Neutral Citation Number: [2020] EWHC 1599 (Fam)

Case No: FD20P00010

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

Royal Courts of Justice
Strand, London, WC2A 2LL

B e f o r e :

MR ROBERT PEEL QC

Sitting as a Deputy High Court Judge

Between:

AX	**Applicant**
- and -	
CY	**Respondent**

Anita Guha (instructed by Sills Betteridge Solicitors) for the Applicant
Hilary Pollock (instructed by Duncan Lewis Solicitors) for the Respondent

Hearing dates: 9 and 10 June 2020

The hearing was conducted remotely by Zoom

HTML VERSION OF JUDGMENT APPROVED

Introduction

1. Before me is an application under the Child Abduction and Custody Act 1985 and the Hague Convention 1980 for the return of the parties' daughter, X, who will be 8 on 14 June 2020, to Spain.

2. Article 3 of the Convention prescribes that the removal 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, 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."

It is common ground that the removal of X from Spain to this country on or about 19 September 2018 was unlawful in that (i) the removal was in breach of the rights of custody of the Father ("F") which he was exercising at the time, and (ii) the removal was from the child's country of habitual residence.

3. The Mother ("M") raises 4 defences:
   (i) Settlement under Article 12;
   (ii) Grave risk of harm under Article 13(b);
   (iii) The child's objections to return under Article 13;
   (iv) Breach of human rights of the child under Article 20.

The burden lies squarely on M to establish the pleaded defences. By the end of the hearing the third defence (objections) was no longer pursued

The evidence and submissions

4. The case was conducted remotely and I heard evidence only from the Family Court Adviser, Ms Jolly. The constructive engagement of the parties, their solicitors and counsel ensured that it proceeded efficiently and with no material hitches. The need for interpreters, as in this case, can throw up challenges to a video link hearing, but cooperation between the court and the parties ensured that appropriate arrangements were made.

5. I have had the benefit of reading the bundle in its entirety, and received written and oral submissions from counsel.

Background and facts

6. M is Colombian by birth and now holds Spanish citizenship. F is Bolivian by birth; he does not hold Spanish citizenship. Their respective ages are 26 and 28. They each moved from their respective countries of origin to Spain during childhood.

7. They met in 2010 and had a relationship until 2015, although they did not always cohabit in that time. X was born in 2012 and, until her removal to this country, had always lived in Spain. Like her mother, she is a Spanish citizen. After separation, X lived with M but had frequent (if irregular) contact, including staying contact, with F. On the evidence before me, there is no real sense of insurmountable parental conflict after separation and, to their credit, the parties reached an agreement, with the assistance of lawyers, which was incorporated into a written document on 20 March 2018. Although M informed the Family Court Adviser that she had entered into the agreement "reluctantly", that did not appear in her written evidence, she had legal advice and the plain fact is that it was entered into. By the accord, X was to live with M and spend time with F on alternate weekends, one day during the week, part of the holidays and important festivals. They applied to the court for an order in the agreed terms.

8. There was no indication (at least to F) of any abiding issue with the agreement. So it came as a considerable surprise to him, and no doubt great dismay as well, to attend for contact in late September 2018 only to find that neither M nor X were either living at home in Barcelona or, in X's case, attending her school. There was no warning of any of this. The letting agent for M's property told him that M had gone abroad. The parties, for the purpose of this hearing, agree that F became aware on or about 28 September 2018 that M had left the jurisdiction, although at that stage he did not know to where.

9. M initially made no contact with F. On 3 October 2018, the parties' March 2018 agreement was made into a formal court order; it appears to have been a rubber stamp exercise, the process having been initiated well before M's departure from Spain. On 6 October 2018, relying in part on the order just made, F made a complaint to the Spanish police. On 21 October 2018 he applied to the Spanish court for enforcement of the order of 3 October, an application which has been stayed. He was not at this time told by his lawyers about the availability of the Hague Convention procedure and I am prepared to accept his evidence on this; it would be surprising if he knew of the Convention but chose not to pursue it, yet at the same time was pursuing other remedies.

10. In December 2018, M made contact with F for the first time and sent photos of X in London. It appears that was the first time F became aware that M and X were probably living in the UK. Thereafter, some intermittent contact between F and X by telephone and social media took place. It is no great surprise that each accuses the other of behaving inappropriately during these interactions; the abduction of a child regularly leads to the heights of tension. Despite F's assumptions about the whereabouts of X, M did not herself confirm the position and no address was given. F was able to produce in this hearing transcripts of telephone recordings in which M told him that there was nothing he could do and he would not find her. M complains that the full context of these recordings (obtained without her knowledge) was not available to me but the clear impression is that M concealed her tracks to avoid being traced by F. Thus (at **C156)** M said to F "*Do you think you're going to win by*

searching the whole world or what". And at **C159:** *and when you come to look for your daughter, wherever you think she is, look, come with a lot of money in your pocket…..you won't have anywhere to look to find me….Nobody knows where I live….So save money if you want to look for your daughter, to find out where we live".* I appreciate that when tempers fray, intemperate words are said, but the important point is that M was plainly unwilling for F to know about X's whereabouts.

11. At some point F changed his lawyers to access expertise on child abduction. He was advised to apply through the Central Authority. He explains in his written evidence that it took "*many months"* for the case to be allocated to his current lawyer. In July 2019 (10 months after the removal) F applied to the Spanish Central Authority. Apparently due to administrative and translation delay, his application was not formally initiated by the Central Authority until 3 September 2019 (just under 1 year since the removal), nor was it sent to the corresponding authority in this jurisdiction until 25 November 2019 (just over 1 year after the wrongful removal).

12. Form C67 was issued on 8 January 2020. M's whereabouts in the United Kingdom were unknown. 3 hearings were held in her absence at which disclosure orders were made. She was eventually located and served on 9 March 2020. At a hearing on 16 March 2020, an order was made for indirect contact twice a week by video link. On 22 May 2020 a case management hearing confirmed that the matter would proceed remotely at final hearing.

Article 12: Settlement

13. Under Article 12:

> "The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child unless it is demonstrated that the child is now settled in its new environment".

14. The parties agree that the reference to "proceedings" means the issue of Form C67 in this country on 8 January 2020 rather than when the application was lodged with the Spanish Central Authority on 3 September 2019. That seems to me to be a plain reading of the Article itself and is consistent with the dicta of Wilson LJ at para 54 of **Re O (Abduction: Settlement) [2011] 2 FLR 1307.**

15. It follows that the defence is available to M if she can satisfy the court that X was settled in her new environment as at the date of the application, a period of about 16 months after removal. Should the defence be established, and discretion come into play, the period after the application date then forms part of the picture for consideration.

16. In **Cannon v. Cannon [2004] EWCA Civ. 1330, [2005] 1 FLR 169**. Thorpe LJ said as follows:

52. In his skeleton argument for the hearing below Mr Nicholls offered this conclusion: -

> "Each case should be considered on its own facts, but it will be very difficult indeed for a parent who has hidden a child away to demonstrate that it is settled in its new environment and thus overcome the real obligation to order a return."

53. I would support that conclusion. A broad and purposive construction of what amounts to "settled in its new environment" will properly reflect the facts of each case, including the very important factor of concealment or subterfuge that has caused or contributed to the asserted delay.

61. I would unhesitatingly uphold the well-recognised construction of the concept of settlement in Article 12(2): it is not enough to regard only the physical characteristics of settlement. Equal regard must be paid to the emotional and psychological elements. In cases of concealment and subterfuge the burden of demonstrating the necessary elements of emotional and psychological settlement is much increased

17. The reasons for the delay in bringing the application are relevant. Per Sir Mark Potter P in **Re C (Child Abduction; Settlement) [2006] 2 FLR 797** at para 47:

> "In determining the issue of settlement, as well as the exercise of the court's discretion if settlement is established, the reason for the delay in bringing the proceedings and the parties' conduct, particularly where the abducting parent has concealed the whereabouts of the child, are relevant: see Re H (Abduction: Child of Sixteen) [2000] 2FLR 51 and Cannon v Cannon supra"

18. Finally, I note the comments of Black J (as she then was), who in **F v M and N (Acquiescence: Settlement) [2009] 2 FLR 1270** warned against taking an unduly technical approach. That, in my view, is particularly apposite where these cases are dealt with largely on paper without the full range of oral evidence commonplace in other family proceedings.

19. Each case is fact specific and I must look at the evidence holistically. In my judgment, it is relevant to consider the context of X's life before departure in order to assess the trajectory of her life after departure. It would be curious simply to look at events post September 2018 without viewing them against the setting of her life in Spain beforehand.

20. The context prior to departure in September 2018 is, to my mind, striking. X was at the time 6 years old. She had lived all her life in Spain and was in full time education. She was and still is a Spanish citizen. Her first language is Spanish. Her extended families on both sides live principally in Spain. It is logical, in my view, that to become settled in a new country may be more difficult for a 6-year old than it would be for, say, an 18-month-old at the time of removal, as was the case in **RS v KS [2009] EWHC 14.** Further, after her parents separated in 2015 X's life appears to have followed a reasonably stable pattern whereby she lived with M and spent significant amounts of agreed time with F. It is interesting to note that when speaking to the Family Court Adviser she did not recall her parents being angry with each other which, if correct, suggests that her own family emotions were reasonably warm and secure. At the time of her departure there was in place a carefully put together written agreement governing welfare matters, principal among which was the division of time between the parents, an agreement which the parties knew would

be made into a court order shortly thereafter. Thus, she was, so far as I can tell, physically, psychologically and emotionally reasonably settled between 2015 and 2018, with the imprimatur of a written accord between her parents. In some ways, this was a model of how parents should approach their child's welfare after separation; clear decisions arrived at by consensus and motivated by the child's interests.

21. The parties acted upon the agreement until M's clandestine departure with X in September 2018. There is no evidence of M preparing X for this major, disruptive move, including the inevitable break in her relationship with F. Nor did she give any hint of it to F beforehand. There was no precipitating event, such as an incident of domestic violence. She did not tell him where she was going. He simply turned up to collect X for contact only to find her not at home. Thereafter M made no meaningful attempt to tell F where she and X were, leaving it to him to attempt to discover which country they were in via Facebook. At no time did M inform F of X's address or school. She sought to ensure that F could not track them down. Nor did she take any active steps to promote direct contact. There is no legitimate justification for M keeping F in the dark about his daughter's whereabouts for so long.

22. It is said on behalf of M that F took little action to establish his Convention rights. I do not accept this analysis. He swiftly made a complaint to the police and additionally sought to enforce the October 2018 order. He was hampered by not knowing exactly where X was. He initially instructed solicitors with no expertise in child abduction. By July 2019 he had applied to the Spanish Central Authority (2 months or so before the expiry of the 12-month period) and it was for internal administrative reasons, rather than his own shortcomings, that it took until 8 January 2020 for the application to be issued in this jurisdiction.

23. It seems to me that the balance of culpability lies much more heavily on M's side and this clearly informs the analysis of the settlement defence.

24. Thus, X moved from a settled, stable environment in Spain to a new country, without direct contact between herself and her father, speaking little English, uprooted from her Spanish school. She was at some point introduced to M's new partner who in a real sense supplanted F who has had no meaningful role in M's life since then. The question I must consider is how this impacts on the nature of the settlement which M relies upon. Logically, in my judgment, the greater the upheaval, the more difficult it will be for a child of that age to "settle" into a new environment.

25. I readily accept that X's main bond is with her mother. To the extent that M is happy and fulfilled with a new partner, has a job as a cleaner and is accommodated securely, that will no doubt ease X in her adaptation to a new life. In a very real sense, X's "settlement" is with her primary carer, wherever she and they may be. That is different from an analysis of whether she has settled into a new environment; part of the picture, but not the whole picture.

26. Looking at the evidence in the round I am struck by a number of relevant matters which to my mind demonstrate instability and uncertainty in X's life since September 2018:

(i) She and M lived with a friend of M's in Borehamwood for 6 months until March 2019 before a falling out, then shared a single rented room in Walthamstow until January 2020 before moving into a single bedroom shared with M's partner in a house occupied also by 5 or 6 additional members of her partner's extended family. M's case is that the accommodation is not ideal for them, and their intention is to move again shortly. In respect of the first two properties there is a lack of clarity about the nature and type of accommodation and precisely who else was living there.

(ii) X attended a primary school in Borehamwood until March 2019. Upon being removed, she was not then enrolled at another school until September 2019, despite a missing education referral by the local authority; during the intervening period she received some help and guidance from M's partner's sister who is a trainee teacher. She is now in a school in Enfield and is recorded by the school (upon inquiry by the Family Court Adviser) as having no issues; she appears to be reasonably happy and progressing well. I note, however, M's own case that X has no particular school friends, and X said much the same to the Family Court Adviser. Further, if M, X and her partner move home, as they intend, X may move school again (as adverted to at para 7 of the Cafcass report). I was told by M's counsel in closing submissions that she does not so intend although that did not appear in the written evidence.

(iii) There is no clear pattern of how child care has been arranged for X while M was working, particularly for the period when she was not attending school. In general, the picture of X's movements, members of households, school attendance and child care is imprecise and vague, lacking the substance which one would expect.

(iv) Taking the relevant date at 8 January 2020, at that point X had completed only one term at her new school (having not attended school between March and September 2019) and had only 6 days before moved into M's partner's accommodation where M and her partner cohabited for the first time. Although X knew both M's partner and other members of his family living there, she shared a room with M and her partner and must have found this disruptive and unsettling. In my judgment it was only when she started her current school (having not been in education for the previous 3 months) and moved with M to her current accommodation that X began to experience a degree of stability. These events can be measured in days (accommodation) or weeks (education), insufficient on the facts of this case to establish any permanence enabling me to conclude that she was "settled" in her new environment by 8 January 2020.

27. I am not convinced that the above demonstrates the necessary physical stability, integration and permanence to establish the defence of settlement. Nor, in my judgment, can it safely be said that the emotional and psychological elements are satisfied, particularly when contrasted with the situation in Spain before departure. She has experienced the dislocation of being separated from direct contact with her father (and, as a consequence, the loss of meaningful interaction with her paternal family), and has been moved around a number of different properties and schools. As mentioned above, she has not readily made friends, and it seems that her activities are as a result of M and her partner's networks rather than her own hobbies and interests.

Her primary need is the care of her mother, but she has additional emotional needs which do not seem to me to be currently fulfilled. I note, for example, that she initially answered "Yes" when asked whether she likes spending time with her father, then after a 1-hour video link hitch said "I don't really like to see him sometimes" which suggests a degree of uncertainty and insecurity in her present state of mind. As the Family Court Adviser put it, her views about her father were "ambivalent and conflicting". It is also, in my judgment, of some relevance that X is reported as sometimes being worried when in bed at night. I must be careful not to over emphasise the significance of this, but it does raise questions about how securely X is anchored into her current life. I take the view that the impact on X of not having re-established proper relations with F and his family, which had been in place before removal, militates against the emotional and psychological stability envisaged within the meaning of "settlement". It is not in every case that absence of contact will have a material impact on the constituent elements of settlement, but this, in my judgment, is such a case.

28. The Family Court Adviser, in her conclusion, told me that on balance she concludes that X is "settled" and has a sense of home and community. She points to X's close relationship with M, her current school placement and an expressed wish to continue living in this country, although it is also recorded that X has "good" memories of Barcelona.

29. I am conscious that the Family Court Adviser has produced a thoughtful analysis, but her interviews with the parties and the child were conducted remotely and she reported that as a result her enquiries were hampered by the lack of direct contact and observation which are particularly useful, so she told me, in settlement cases. She thought that her report was probably about 60-70% of where she would have liked it to be if she had had the chance of observing X going to school and then settling back into home life at the end of the school day. Inevitably, she could only rely on what she was told. I thought she was very fair and sensitive in her approach, and in acknowledging the deficiencies imposed upon her by current circumstances. She also told me that she felt the case was very finely balanced. She found it difficult to get a proper pattern and to assess the whole picture. In the end she tilted only marginally in favour of a finding that X is settled. I also bear in mind that she had based her settlement conclusion principally up to June 2020 (the hearing date) whereas the legal test takes the operative date as at January 2020. Plainly, the longer the period in play, the more likely settlement will be established. She accepted that in the end it is a decision for the court, based on legal principles.

30. I have, notwithstanding the report of the Family Court Adviser, come to the clear conclusion that the settlement defence is not made out. I have considered this with great care, given that I am departing from her recommendation. But having (i) surveyed all the evidence, including the position of the child before removal, the clandestine nature of M's behaviour, the attempts of F to secure court orders and the overall physical, emotional and psychological factors, and (ii) analysed the evidence within the applicable legal principles, I am satisfied that the defence fails.

Article 13(b): grave risk of harm etc.

31. The principles in **Re E (Children) (Abduction: Custody Appeal) [2011] 2 FLR 758, SC** were helpfully distilled by Macdonald J at para 67 of **Uhd v McKay [2019] EWHC 1239**:

> "(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)."

32. In **Re D [2007] 1 FLR 961** at paragraph 54, Baroness Hale characterised "intolerability" thus:

> "'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'. It is, as Art 13(b) makes clear, the return to the requesting state, rather than the enforced removal from the requested state, which must have this effect. Thus, the English courts have sought to avoid placing the child in an intolerable situation by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting state to protect him once he is there."4

33. In considering the Article 13(b) defence, the court is duty bound to consider what protective measures can be put in place. Article 11(4) of Council Regulation 2201/2003 is as follows:

> "A court cannot refuse to return a child on the basis of Article 13(b) of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return".

34. Williams J summarised the use of protective measures thus in **A (A Child) (Hague Abduction: Art 13(b) Protective Measures [2019] EWHC 649**:

> "23. Article 11(4) of BIIA rules out a non-return where it is established that adequate protective measures are available. The Practice Guide makes clear that this is intended to address the situation where authorities have made or are prepared to make such arrangements. The Court of Appeal has recently confirmed that protective measures include all steps that can be taken, including housing, financial support, as well as more traditional measures such as non-molestation injunctions (see *Re C* [2018] EWCA Civ 2834).
>
> 24. Protective measures may include undertakings, and undertakings accepted by this court or orders made by this court pursuant to Article 11 of the 1996 Hague Child Protection Convention are automatically recognised by operation of Article 23 in another Convention state (see *Re Y (A Child) (Abduction: Undertakings Given for Return of Child*). To be enforceable they must be declared enforceable pursuant to Article 26. The 1996 Hague Convention Practical Operation handbook provides examples of measures which might be covered by Article 11. European Regulation 606/2013 on the Mutual Recognition of Protection Measures in Civil Matters sets up a mechanism allowing for direct recognition of protection orders issued as a civil law measure between member states, thus a civil law protection order such as a non-molestation order or undertaking issued in one member state, can be invoked directly in another member state without the need for a declaration of enforceability but simply by producing a copy of the protection measure, an Article 5 certificate and where necessary a transliteration or translation.
>
> 25.A protection measure within that is defined as any decision, whatever it is called, ordered by an issuing authority of the member state of origin. It includes an obligation imposed to protect another person from physical or psychological harm. Our domestic law provides this court can accept an undertaking where the court has the power to make a non-molestation order. Thus, it seems that a non-molestation undertaking given to this court could qualify as a protection measure within the European Regulation on protection measures."

35. M's case is that:
    (i) On 2 occasions in 2012, F assaulted her, once during her pregnancy and once shortly after the birth of X. Her application for a Protection Order was refused.
    (ii) On 2 occasions in September 2015 she was assaulted by F. Again, she applied through the relevant channels for redress and protection. On 30 November 2015, before the criminal court, F admitted the charges. He was sentenced to a period of community service, and a restraining order was made

preventing him from approaching M, her home address or workplace for 1 year.

(iii) F refuses to accept that he attacked M. He has in these proceedings denied the allegations. He maintains that he admitted the charges in 2015 in order to reduce the sentence which could have negatively impacted his application for a National Identity card. So, says M, his failure to acknowledge the fact of the offences, or their gravity, demonstrates an attitude and behavioural propensity which would place M at risk.

(iv) Between 2015 and 2018 there was no physical violence but, in the street and at contact handovers, F regularly threatened M.

(v) M says, in her first statement, that "*I fled Spain because following a history of domestic abuse…. It was my decision to also leave Spain for the safety of X who would be witnessing such abuse"*.

36. I have taken M's case on the allegations of abuse at its highest, not least because of the criminal convictions from 2015. But in my judgment M falls far short of establishing the defence for the following reasons:

(i) The 2012 assaults were followed by a 3-year reconciliation between the parties which suggests that, certainly at that stage, M was not in such fear for her safety that she could not now be in the same country as F.

(ii) The restraining order in 2015 expired in November 2016. M took no steps to apply to renew it or obtain an extension.

(iii) There is no suggestion that F in any way perpetrated violence on X.

(iv) From 2015 to 2018, a period of some 3 years after separation, M made no complaints to the police or other authorities. The allegations of threatening behaviour are unparticularised. There is no evidence that M's state of mind was jeopardised by F's actions, nor that X's welfare was compromised, nor that either M or X felt in fear. There is no psychiatric or medical evidence as to the impact on M, either from her time in Spain or commissioned within these proceedings. There is no cogent evidence of any material risk to M and/or X after separation. The evidence points the other way; X appears to have been settled, stable and happy in Spain with the comfort of a clear agreement between her parents about division of time.

(v) In the Family Court Adviser's inquiries, it does not appear that X is fearful of F. Nor is it suggested that X would be exposed to the risk of trauma (physical or mental) were she to return to Spain.

(vi) I consider it improbable that M left Spain because of alleged domestic abuse. On the evidence before me, there had been little in the previous 3 years to justify a clandestine departure with no warning to F. Her precise motives for leaving are not clear. It may be that she wanted to avoid the consequences of the order which was made shortly after she left. It may be that she was encouraged by a friend in the United Kingdom. It may be that she had some debt issues. But looked at objectively, in my judgment, there was no trigger event referable to F's behaviour.

(vii) Protective measures can be put in place to ensure the safety and wellbeing of X upon return to Spain. I am entitled to assume that the Spanish police, judicial and administrative authorities will act to ensure the continued wellbeing of X, if so required and M may wish to make appropriate applications in Spain. In any event, I expect F to provide the following:

(a) Any contact shall be supervised and/or indirect until the Spanish court considers the matter and reviews the order made in 2018;
(b) F shall give a non-molestation undertaking in appropriate terms;
(c) F shall undertake not to remove X from M's care and control;
(d) F shall withdraw his complaint to the police and not pursue any criminal proceedings against M arising out of the circumstances of X's departure;
(e) F shall pay child maintenance in accordance with the requirements in Spain;
(f) F shall pay for a return flight for X;
(g) F shall ensure that accommodation is made available for M for a period of 3 months.

This list may be amended/expanded after hearing submissions from counsel.

Article 13: child objections

37. The law is conveniently summarised by Macdonald J in **B v P [2017] EWHC 3577**, at paragraphs 60 -61:

> "60. The law on the 'child's objection' defence under Art 13 of the Convention is comprehensively set out in the judgment of Black LJ in *Re M (Republic of Ireland)(Child's Objections)(Joinder of Children as Parties to Appeal)* [2015] 2 FLR 1074 (and endorsed by the Court of Appeal in ***Re F (Child's Objections)* [2015] EWCA Civ 1022**) and I have regard to the clear guidance given in that case. In summary, the position is as follows:
>
> i) The gateway stage should be confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.
>
> ii) Whether a child objects is a question of fact. The child's views have to amount to an objection before Art 13 will be satisfied. An objection in this context is to be contrasted with a preference or wish.
>
> iii) The objections of the child are not determinative of the outcome but rather give rise to a discretion. Once that discretion arises, the discretion is at large. The child's views are one factor to take into account at the discretion stage.
>
> iv) There is a relatively low threshold requirement in relation to the objections defence, the obligation on the court is to 'take account' of the child's views, nothing more.
>
> v) At the discretion stage there is no exhaustive list of factors to be considered. The court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available. The court must give weight to Convention considerations and at all times bear in mind that the Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly".

38. The Family Court Adviser is of the view that X's maturity and cognitive development are commensurate with her chronological age. X told her that she *"loves England".* She added that "*I don't really like to be in Spain"*, although when pressed she was unable to say why. Her preference is to live in England rather than in Spain. I do not take that to be an objection to a return to Spain within the Convention meaning. Unsurprisingly the Family Court Adviser remarked that the context surrounding her views about a return to Spain was unclear to X. The legal test on settlement, the complexities of the nature of a return to Spain, the welfare exercise undertaken in either this jurisdiction or in Spain; all these are matters beyond a child not yet 8 years old (by contrast, the child in **SP v EB and KP [2014] EWHC 3964** on which M relies was 14 ½ years old and had well justified reasons for objecting to a return order). It is obvious from the Family Court Adviser's evidence that the real import of X's views is an entirely natural wish to be with her mother. It is not, in my judgment, specifically an objection to returning to Spain. In my judgment her this defence must also fail and in closing submissions it was sensibly abandoned by M's counsel.

Discretion

39. Given my findings on the defences of settlement and grave risk of harm raised above (child's objections not being pursued and Article 20 in my view not altering my approach), I do not strictly need to consider the exercise of my discretion. However, for completeness I have carefully surveyed the evidence and competing submissions and am satisfied that:
(i) Had the settlement defence been established I would in any event have exercised my discretion to order a return for the reasons below.
(ii) It is likely that had the grave risk of harm etc. defence been established I would not have ordered a return for the reasons referred to at para 45 of **Re M (infra)**.

40. My starting point in considering the exercise of discretion when the settlement defence is made out is the decision of **Re M (Abduction: Zimbabwe) [2007] UKHL 55** and in particular the following paragraphs:

> "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.
> 41. But there remains a distinction between the exercise of discretion under the Hague Convention and the exercise of discretion in wrongful removal or retention cases falling outside the Convention. In non-Convention cases the child's welfare may well be better served by a prompt return to the country from which she was wrongly removed; but that will be because of the particular circumstances of her case, understood in the light of the general understanding of the harm which wrongful removal can do, summed up in the well-known words of Buckley LJ in Re L (Minors) (Wardship: Jurisdiction) [1974] 1 WLR 250, at 264:
> "To take a child from his native land, to remove him to another country where, maybe, his native tongue is not spoken, to divorce him from the social customs and contacts to which he has been accustomed, to interrupt his education...are all acts...which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted."

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.
45. By way of illustration only, as this House pointed out in Re D (Abduction: Rights of Custody) [2006] UKHL 51; [2007] 1 AC 619, para 55, "it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate." It was not the policy of the Convention that children should be put at serious risk of harm or placed in intolerable situations. In consent or acquiescence cases, on the other hand, general considerations of comity and confidence, particular considerations relating to the speed of legal proceedings and approach to relocation in the home country, and individual considerations relating to the particular child might point to a speedy return so that her future can be decided in her home country.
46. In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances.
47. In settlement cases, it must be borne in mind that the major objective of the Convention cannot be achieved. These are no longer "hot pursuit" cases. By

> definition, for whatever reason, the pursuit did not begin until long after the trail had gone cold. The object of securing a swift return to the country of origin cannot be met. It cannot any longer be assumed that that country is the better forum for the resolution of the parental dispute. So the policy of the Convention would not necessarily point towards a return in such cases, quite apart from the comparative strength of the countervailing factors, which may well, as here, include the child's objections as well as her integration in her new community."

41. The court must take account of all the relevant circumstances. "Hague policy considerations are by no means irrelevant in exercising the discretion that arises in a settlement case but their relevance is strictly as a part of the whole picture*"*: **Re O (supra)** at para 24.

42. Both parents have lived in Spain since childhood. X was born and raised in Spain. They are all native Spanish speakers. M and X are Spanish citizens. Extended family on both sides are in Spain. Neither M nor X had any connection with this country before their departure in September 2018. There is no evidence that X would be at risk of harm on returning to Spain and she clearly has some happy memories of life in Barcelona. The Spanish courts are seised of issues regarding X's welfare; the order of 3 October 2018, based on the parental agreement, was in my view an important foundation stone for X's wellbeing. I note that in **Re O (supra)** when addressing the exercise of discretion in a settlement case at para 56 Wilson LJ said: "….in particular, that in November 2009 the father himself issued proceedings in Nigeria in relation to the girls, as a result of which lawyers were instructed on both sides and, with the parties and various other members of each of their families, they attended a substantial meeting with a view to consensual settlement. This optimum mechanism for family dispute resolution, with the facility for a fall-back into the courts of Nigeria, has been invoked already and readily can, and no doubt should, be invoked again*"*. So too, in my view, the parties' agreement in this case, and subsequent court order, weigh heavily.

43. In balancing the relevant factors, the conduct of M in effecting a clandestine removal of X (and thereafter concealing X's whereabouts from F) is disturbing, demonstrating as it does a disregard for the clear contact programme which was in place and the need for an ongoing meaningful relationship with F. She should not be permitted to deploy subterfuge to further her own ends, relying on a settlement defence which is generated in part by behaviour designed to thwart F. And although F might have pursued his legal remedies with greater urgency, in my judgment he did not sit on his hands and do nothing; he was hampered by a combination of inadequate advice, M's concealment of whereabouts from him and cumbersome procedure in Spain. I accept that the further away one gets from a speedy return envisaged by the Convention, the less weighty the Convention objectives are but in the individual circumstances of this case, the balancing exercise comes down clearly in favour of a return.

Article 20

44. This defence appeared for the first time in M's counsel's skeleton argument. It largely draws on the decision of **SP v EB and KP (supra)**.

45. The Article itself provides that "The return of the child under the provision of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested

State relating to the protection of human rights and fundamental freedoms". In **SP v EB and K (supra)** Mostyn J decided that to order a return contrary to the expressed wishes of a child of 14 ½, who had been joined to the proceedings, and who had been in this country for a substantial period of time, would infringe the child's human rights which prevail over those of the adult members of her family. That said, Mostyn J was clear that Article 20 cannot be established routinely and is an "exceptional" course of action as it would risk undermining the core purposes of the Convention. The exceptionality classification of course is plainly set out by the House of Lords in **Re E [2012] 1 AC 144** at paras 26, 27 and 52. To my mind, it is hard (but not impossible) to see how a careful application of Hague Convention principles will lead to a violation of fundamental rights such as to take the court in the opposite direction to that which follows from a Hague Convention decision.

46. It seems to me that the facts of **SP v EB and K** were very different from this one and I am told that it is the only first instance reported decision to feature Article 20 as a foundation for a Hague Convention decision. The child was much older and had clearly expressed autonomous wishes to which Mostyn J attached considerable weight. The father had taken no steps to secure a return for a lengthy period of time whereas here F did take steps and was hampered by (a) lack of knowledge of the Hague Convention and (b) M's concealment of her whereabouts. I have decided that the defences are not made out, and this decision is both in accordance with the Convention and a proportionate approach to the rights of the parties, in particular the child. Article 20 does not change the result. It follows that this defence, too, fails.

Conclusion

47. All the defences raised by M fail. It follows that an order for return shall be made. I am conscious that with the current state of travel between England and Spain severely curtailed by the Covid-19 pandemic, it may take a little time to organise a safe return, but I expect it to take place as soon as reasonably practicable. The parties shall also agree the precise protective measures to be put in place in the light of this judgment. Any dispute on the order shall be referred back to me.

48. Upon return the Spanish court will be seised of matters relating to X's welfare. Those may include an application by M to relocate from Spain to this country; the sooner she applies, the better. That will be a matter for the Spanish courts.