in *Re R*, at [16], it is "the stability of the residence that is important, not whether it is of a permanent character" but there "is no requirement that the child should have been resident in the country in question for a particular period of time" because habitual residence can be acquired quickly: e.g. *A v A*, at [44];

(f) The "degree of integration of the child into a social and family environment in the country in question" is relevant, *Re R*, at [17]. It is clear that "full integration" is not required, "*Re B (SC)*", at [39], but only a degree sufficient to support the conclusion, when added to the other relevant factors, that the child is habitually resident in the relevant state;

(g) The relevant factors will reflect the age of the child (see *Mercredi v Chaffe* [2012] Fam 22, at [53]-[55]; *A v A*, at [54(vi], and *Re LC*, at [35]). Accordingly, "The social and family environment of an infant or young child is shared with those (whether parents or others) on whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned": *Re A*, at 54(vi);

(h) The court is considering the connections between the child and the country or countries concerned: *A v A*, at [80(ii)]; *Re B (SC)*, at [42]; and *Proceedings brought by HR*, at [43]. This is a comparative analysis as referred to, for example, in *Re M*, at [60]; *Re B* (EWCA), at [86]; and *Re A*, at [46]. As observed by Black LJ in *Re J*, I repeat:

> "What is important is that the judge demonstrates sufficiently that he or she has had in mind the factors in the old and new lives of the child, and the family, which might have a bearing on this particular child's habitual residence."

An example of this is seen in *Re B (SC)* in which Lord Wilson, at [49]-[50], referred to the factors which pointed to the child having "achieved the requisite degree of disengagement from her English environment" and those which pointed to the child having "achieved the requisite degree of integration in the environment in Pakistan".

36. Here, as I have found, the wrongful retention had occurred by 28 September 2024. At that stage I do not consider that B's circumstances in England and Wales had acquired the necessary stability and degree of integration to amount to habitual residence. Although Ms Green refers to events which, she says, have caused B to become integrated into his English environment, such as his enrolment into a pre-school and being registered with a GP, these all took place some time later. As of late September B had been in England for a matter of a few weeks on what had been intended to a relatively short and temporary holiday. By contrast B had lived all of his life in New Zealand prior to 2 September and that country was plainly his home. In this context I note the comments of Moylan LJ at [62] in *Re F* where he stated that the depth and strength of that child's connection with Columbia would have required strong countervailing factors to justify the conclusion that she had become habitually resident in England in a short period of time. Similar considerations apply here and in the absence of any strong countervailing factors, I consider that B remained habitually resident in New Zealand as at the date of wrongful retention.

37. I should add, that if I am wrong about the precise date of wrongful retention and it did not

occur until later in October 2024, I consider that the same analysis would apply and B would have remained habitually resident in New Zealand as at that date.

Acquiescence

38. Counsel are agreed that the relevant law on acquiescence can be found in the speech of Lord Browne-Wilkinson in the case of *Re H (Minors)(Abduction: Acquiescence)* [1998] AC 72 at 90.

> "(1) For the purposes of article 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill L.J. said in *In re S. (Minors) (Abduction: Acquiescence)* [1994] 1 F.L.R. 819 , 838:
>
> > "the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact."
>
> (2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.
>
> (3) The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law.
>
> (4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."

39. Ms Green also identified the proposition (which Ms More O'Ferrall accepted) that once given, acquiescence cannot be withdrawn; *Re S (Abduction: Acquiescence)* [1998] 2 FLR

115 at 122 (CA). Both counsel took me to the decision of Mostyn J in *JM v MR (Abduction: Retention: Acquiescence)* [2021] EWHC 315. At [45] to [50] the judge stated:

> "[45] Therefore "consented" means, for the purposes of the Convention, active, advance, communicated permission granted by the left-behind parent for the period of care with the other parent. In contrast, according to the OED "to acquiesce" means "to agree, esp. tacitly; to accept something, typically with some reluctance; to agree to do what someone else wants; to comply with, concede". The word carries with it a much greater sense of passivity; of acceptance of a state of affairs by doing nothing; of tacit compliance. In ordinary language it obviously covers active consent ex post; but it also covers passive acceptance by just "going along with" the proposal. This dual meaning is to be found in the leading authority on the defence of acquiescence namely the decision of the House of Lords in *In re H (Minors) (Abduction: Acquiescence)*[1998] AC 72. In his speech Lord Browne-Wilkinson stated at p.87:
>
> > "What then does article 13 mean by "acquiescence?" In my view, article 13 is looking to the subjective state of mind of the wronged parent. Has he in fact consented to the continued presence of the children in the jurisdiction to which they have been abducted?" (my emphasis)
>
> Here Lord Browne-Wilkinson is clearly using acquiescence in its first sense. However, at p.89 he says:
>
> > "In my judgment, therefore, in the ordinary case the court has to determine whether in all the circumstances of the case the wronged parent has, in fact, gone along with the wrongful abduction." (my emphasis)
>
> Here he is using acquiescence in its second sense.
>
> [46] In my judgment, to succeed in a defence of acquiescence, it is not necessary to show more than the second sense of its meaning, namely that the

left-behind parent has passively gone along with the removal or retention. This is not to reintroduce the distinction between active and passive acquiescence disapproved in *In re H*. That distinction had given rise to different legal treatments of the left-behind parent's subjective intentions. That distinction was overturned. Whether the conduct of the left-behind parent was active or passive, his intentions had to be established as a matter of fact.

[47] Lord Browne-Wilkinson identified two separate factual scenarios where the defence might be established. The first, which Lord Browne-Wilkinson described as "the ordinary case", is where the left-behind parent has subjectively consented to, or has gone along with, the continued presence of the children in the place to which they had been taken. Lord Browne-Wilkinson explained that this state of subjective intention is a pure question of fact. In determining that question the court will pay more attention to outward conduct than to self-serving evidence of undisclosed intentions. As part of the normal process of fact-finding the court may infer the actual subjective intention from the outward and visible acts of the left-behind parent, but will not impute to the left-behind parent an intention which he did not in fact possess. Judges should be slow to infer an intention to acquiesce from attempts by the left-behind parent to effect a reconciliation or to reach an agreed voluntary return of the abducted child. Nonetheless, it is for the judge, in all the circumstances of the case, to attach such weight as he thinks fit to such factors in reaching his finding as to the state of mind of the left-behind parent

[48] The second factual scenario capable of demonstrating the defence of acquiescence was described by Lord Browne-Wilkinson as exceptional. It is where the left-behind parent did not in fact internally acquiesce but where his outward behaviour demonstrated the contrary. If that outward behaviour showed clearly and unequivocally that the left-behind parent was not insisting on the summary return of the child then:

> "…he cannot be heard to go back on what he has done and seek to persuade the judge that, all along, he has secretly intended to claim the summary return of the children." (p.88)
>
> [49]The sort of conduct that might engage this defence would have to be very explicit, for example by signing a formal agreement allowing the child to stay where she is, or by participating in proceedings about the child in the other place (p.89). Passing remarks or letters written by a parent who has recently suffered the trauma of removal of his children, or requests for contact will not normally amount to the requisite clear and unequivocal conduct (p.90).
>
> [50] It seems to me that the happening of the second factual scenario will be vanishingly infrequent. It will surely be a very rare case where a left-behind parent will outwardly consent to, or go along with, the retention, but will nonetheless inwardly be objecting to it."

40. I have considered carefully the evidence, both written and oral of both of the parents, the surviving messages between them and the transcripts of the telephone conversations. Taking all of this material into account, I am satisfied that the father had indeed acquiesced in the mother's retention of B in England. Although it is not possible to point to one message as setting out a specific agreement between the parties, when taken as a whole, I consider that the tenor of the parties' messages is sufficient for me to be satisfied to the civil standard of proof that the father had acquiesced to B remaining here.

41. As the passages from the judgments that I have set out above demonstrate, it is sufficient for the parent seeking to rely on this defence to prove that the other parent has "gone along with" the retention; a phrase that I consider appropriately encapsulates the situation that pertained in this case.

42. As I have indicated in my summary of the messages that I have set out above, it is clear

that from the outset, the father had availed himself of the resources found on the New Zealand Ministry of Justice website and was aware that he had open to him legal remedies to obtain a return of B to that jurisdiction. I accept that the father would not have had a complete understanding of the Convention or its details. However, he was aware that he had legal options available to him, he informed the mother of this and then chose not to pursue them for a significant period of time.

43. It is clear from the discussions that took place between the parties that both parents' views on what the father should himself do changed from time to time. At various points there were discussions of the father coming to the UK on a spousal visa; on his coming on a family visa as a parent of a British child; on him remaining in New Zealand either for a further year or permanently. The parties were equally uncertain as to the future of their relationship; the mother making clear that she wanted time to explore her options; the father at time saying that he considered himself separated or stating that he would not see the mother and B again.

44. However, although there is an obvious lack of certainty as to whether the parents would have a future relationship, and whether or not the father had the objective of setting himself up in the UK, it is striking that the discussions during this period do not cover any debate as to where B should live. In my judgment, between 28 September 2024 and 3 March 2025, there is a clear assumption within the messages that whatever the father did, the mother and B would be remaining in England.

45. In my view this assumption clearly underlay the actions of both parents between those dates. The mother told that father that she was resigning her job in New Zealand and seeking a new one in England. His reaction was to wish her luck with the interviews. He made no objection to the mother taking steps to find a house or to enrol B in pre-school. Meanwhile, he was taking steps to draw together the threads of their previous life in New Zealand, renting out their former home, finding a new job for himself elsewhere in the country and discussing with the mother the sale of their possessions there such as her

desk and B's car seat.

46. I consider that the father's behaviour during this period, when taken as a whole, demonstrates that he had acquiesced in B's retention in England and that he had formed an intention not to seek a return under the Convention. In supporting the mother in her search to find a job, not challenging the steps that she was taking to integrate herself and B into life in the UK and in disposing of items of property which would be required if B and the mother returned to New Zealand I find that he had formed the subjective intention not to challenge B's retention here. That subjective intention is consistent with the mother's evidence that in late September / early October they agreed that she and B would remain in the UK. Even if I am wrong in this conclusion, I am also satisfied that the father's actions and words led the mother to believe that he was not going to assert his right to the summary return of B.

47. For the father, Miss More O'Ferrall argued that the father expected that if there was to be a permanent move to the UK, the family as a whole would move together. She therefore argued that any agreement that was reached between the parents in respect of B's stay in England was always conditional or contingent on a resolution being found as to the father's own position, and that this was never resolved with the position in relation to the father changing day by day. She also argued that the messages needed to be viewed in the context of the father suffering severe emotion, stress and grief following B's retention in England.

48. I have taken these arguments fully into account, but do not accept them. I have no doubt that the proposals as to what the father would himself do evolved over the period of the messages and that some of his earlier suggestions that he would not see the mother and child again were said in the heat of the moment, and did not represent his true wishes. That said, and notwithstanding the fluid nature of the father's own plans, there was a five month period during which he took no steps to assert his right (of which he was aware) to bring legal proceedings to obtain B's return, and during which he instead either stood by

or actively encouraged the mother to take steps to integrate herself and B into a new life in England. At no stage during this period did the father say in any of the messages that B's stay in England was conditional upon him moving to the UK; I do not see how it could have been given the father's uncertainty in his own mind about his future plans. Moreover, the period between October 2024 and March 2025 was clearly long enough for any initial emotion arising from the mother's actions to dissipate; that it did so can be seen by contrasting the highly emotional messages sent between 26 and 28 September with the later messages in November 2024 about the mother's job hunting.

49. I have also carefully considered Lord Brown-Wilkinson's injunction in *Re H* that judges should be slow to infer an intention to acquiesce from attempts by the left-behind parent to effect a reconciliation or to reach an agreed voluntary return of the abducted child. However, here I consider that the father's actions and inactions went beyond such steps. He was going along with the mother breaking her ties with New Zealand and setting up a new life for herself and B in England. When viewed as a whole I consider that the father's words and actions amount to an acquiescence in the retention of B for the purposes of Article 13(a).

50. I therefore find that the mother's defence under this ground is made out.

Art 13(b) - Grave risk of harm or intolerability

51. In relation to the Article 13(b) defence, there was again broad agreement at the Bar on the law and I do not understand there to be any issue between them as to the approach that I must adopt. Although Ms Green took me to passages from the decision of the Supreme Court in *Re E (Children)(Abduction: Custody Appeal*) [2012] 1 AC 144 and the Court of Appeal in *Re A (Children)(Abduction: Article 13(b))*[2021] EWCA Civ 939, for the purposes of this judgment I propose to adopt the helpful summary of the effect of those cases set out by MacDonald J in *E v D* [2022] EWHC 1216 (Fam) at [29] to [33].

> "[29.] The law in respect of the defence of harm or intolerability under Art 13(b) was examined and clarified by the Supreme Court in *Re E (Children)(Abduction:*

Custody Appeal) [2012] 1 AC 144 The applicable principles may be summarised as follows:

i) There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.

ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.

iii) The risk to the child must be 'grave'. It is not enough for the risk to be 'real'. It must have reached such a level of seriousness that it can be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two.

iv) The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'. 'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'.

v) Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child's immediate future because the need for protection may persist.

vi) Where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the

child's situation would become intolerable, in principle, such anxieties can found the defence under Art 13(b).

[30.] In *Re E*, the Supreme Court made clear that in examining whether the exception in Art 13(b) has been made out, the court is required to evaluate the evidence against the civil standard of proof, namely the ordinary balance of probabilities whilst being mindful of the limitations involved in the summary nature of the Convention process. Within the context of this tension between the need to evaluate the evidence against the civil standard of proof and the summary nature of the proceedings, the Supreme Court further made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as grounding the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm can be identified.

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

[32.] In determining whether protective measures, including those available in the requesting State beyond the protective measures proposed by one or both parties, can meet the level of risk reasonably assumed to exist on the evidence, the following principles can be drawn from the recent Court of Appeal decisions concerning protective measures in *Re P (A Child) (Abduction: Consideration of*

Evidence) [2018] 4 WLR 16 , *Re C (Children) (Abduction: Article 13(b))* [2019] 1 FLR 1045 and *Re S (A Child) (Hague Convention 1980: Return to Third State)* [2019] 2 FLR 194 :

i) The court must examine in concrete terms the situation that would face a child on a return being ordered. If the court considers that it has insufficient information to answer these questions, it should adjourn the hearing to enable more detailed evidence to be obtained.

ii) In deciding what weight can be placed on undertakings as a protective measure, the court has to take into account the extent to which they are likely to be effective both in terms of compliance and in terms of the consequences, including remedies, in the absence of compliance.

iii) The issue is the effectiveness of the undertaking in question as a protective measure, which issue is not confined solely to the enforceability of the undertaking.

iv) There is a need for caution when relying on undertakings as a protective measure and there should not be a too ready acceptance of undertakings which are not enforceable in the courts of the requesting State.

v) There is a distinction to be drawn between the practical arrangements for the child's return and measures designed or relied on to protect the children from an Art 13(b) risk. The efficacy of the latter will need to be addressed with care.

vi) The more weight placed by the court on the protective nature of the measures in question when determining the application, the greater the scrutiny required in respect of their efficacy.

[33.] With respect to undertakings, what is therefore required is not simply an indication of what undertakings are offered by the left behind parent as protective measures, but sufficient evidence as to extent to which those undertakings will be effective in providing the protection they are offered up to provide."

52. In support of this ground Ms Green relies on two broad matters. First, she points to allegations within the mother's witness statement of physical and emotional abuse that

she says has been perpetrated by the father. The mother alleges an assault early on their relationship in 2014, and further assaults from 2017 onwards. She alleges that she sustained a head injury in 2020 and that in 2024 there were two further assaults, one of which was witnessed by B. The mother also points to a protection order made against the father as a result of a complaint by a previous girlfriend who is the mother of the father's elder child.

53. The father vehemently denies the mother's allegations. He has exhibited a Police report of an incident in 2015 in which it is recorded that the mother has "made no allegation of any assault or intimidating behaviour". He accepts that the mother sustained a sprained ankle in 2017, but argues that this was an accident, as was her 2020 head injury. The protection order in respect of the former partner was made in 2008 and discharged by consent in 2010 and did not involve any violence, threats or harassment of the former partner.

54. It is not my role within these summary proceedings to conduct a fact finding investigation as to the truth of these allegations, and I am in no position to do so. Taking the risk posed by mother's allegations of domestic violence at their highest, I can see that a grave risk of harm could arise, particularly given that once of the incidents is said to have taken place in B's presence. However, I am satisfied that in this case these risks would be ameliorated by the protective measures offered by the father. He does not propose that he and the mother should resume cohabitation; instead he has identified a separate property for the mother and B to live in which he has paid a deposit and some initial rent. He is also willing (on a no admissions basis) to offer undertakings not to remove B from her care or to intimidate, threaten, harass or pester her. Moreover, I am also entitled to assume that the New Zealand courts and authorities are able to assist in protecting the mother and B from any risk of domestic violence. Taking all of these matters into account I am not satisfied that the mother's allegations of domestic abuse are sufficient to enable her to rely on the Article 13(b) defence.

55. Ms Green also has a second string to her bow. She argues that the circumstances that the mother and B would face on a return to New Zealand would be intolerable in the sense explained by the Supreme Court in *Re E*. She argues that the rental property that has been procured by the father is in the South Island, near to where he is currently living, in an unfamiliar part of New Zealand. That the father is not offering to pay the rent on this property, and that the mother and B when they arrive will have no income, no job and be placed in an intolerable situation, effectively controlled by the father, and that B would be being returned to a country of which he has no memory. Ms Green asserts that the mother would not be entitled to any state benefits in New Zealand and points to the fact that the father has not offered to pay for the mother's air fare (he will meet only B's) and that the mother has only £2,500 in savings.

56. For the father, it is said that the mother and B will be returning to a country with which they are wholly familiar (and where B spent the first two years of his life); that the mother has New Zealand residency and would be entitled to work. Following an intervention by me Ms More O'Ferrall also indicated that the father would be prepared to meet the rent on the mother's property for a longer period.

57. As to the mother's entitlement to state benefits in New Zealand, this is not an issue upon which I have received any formal evidence (one way or the other). After the close of submissions, and during the preparation of this judgment I received an email from Ms More O'Ferrall with some AI generated information obtained by the father's New Zealand solicitors on the benefit position. This indicates that New Zealand has a good "safety net" welfare system. However, the mother's entitlement to benefits may be contingent on her having retained her residency. Given the late and unsatisfactory nature of this evidence I do not give it any weight.

58. Whilst I accept that the circumstances of a return would be far from comfortable for the mother and B, subject to the point that I raise below, I consider that they fall significantly short of raising a defence under Article 13(b). Both the mother and B are familiar with New Zealand and the mother is entitled to work there. Whilst the benefit position is not

clear, I am satisfied that the mother should able to earn sufficient income to meet her and B's living expenses (other than rent) whilst there and I note that the protective measures sought by the mother in her witness statement do not extend to asking for the father to supplement her and B's living expenses (other than rent). From B's perspective he will be living with his primary carer in the same country that he spent the first two thirds of his life in. Subject to (a) the father agreeing to meet the mother's air fare (so that the mother can retain her limited savings) and (b) me being satisfied that they will have a property available to them for a reasonable period of time upon their return in order for proceedings about B to be brought before the courts of New Zealand, I do not consider that the Article 13(b) defence arises.

59. As to the provision of a property, Ms More O'Ferrall indicated that the father would be willing to pay rent for a longer period than initially offered. It seems to me that a reasonable period in these circumstances would be four months from the date of the mother and B's return, on the basis that the matter would then be before the New Zealand court and the mother would have had sufficient time to explore the benefits position and / or obtain work.

60. Were the father to agree to provide the further protective measures indicated above, I do not consider that the mother's arguments, either individually or cumulatively would be sufficient to raise a defence under Article 13(b) of the Convention.

Discretion

61. Given that I am satisfied that the mother has made out her defence under Art 13(a) I must consider whether to exercise my discretion to nevertheless return B to New Zealand. Guidance on the exercise of this discretion was provided by Baroness Hale in *Re M* [2007] UKHL 55; [2008] 1 AC 1288 at [40]:

> "[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 *In re J (A Child) (Custody Rights: Jurisdiction)* [2006] 1 AC 80 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.

…

"[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."

62. Although predating *Re M*, Ms Green also took me to the guidance formulated by the Court of Appeal in *Re W (Abduction: Acquiescence)* [1993] 2 FLR 211 (referred to by the Court of Appeal in *Re S (Abduction: Acquiescence)* [1998] 2 FLR 115) as to the factors to be considered in the context of the acquiescence defence which include (but are not limited to):

(1) The welfare of the child, which is to be treated as important but not necessarily paramount;

(2) The purpose and philosophy of the Convention through the return of the child on the one hand;

(3) Countervailing factors pointing on the other hand to the child being kept in England, examples of which were:

(a) choice of forum;

(b) possible outcome of any family proceedings initiated in whatever forum is chosen;

(c) the consequences of the acquiescence that has occurred;

(d) the situation in the left behind country that would await the mother and child if a return order were to be made;

(e) the anticipated emotional effect on the child of a peremptory return order;

(f) the extent to which the purpose and philosophy of the Convention would

be at risk of frustration if a return order were to be refused in the particular circumstances of this present case.

63. The purpose of the Convention is clear. It is to secure the prompt return of abducted children and to deter abduction in the first place. A return under the Convention also means that substantive issues about the welfare of the child can be considered by the "home" court, which may be best placed to do this.

64. I am not satisfied that the mother had definitely planned to retain B here when she travelled to England in September 2024; had she done I consider it likely that she would have taken additional steps (for example taking a record of her UK National Insurance number with her). Nonetheless I consider that the possibility of remaining here was within her mind. In any event, as I have found, within a short period of time she unilaterally decided that any return was to be on her own terms and not in accordance with the agreement previously reached with the father. The purpose of the Convention therefore points towards me ordering a return notwithstanding what I have concluded about acquiescence.

65. That said, this is a case where there has been significant delay. For the first five months following the wrongful retention, the father took no steps to assert his Convention rights to seek a return, and instead either stood by or actively offered encouragement as the mother took steps to build a life for herself and B in England. I have in mind, in particular, the fact that the father said nothing in response to the mother's communication that she was resigning her job in New Zealand and instead offered encouragement in her applications for a new job in the UK. He also took no steps to object to B starting pre-school.

66. I am extremely conscious that B is only three years old and that he has now spent a significant and crucial part of his life in the UK. I have no doubt that that he has put down strong roots during the eleven months that he has now been in this country, near to

his maternal family. In this context, given B's age, the delay by the father in bringing proceedings under the Convention does, in my view, significantly diminish the weight that I would otherwise be justified in giving to the purposes of the Convention.

67. When looked at from a welfare perspective, the factors do not all point in one direction. If I permit B to remain in the UK this will have an obvious impact on his relationship with his father. I recognise that the father will face significant challenges in visiting the UK to spend time with B. Ms More O'Ferrall suggested that this would effectively be an impossibility. I do not accept this; the father is in employment and I do not consider that travel to the UK for visits would be impossible. However, I recognise that this presents real difficulties for him.

68. The father has also expressed concern that the mother has being denying him contact with B. The reasons for the difficulties that have been experienced are disputed, and I do not accept that the mother is deliberately trying to prevent the father from maintaining contact with B. Both parents should be left in no doubt that if I permit B to remain in this jurisdiction, it is essential for B's welfare that they both abide by the contact arrangements that are agreed (or in default of agreement are ordered by the court) and I will expect them both to do so.

69. I recognise also that the father will face difficulties in participating in any future court proceedings in England, although these should not be overstated as he has participated effectively in the proceedings before me.

70. On the other hand, I must also recognise that if I order a return the mother and B will not be returning to their previous home. This has been let out and is, I understand, likely to be repossessed by the mortgagee in the near future. They will be living in a different city; in a different part of New Zealand to their former home. The mother would need to support herself by working whilst also caring for B and would do so without the support of the maternal family that she currently enjoys in England. B would be removed from

his current environment and the stability of his current life.

71. I consider that this is a difficult case and the competing arguments for and against a return are finely balanced. Having taken all matters into account, I have decided that the appropriate course is for me to refuse to order a return in this case. B has now lived nearly one third of his life in England and has achieved (in part through the acquiescence of the father) a measure of stability at an important and formative time for him. On balance, and notwithstanding the purposes of the Convention and the other factors that point towards a return I have concluded that B's welfare is best served by maintaining that stability, rather than ordering a return with the inevitable uncertainty over his future that such a step would bring.

72. I therefore dismiss this application.

73. That is my judgment.

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