



Neutral Citation Number [2021] EWHC 2673 (Fam)

Case No: FD20P00625

IN THE HIGH COURT
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 the Inherent Jurisdiction of the Court of England & Wales

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 March 2021

Before :

Ms Clare Ambrose sitting as a Deputy High Court Judge

Between :

AB

Applicant

-and-

CD

1st Respondent

-and-

XY

2nd Respondent

Sarah Lucy Cooper for the Applicant instructed by Amanjit Lalli of A L Law
Paul Hepher for the 1st Respondent instructed by Bushra Khan of Thompson & Co Solicitors
Michael Gration for 2nd represented by Jamie Niven-Phillips through CAFCASS Legal

Hearing date: 15-19 and 26 March 2021

APPROVED JUDGMENT

MS CLARE AMBROSE (SITTING AS A DEPUTY HIGH COURT JUDGE)

This judgment was delivered in private. The judge gives leave for this anonymised version of the judgment to be published. In no report or publication of this judgment may the identities of the parties be revealed. Breach of this restriction will amount to a contempt of court.

Ms Clare Ambrose:

Introduction

1. This case concerns XY who is a boy aged 4 years. This is the final hearing of two applications made by the mother AB (“the mother”) seeking an order for his return to her in New Jersey, USA.
 - (i) pursuant to the 1980 Hague Convention on the Civil Aspects of International Child Abduction (“the Hague Convention”) also given effect under the Child Abduction and Custody Act 1985; alternatively
 - (ii) pursuant to the inherent jurisdiction of the High Court of England and Wales.
2. The mother’s applications are resisted by XY’s father, the first respondent, CD (“the father”).
3. The mother is in New Jersey USA. The father is presently in prison in the UK at HMP Wandsworth awaiting a decision on an extradition request that has been made by the USA following an international arrest warrant. XY is being cared for by a foster carer under the care of London Borough of Hillingdon by consent under section 20 of the Children Act 1989.

Procedural background

4. The hearing before me was heard remotely by reason of the COVID 19 pandemic and in light of the fact that none of the parties or witnesses (save for the Guardian) was able to attend in person.
5. On 1 October 2020 the mother made a without notice application under the Hague Convention.
6. On 13 October 2020 XY was made a ward of the High Court by order of Peel J.
7. On 20 October 2020 Peel J appointed a guardian for XY and he was made party to the proceedings.
8. On 16 December 2020 there was a comprehensive directions hearing before Mostyn J. He listed the matter for a 5 day final hearing to determine the mother’s Hague application and also subsequent orders in wardship, as may be in the child’s best interest, to determine whether the child should return to live in India or the USA on the basis that neither party seeks for the child to remain living in the UK. He ordered the mother to serve a statement with supporting evidence dealing with:
 - (i) confirmation of her current immigration status in the USA;
 - (ii) a copy of any application made to remain resident in the USA;
 - (iii) subject to legal privilege, any opinion received as to the prospects of such application succeeding,
 - (iv) the timescales involved in obtaining a decision on the application.
9. The mother’s compliance with this order was unsatisfactory because it remained unclear that any part had been fully complied with. Her solicitor provided a statement explaining attempts to comply. I accept that the mother had some difficulty in obtaining information from her US lawyers and her UK lawyers have made efforts. There was sufficient information available elsewhere for me to draw conclusions as to the mother’s immigration status and the basis for her U-Visa application. I do not need to decide whether there has been non-compliance or draw adverse inferences at this stage.

The Issues

10. The issues were helpfully identified by the guardian (and adopted by the mother) and appear to be largely as follows:
- a. Did the mother have rights of custody at the time of XY’s alleged wrongful removal or retention? Did the making of a US court order dated 2 May 2017 granting sole custody of XY to the father extinguish the mother’s rights of custody?
 - b. What discussions took place leading to the mother entering into a custody agreement dated 8 March 2017 and a consent order dated 2 May 2019? In particular, did the parents agree that the father should be granted sole custody over XY because i) the mother had refused to care for XY any longer (the father’s case)? or ii) the father wished to take XY to India on holiday, required a visa for him, and had told the mother that he required a sole custody order to enable him to obtain that visa (the mother’s case)?
 - c. Did the mother consent to XY’s permanent removal from, or retention away from the USA or did she only consent to a holiday?
 - d. Did the mother acquiesce in XY’s permanent removal from, or retention away from the USA in late July 2017?
 - e. Did XY become settled in India?
 - f. If the mother had rights of custody at the relevant time, but the father has established one (or more) of the exceptions to return, how should the court exercise its discretion?
 - g. If the mother’s 1980 Hague Convention application fails, should the court nonetheless order XY’s return to the USA in the exercise of its inherent jurisdiction? That would involve deciding if it was in XY’s best interests to be returned to the USA.
11. The English High Court has jurisdiction under the Hague Convention by reason of XY having entered the UK in October 2020. The mother made this application to the English court on that basis and because India is not party to the Hague Convention. This court’s findings below recognise that XY is a US citizen and that the Superior Court of New Jersey (“the New Jersey court”) was seized in relation to custody of XY in May 2017.

The Evidence

12. The mother served 4 witness statements and the father served 3 statements. I heard oral evidence from the parents across 4 days. They confirmed the truth of those statements on oath and then gave oral evidence on oath before me for more than a day each. They were both represented by experienced counsel and solicitors. Their evidence (and the content of the proceedings) were interpreted by qualified Gujarati interpreters.
13. In terms of oral evidence I heard from the following (who also served statements):
- (i) the mother;
 - (ii) the father;
 - (iii) the Guardian;
 - (iv) the Paternal Grandmother,;
 - (v) the Paternal Grandfather;
 - (vi) the mother’s brother in law; and
 - (vii) the mother’s Aunt.

14. I also had statements from:
 - a) the mother's solicitor in these proceedings;
 - b) a lawyer in New Jersey USA; and
 - c) the social workers.
15. The parties also adduced a short joint expert report on New Jersey law in relation to the effect of a sole custody order. I was also provided with some documents from the proceedings that had taken place in the New Jersey court and various documents from the local authority including a viability assessment of the father's sister, and some of the social work review documents.

The Factual Background

16. Although there were significant differences between the parties there was also substantial common ground as to what happened, and the account below is based on their evidence given on oath to the court.
17. Both parents are Indian citizens by birth but were living in New Jersey, USA when XY was born there in November 2016. They both come from villages around 30 km apart in the state of Gujarat. The maternal grandmother and two of the mother's sisters live in that area and one sister lives in New Jersey. The mother's father has been deceased for some time. The father's parents also in that area in Gujarat. He has one sibling, a sister who lives with her husband in London.
18. The father arrived in the USA first in 2008. By reason of his first marriage in around 2008 he obtained USA citizenship and then separated from his first wife, a USA citizen. He then remarried in 2013 and divorced again in 2016. He obtained registration as an Overseas Indian Citizen ("OCI") on 17 April 2017 while still in the USA. As an OCI he is entitled to enter India without a visa, and live there with most, but not all, the benefits of Indian citizenship. Dual citizenship is not generally allowed under Indian law.
19. The mother had previously been married to a US citizen but she had petitioned for a divorce. In March/April 2015 she travelled from India to Mexico, stayed in a hotel and crossed over the US border to enter the USA. At that stage she was detained by the US authorities and sent to prison for a short period based on allegations of illegal entry. She was released on bail and appears still to be subject to a bail bond of US \$7,500 that was put up by a relation based in New Jersey who she treats as her aunt. The mother later made an asylum application that has not yet been determined by the US authorities.
20. Initially the mother was living for a few months with her aunt. She met the father in around June 2015 through Facebook. The parents commenced living together in New Jersey in around August 2015. The father took a tenancy on a one bedroom flat and purchased furniture.
21. The mother found that she was pregnant in around April 2016. There is a dispute as to whether the father assured her that he would marry her once his divorce came through.

22. In June 2016 the father's parents (the paternal grandparents) came over to New Jersey and stayed with the couple until late November, shortly before XY's birth. It is common ground that there was tension both between the couple, and also between the mother and the paternal grandparents. In around August 2016 the mother went into hospital overnight and she signed a letter before discharge. The source of the tension and the hospital visit is disputed. The mother contends that the father's mother force fed her tablets in an attempt to abort the child, while he says she attempted an overdose for the same purpose and expressed remorse.
23. In October 2016 the father's divorce to his second wife was finalised. It is common ground that the mother wanted to marry the father at this stage but disputed as to whether he reassured her that he would.
24. XY was born on 28 November 2016 and a US passport was obtained for him on 30 January 2017.
25. It is common ground that from around the end of February 2017 both parents were making arrangements for the father to travel to India with XY. There is a dispute as to what was discussed and whether these arrangements were being made for what the mother believed was for a holiday for 1 month (the mother's case) or whether she wanted the father to take responsibility for XY and understood he would take him permanently to India (the father's case).
26. XY needed an Indian visa in order to visit India as he is a US citizen. He travelled to India on a visitors or tourist visa. The father later registered XY as an Overseas Citizen of India on 26 June 2018.
27. It is common ground that both parents signed a custody agreement ("the custody agreement") and this was witnessed at a travel agent in New Jersey on 8 March 2017. The circumstances surrounding that agreement are disputed but it is common ground that the agreement was obtained with a view to obtaining a visa, and that the initial application for a visa for XY to enter India with his father was refused. Under the custody agreement the parents agreed that:
- "The father is permitted to move anywhere both within and outside of the United states, with XY without the Mother's consent....The parties acknowledge that due to their financial and other circumstances, this is the best decision for the welfare of XY as the Mother is not able to take care of XY. The Father shall be responsible for all expenses related to XY, including healthcare, education and his day- to- day expenses."*
28. It is also common ground that by consent the father obtained an order from the New Jersey Court for sole custody ("the custody order") of XY dated 2 May 2017 and the mother was aware of this application in advance. Both parents accept that:
- following the rejection of the initial visa application, and towards the end of April 2017 the father proposed to the mother that he obtain an order for sole custody over XY in order to obtain a visa for XY to travel with him;
 - both parents went to court on 1 or 2 May 2017 when a hearing had been fixed for the father's application for sole custody;
 - the parents had a meeting with a court appointed staff member who arranged for a Gujarati interpreter, at which point there was a consultation, and the mother was

asked why she was giving sole custody, she confirmed that the couple were separating and she could not take financial care of the baby, and also confirmed that the parents had a mutual understanding of when she would be seeing the child, that she understood that she was giving up all her rights to XY, and the court staff member confirmed to her that she could apply for joint custody if she wanted, following this consultation the judge approved the custody order;

- d) both parents signed the order stating “I hereby declare that I understand all provisions of this Order”;
- e) each of the parents were given a copy of the court order, and a sealed copy was sent to them by post.

29. The basis upon which the custody order was obtained is disputed. The mother says that the father deceived her by telling her that the order was needed to obtain a visa for XY for the purpose of a one month holiday and they would then return to live together in the USA. The father says the mother had agreed that he would obtain sole custody in the knowledge that he was taking XY permanently to India.

30. On 28 June 2017 the father informed the mother that he had purchased one way tickets for himself and XY to travel to India on 27 July 2017. Around this time he gave one month’s notice on his lease on the apartment with a view to departing for India when the lease came to an end on 1 August 2017. The mother was planning to stay at her aunt’s house on the end of the lease. She knew he was making arrangements to put his furniture into storage. Indeed the storage agreement was taken out in her aunt’s name on around 24 July 2017. She also knew that he gave notice quitting his job. Until the father’s departure the mother lived with him in the apartment and they continued to have sexual relations. On 27 July 2017 the father travelled with XY from the USA to India (XY was aged 8 months at the time) and the mother travelled with him to the airport. All these matters were common ground. The dispute was as to the parties’ future intentions, and what had been communicated to the mother. The mother says that she was deceived to believe that the plan was that the father would return after a month’s holiday and the couple would find a new apartment on his return to the USA. The father says that the couple had decided to part, he was returning to India and she was going to stay with her aunt and planned to rent an apartment with her sister.

31. Shortly after the father’s arrival in India on 27 July 2017 there was a telephone conversation between the parties on 29 July 2017 but its contents are disputed. The mother says that this was the first time he told her that he would not be returning with XY to the USA. The father says that the mother told him not to call or contact her again. It is common ground that the parents have not spoken to each other since then, or exchanged emails or text messages or contacted each other on social media.

32. The mother contacted the firm of New Jersey lawyers that were dealing with her immigration case, and set up a meeting on 3 August 2017 which the lawyers have said was about the abduction of XY.

33. In November 2017 the mother secured a US work permit which enables her to work and she currently works as a cashier.

34. XY and the father remained living with the paternal grandparents in India until coming to the UK for a short holiday on 1/2 October 2021.

35. On 12 July 2018 the mother commenced proceedings in the US for joint custody. No legal aid was available.
36. On 16 September 2018 the mother obtained an order for joint custody in the New Jersey courts, and the Judge made an order that the father return XY to the US immediately. The father became aware of the proceedings and on around 17 and 24 September 2018 he made at least two telephone calls to find out what had happened. He was told by a member of staff that an order had been made giving the mother joint custody.
37. The mother made a criminal complaint against the father for kidnapping and in July 2019 criminal proceedings in the USA were instituted against the father. As a result, an international arrest warrant appears to have been issued against the father. The FBI also became involved in the case.
38. On 27 July 2020 the mother applied for a “U” visa in the USA on the basis that she is the victim of a “qualifying” criminal activity. The basis of that application is, in part at least, the alleged abduction of XY.
39. On 1 October the father travelled from India to the UK with XY. He had been offered free flights and a free hotel by a friend. On arrival he was promptly arrested on 2 October 2020 in execution of the international arrest warrant. He was taken from the airport to prison where he remains. He is contesting his extradition to the USA and his extradition proceedings are due to be heard in a 3 day case starting on 17 May 2021.
40. On 16 October 2020 the mother made an application for sole custody in the New Jersey courts.
41. A hearing took place in the family law proceedings in New Jersey on 24 March 2021 and the New Jersey court was aware of these proceedings. It made an order that the mother shall have temporary legal and physical custody of XY pending further order.
42. Since arrival in London XY has been re-introduced to his mother by video contact, and has had video contact with the paternal grandparents, and also the father’s sister and brother-in-law who live in London. He has had no direct contact with his father but has spoken to him over the phone.

FINDINGS ON THE ISSUES

Did the mother have rights of custody?

43. The relevant legal test as to whether the mother can invoke rights under the Hague Convention is uncontroversial. In order to engage the presumption of return, an applicant must demonstrate that the removal or retention was wrongful. A removal or retention will be considered wrongful where it is in breach of rights of custody, per Article 3 which provides that:

Article 3

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, 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.*

44. Article 5 provides further assistance as to breaches of rights of custody:

Article 5

For the purposes of this Convention -

- a) *"rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;*
- b) *"rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.*

45. The father's counsel had in opening submissions contended that the mother had no rights of custody upon XY's removal (or retention in India) since she had signed the custody agreement, and the position had been confirmed by way of a court order. Accordingly, on opening the custody question was whether the making of an order granting sole custody to the father meant that the mother had no relevant rights of custody. The court later had the benefit of a US lawyer's opinion on the effect of the New Jersey sole custody order, and this confirmed that the custody order superseded the custody agreement and provided the mother with rights of custody, since it conferred the right on her to apply for joint custody. In addition the 2009 New Jersey Code makes provision, at Title 9, for cases concerning children. Section 9:2 deals with custody. Section 9:2:2 makes specific provision for relocation, as follows:

"9:2-2. Custody of children of divorced or separated parents within jurisdiction of Superior Court; removal from jurisdiction; consent; security

When the Superior Court has jurisdiction over the custody and maintenance of the minor children of parents divorced, separated or living separate, and such children are natives of this State, or have resided five years within its limits, they shall not be removed out of its jurisdiction against their own consent, if of suitable age to signify the same, nor while under that age without the consent of both parents, unless the court, upon cause shown, shall otherwise order. The court, upon application of any person in behalf of such minors, may require such security and issue such writs and processes as shall be deemed proper to effect the purposes of this section." [The underlining is the US Lawyers emphasis.]

46. This court accepts this approach and finds the mother had rights of custody at the relevant time for the purpose of invoking the Hague Convention. To the extent relevant, this approach also reflects the approach that would have applied if English law applied to the question. It is not necessary for me to go further since the father's counsel correctly appeared to concede that the mother had rights of custody for the purpose of invoking the Hague Convention (although submitted that there were separate questions as to the effect of the consent order and custody agreement regarding consent under the Hague Convention).

47. The father accepts that while the mother has rights of custody and he invoked the jurisdiction of the New Jersey court to obtain a custody order, he was entitled to remove

XY from the USA permanently because the mother consented to his removal. His position is that he can defend the allegation of wrongful abduction from the USA by invoking the Hague Convention exceptions for consent, acquiescence and settlement under Articles 12 and 13 of the Convention. It was not disputed that this reflects the position under English law where consent to removal is addressed under Article 13 rather than under Article 3.

What discussions took place leading to the mother entering into a custody agreement dated 8 March 2017 and a custody order by consent dated 2 May 2017?

Did the mother consent to XY’s permanent removal from the USA?

48. The father relied on the defence of consent under Article 13 of the Convention. The principles were uncontroversial. Consent applies prior to the alleged wrongful removal or retention. As explained in *Re P-J* [2009] EWCA Civ 588:

“The ultimate question is a simple one even if a multitude of facts bear upon the answer. It is simply this: had the other parent clearly and unequivocally consented to the removal?”

49. The burden of proving consent rests on the party asserting it. Consent based on fraud or misunderstanding will generally not be considered valid, as explained by Waite LJ in *Re B* [1994] 2 FLR 249, 261:

“courts of the requested state are unlikely to regard as valid a consent that has been obtained through a calculated and deliberate fraud on the part of the absconding parent”.

In circumstances where consent has been established but the other parent is alleging that fraud or other wrongful conduct vitiated or induced it then the burden of proving such wrongful conduct may lie on that parent. However, here the essential issue was as to consent to a permanent move. The father must prove that there was consent to the permanent removal (and retention) of XY and that includes showing consent that has not been wrongfully or falsely obtained.

50. The content and circumstances of the communications relating to the custody agreement and custody order was the central factual issue in dispute. This went to the issue of consent (and was also relevant to acquiescence) under the Convention. Both parents gave evidence of the circumstances leading up to the custody agreement, the custody order, and also XY’s departure, plus events afterwards. They also asked me to look at the broader context of the parents’ education, social and cultural background, work history and relationship so as to put the issues and events in context.

The mother’s evidence

51. The mother’s case in essence was that the father had proposed taking XY to India in around February 2017 and she had, with reluctance, agreed to the departure of XY to India for a holiday and had also consented to the sole custody order but the father had deceived her by:

- a) persuading her he was only going on holiday for 1 month and assuring that he would return to the USA with XY, when instead he had no intention of returning and ceased all contact;
- b) telling her that it was only possible to obtain a visa for XY for a holiday if she agreed a sole custody order.

52. The mother's evidence was that she and the father were both deeply in love. She had believed him because she blindly loved and trusted him. He had said he needed to wait for his divorce before marrying. After the divorce finalised in October 2019 he had informed her that he would not marry her because his parents had said they would disinherit him if he married her but he assured her that they would get married after XY was born. She said that after XY's birth the father told her the grandparents had insisted on a DNA test as they had threatened to disinherit him if XY was not his child. The father had said he wanted to show XY to his family and needed to go to India for a DNA test to satisfy his parents, and was promising to return, and assuring her that he would lease a new apartment on his return. In March 2017 he had told her that she was required to sign some documents including the custody agreement at the travel agency in Edison in order for XY to obtain a visa but the custody agreement was never read to her or understood by her. She had held no doubt that he would marry her and believed all his assurances. This was the reason why she had not suspected that he was leaving permanently and how he had convinced her to agree sole custody in order to obtain a visa for a holiday.
53. It was her evidence that once she telephoned the father after his arrival in India on 29 July 2017 she then knew she had been betrayed and lost all trust in him at that point. On her account she had immediately (the following day or so) telephoned US family lawyers to obtain advice on child abduction. She says that she had then pressed ahead with trying to obtain recourse from the courts and delays were attributable to her lawyers acting slowly and the fact that she had to fund their fees from her small salary as a cashier. Following XY's departure to India her brother in law had gone to the paternal grandparents' house on one occasion in August 2017 but had been faced with a barrage of abuse and the family had threatened to call the police. After that neither she nor any member of her family made contact with the father or his family as she had trust in the court system and did not want to trouble her family.
54. In relation to the incident in August 2016 leading to her hospitalisation while 6 months pregnant, the mother said that there had been an argument in the kitchen. The paternal grandmother had taken hold of her neck, forced her mouth open, and forced pills down her throat and she had started vomiting. The mother's account was that the paternal grandfather and the father had been present throughout, with the paternal grandfather standing nearby verbally abusing her. The father was asking them to stop but he did not pull the grandmother off, instead taking the mother to her room. The mother said that when in hospital there were red bruise marks where she had been grabbed.

The father's evidence

55. The father's evidence was that he had never wanted to marry the mother since he had already been through two unsuccessful marriages. He had enjoyed their physical relationship and had agreed to live with her, but had never promised to marry. Her family were not happy about her having a baby out of wedlock. They considered that if he did not marry her then her prospects of marriage as an unmarried mother were slim. The mother had nearly attended an appointment for an abortion but had not gone through with it. His case was that following his parents' arrival there had been tension because she wanted the paternal grandparents to persuade him to marry and she had threatened to abort the baby otherwise. He says that following another argument about this she took an overdose of

sleeping tablets and this led to her going into hospital in August 2016. The following day she signed a note in remorse to ask for forgiveness at the shrine in their home.

56. He says that in February 2017 things came to a head because the mother warned that if he did not marry her she would leave him and XY. She said that if he was unwilling to marry her then he should take XY and leave her to move on with her life, re-marry and regularise her immigration status. He had remained unwilling to marry with the result that they had decided that he should take over care of XY and they would separate. He said that the mother knew he could not look after XY in the US as he had no other family support. He had planned to stay in the US until the lease on his apartment would end on 1 August 2017 and had asked his parents to come over to help but the paternal grandfather had blood pressure problems and remained in India. The mother had agreed that she would stay and care for XY until he gave up the apartment, at which point he would take over care for XY and take him to India. He had never said that he needed to go to India for a DNA test or to talk to his parents so they would not disinherit him. The mother agreed to the custody agreement and custody order as a means to enable the father to obtain a visa and take XY to India permanently. Her agreement was not based on a belief that the trip was being made only for a holiday.
57. He said that the mother had been fully aware of the terms of the custody agreement because on 7 March 2017 both had attended a lawyer, Ms TP, who had taken instructions about the permanent move to India, and that Ms TP had brought the agreement out to the car, and read it out in Gujarati to the mother.
58. The father says that the mother was fully aware that his arrangements in advance of the trip were being made as part of a permanent move. She wanted some of the furniture and he left a blank transfer form for his car so it could be transferred as the mother did not drive. He says she was planning to move in with her aunt and later to rent an apartment with her sister.
59. Following the move the mother and her family made no contact with the father or XY. The father accepts that there was a telephone call on the 29 July 2017 with the mother but does not accept that the brother in law came to their family home. The father had contacted the mother's brother in law in October 2019 to ask for a copy of the mother's birth certificate for the purpose of XY's school admissions. They had a civil and cooperative conversation with no hint of the mother's family having regarded the father as having acted wrongly in taking XY from the mother.

Assessment of the evidence

60. The factual dispute depends to a large degree on which parent is telling the truth. Their accounts are diametrically different and the issue of consent depends largely on what they are said to have believed and communicated at the time. In assessing the evidence I have placed weight on the available contemporaneous evidence. I have also looked at the consistency of the parties' accounts with the known facts, and their internal consistency, and also addressed the inherent probabilities of the matters alleged. Both parents called family members to give evidence. I considered that these witnesses were not independent and were likely to have been highly influenced by the account the respective parent provided to them and genuine concern to support that parent. Accordingly, I give limited weight to the evidence of these witnesses on serious matters where there is a conflict in the

parents' account. Ms TP was an independent witness and I gave weight to her evidence that she had read the custody agreement to the mother in Gujarati and had advised her to seek alternative legal advice. The mother had alleged that Ms TP's comments were fabricated.

61. Taking all the evidence into account, I preferred the father's account of matters where there was a conflict on the evidence. His evidence has remained consistent and was supported by contemporaneous evidence. It was also significantly more consistent with the known facts. Overall, I considered that the mother's evidence on the disputed factual issues was unreliable because it was:
- a) not supported by the contemporaneous evidence;
 - b) inconsistent in itself;
 - c) inconsistent with the known facts and contemporaneous evidence;
 - d) inherently improbable.

Lack of contemporaneous evidence for mother's case

62. The father produced the custody agreement and custody order with the mother's signature dating from 2017, and his civil action complaint in the New Jersey court dated 11 April 2017 together with the hearing notice. I also had the agreement under which he put furniture into storage in the name of the mother's aunt (the mother confirmed she had later disposed of the items). All these items were strong contemporaneous evidence that the trip to India was not a holiday but a permanent move under which he would take over care of XY. I reject the mother's submission that the fact that he only took 2 suitcases showed it was a holiday.
63. Neither parent produced contemporaneous evidence of their communications at the time or evidence relating to the disputed incidents, even though on the mother's own evidence they were using WhatsApp and text messages at the time and she was directly involved in discussions and detailed arrangements for the trip over 4 months between February and late July 2017.
64. The mother produced a small number of text messages but these were not a complete record of the relevant communications. There was no contemporaneous evidence to support her assertion that the father repeatedly assured her that he would marry her, or that the trip was a holiday, or that he was returning to the USA. If she had consulted lawyers in early August 2017 and had reasonable grounds to allege that XY had been kidnapped and she had been seriously tricked it is surprising that, on her own evidence, she had not retained records of her phone communications but had instead lost her log-in details sometime in 2019.
65. The father was criticised for not producing material from the USA such as car title and transfer documents, information from his former employer or the court staff member, a transcript of the hearing on 2 May 2017 and what the travel agents had told him in 2017. However, on the father's case the absence of contemporaneous evidence was unsurprising since there was no issue at the time. The events in question took place almost 4 years ago and his phone records would probably not be preserved, nor would transcripts of court staff consultations be easy to obtain almost 4 years after the event. There was little prospect of the father finding the court officer, let alone obtaining a statement from her while there were existing proceedings in New Jersey between the parents. The father had preserved the complaint seeking custody but he had little reason to have preserved the other

documents. The very purpose of him obtaining the custody agreement and custody order was to have a formal record of what had been agreed and ordered by the US court, and to ensure that the arrangement was lawful in the eyes of the Indian authorities. While in prison his ability to retrieve or obtain papers and information from the US (including a statement from a travel agent or former employer about events four years ago) would also be impeded.

Internal inconsistency

66. The father's evidence was consistent. The main point of criticism of the father's evidence was in relation to what his sister had said to a social worker shortly after the father had been taken to prison. The comments were included in a viability statement had been made by a social worker who had interviewed the sister on the basis that XY had been kidnapped and the father had committed a serious crime. It was not based on a neutral position. In any event, the answers given by his sister were consistent with the father's case, namely that the parents had reached a mutual understanding for XY to move to India, the father had a role in India in supporting the family properties and the timing of the move was linked to the fact that the paternal grandfather's health had deteriorated around that time. It was unsurprising that the sister's account may have been inaccurate as to how long his divorce took to come through or the implications of the order sent by the US courts. These inaccuracies were of limited weight.
67. The mother's evidence contained several inconsistencies on important issues. She said in her statement dated 10 March 2021 that she did not know how the FBI sourced the information that led to the father being arrested in London. This was untrue. In her oral evidence she changed her evidence to say that she had told the FBI that the father was coming via information she had obtained from an individual. She said that this individual had asked her not to give his name because he would be in trouble with the paternal family.
68. The mother's evidence was also inconsistent in relation to her allegations of physical abuse. She said in oral evidence that the maternal grandmother had grabbed her by the neck and forced pills into her mouth with a view to causing an abortion. This account had not been raised in any of her witness statements and yet she had alleged physical abuse against the paternal grandparents in all her statements. The failure to mention the alleged attack by the grandmother in 2016 until some time in February 2021 was an extraordinary omission where she had been making serious allegations of abuse by the paternal grandparents to the US authorities since July 2018. She later suggested that she had told her lawyers about the incident and they had omitted it. However, it was clear that she had only raised the incident with the guardian and UK lawyers after the father had raised the attempted overdose in his statement.
69. In her statements the mother made serious allegations of physical violence committed on her by the father that stopped following the birth of XY and that the paternal grandparents were verbally abusive. In her statement to the US court dated 12 July 2018 she maintained that the grandparents were physically abusive and that the father's physical abuse continued following XY's birth. These allegations were denied by the father and the paternal grandparents in their statement evidence and the mother's counsel wisely refrained from challenging them on this. The mother did not ask me to make findings on these serious allegations but they were part of the evidence and the inconsistency was relevant to credibility.

70. In two of her statements the mother had said that the father had obtained XY's passport without any involvement on her part. This was untrue and she gave evidence that she had attended with XY at the post office to obtain it. This was another point where she blamed the lawyers for not including something that she could not explain.

Inconsistency with the facts/ inherent improbability of the mother's case

71. The father's account largely reflected the known facts, and the reality of a relationship that had broken down where he was unwilling to marry.
72. However, the mother's account was less plausible and there were two striking aspects of her evidence that did not fit the known facts. First, if she believed that XY had been abducted wrongfully and without warning, it was extraordinary that on her own evidence she and her family had taken no measure at any stage since August 2017 to check how he was doing, whether he was being cared for properly and who was caring for him. She had also taken no step to send a card, message or present to show him that she cared for him. It was significant that even on her own evidence there was no suggestion that the family members who had visited the father's home in August 2017 had found out if XY was present or well. The brother in law said he had never seen XY on that visit, and did not remember to a great extent what had happened. When the father contacted the brother in law by telephone in late 2019 about XY's schooling, there had been no concern as to whether XY was being looked after. The known facts were more consistent with her having agreed that the father would take over XY's care and having correctly assumed that he was being cared for.
73. The other strikingly implausible aspect of her case was the suggestion that notwithstanding being aware of all the arrangements for sole custody for a trip to India, she had believed at all stages until 29 July 2017 that the father would return in a month and move back in with her.
74. The mother is 36 years old and has a degree in microbiology. Her family is middle class and educated (her mother and brother-in-law have worked in teaching) although not wealthy. She had travelled widely on her own, spending several months in Australia to learn English, and had been on a holiday to Singapore. These trips had been financed by her mother. She had already been married to a US citizen and chosen to divorce. She had then gone to Mexico, and made her own way across the border, and had got out of detention. She had already started asylum proceedings and was plainly determined to obtain a green card in the US. She has been consulting lawyers in the US since shortly after she arrived there, and has secured a work permit. She is better educated than the father.
75. The father and his family are also middle class and own property but the mother had overstated the position in asserting that the father's family was wealthy and that they could intimidate her and her family. The brother in law's view was that the paternal grandparents' situation is average. They live in a 4 bedroom house. They had worked in a motel to support themselves while in the US. Even with US citizenship and a green card the father only found relatively menial jobs in the US. There was no significant imbalance between the mother's education, family background and social standing and that of the father.
76. The mother had made an asylum application and that is a matter for the US authorities to decide. The affidavit she made in support of it contains some very serious allegations that

have not been supported by any independent or contemporaneous evidence before this court. They appear implausible based on the actual support the mother had from her family on arrival in the US, and that she continues to have from her family. I also take into account *R v Lucas* [1981] QB 720 and that the fact a person tells lies in relation to one matter should not be treated as meaning they have lied on another matter. The fact that the mother may have lied in seeking asylum is of limited relevance on her applications before this court.

77. Even taking account of the matters alleged in the asylum application she has been supported by her family throughout both in the USA and India. Having a child outside marriage carried some shame within both parents' families. Her case was that neither parent would want her left as a single mother. This in itself supported the father's explanation of the separation. In any event, she had the support of both her aunt and her sister who now offer to house her and the child.
78. It is relatively unusual for a mother to give up all her rights to a child and agree that the father may permanently take a child to another country. In addition, it is common for a father to have greater financial control and independence and for a mother to be more vulnerable and dependent due to childcare obligations and lack of resources such as finances, education and language skills. In this context, at a superficial level the mother's case might appear inherently more probable than that of the father. However, based on the undisputed evidence here it would be very wrong to conclude that the mother's version of events is inherently more probable.
79. Although the mother has faced challenges (including the lack of immigration status), she is, on her own evidence, an educated, literate, determined and resourceful woman with family support. She is acutely aware of immigration issues. On the mother's own account, she was keen to secure her immigration status and get married to the father but he was not willing to marry after his divorce came through or after XY was born, and there was clearly tension with the grandparents. His family had businesses and property while he had only found short term jobs in the US. The father's account of the parents deciding to separate at that stage, with him taking sole care of XY so that she was not impeded in re-marrying was most consistent with the known facts at the time.
80. On her own evidence the mother had been involved in arrangements for XY's trip over several months, and had formally agreed to give up all rights to XY (as evidenced by a witnessed agreement and court order) to satisfy the Indian authorities, and let him travel to stay with the paternal grandparents on a one way ticket. On her own evidence the father had quit his job, given up the lease on his apartment and put his furniture into storage under her aunt's name on the basis that she would move into her aunt's house when the lease came up. In all these circumstances it is wholly implausible that the father had made all these arrangements in order to betray her once he arrived in India, especially when her family lived so close by, and that she had believed it all. It is inherently more probable that she agreed to XY's departure and that she was party to all these careful arrangements in the knowledge that it was a permanent move for XY that would enable both parties to move on following their separation. It was also inherently improbable that she had been told by the father that he had to go to India for a DNA test, and that she believed that this was the purpose of the trip.
81. The mother's account of the grandmother choking her and pushing large numbers of pills down her mouth while the father was standing nearby and asking his mother to

stop was contradictory and inherently improbable. The mother said that her account was supported by the grandparents' departure shortly before XY's birth but this was better explained by the on-going tension over the following months.

Factual conclusions

82. I find that in their discussions prior to the custody agreement, the custody order and the departure of XY to India on 27 July 2017 the mother had agreed that the father should be granted sole custody over XY because she had agreed that the father should take full responsibility for XY and he could take him to India permanently and care for him there. The mother agreed to the custody agreement and custody order as a means to enable the father to obtain a visa to take XY to India permanently. She was fully aware of the contents of the custody agreement which were read out to her in Gujarati by Ms TP, a New Jersey lawyer. Her agreement to XY's departure and the custody order was not induced by the father falsely assuring her that he was only going for a month for a holiday or for the purpose of a DNA test. The mother knew and agreed that the father and XY were moving permanently. The agreement arose from the parents' decision to separate and live their own lives, in circumstances where the father was unwilling to marry the mother.
83. Both sides alleged that the other was deliberately lying. The mother's case was that the father deceived her in 2017 and is now deliberately not telling the truth. The father alleges that the mother's case was deliberately false. Both sides were alleging that the other side had lied rather than been mistaken. Given that credibility was a central issue and also had implications for my decisions on welfare, it is necessary for me draw conclusions as to whether either parent deliberately lied on the critical issues. For reasons set out above I find that the mother was deliberately lying in making her various allegations saying that the father told her over several months that the trip was only a holiday rather than a permanent move, and in alleging that he had misled her, in particular into agreeing to XY's departure, the custody agreement and the custody order. These deliberate lies ran throughout her evidence and appeared to be a deliberate attempt to support a case on abduction, most probably with a view to improving her prospects of securing a green card and also enabling her to have XY in the USA.
84. In closing submissions the mother's counsel suggested that the mother's account of the incident leading to her hospitalisation in 2016 attempt was important and asked the court to accept it, and conclude that the mother's letter at the hospital was suspicious in attempting to protect the paternal grandparents. The mother was probably unhappy around that time. She may well have been upset by the father's family, and blamed them for what led to the hospitalisation. I take account of the *Lucas* direction and consider that the allegation is of limited relevance to the abduction. However, her serious and harmful allegation remained part of her case. For reasons set out above, I find that her account of the grandmother's attempt to choke and force pills down her (and abort XY) was untrue.

Did the mother acquiesce in XY's permanent removal from, or retention away from the USA in late July 2017?

85. The law here was uncontroversial. Acquiescence applies after any alleged wrongful act. Under the Hague Convention acquiescence is “*a matter of the actual subjective intention of the wronged parent, save only where his words or actions clearly showed, and had led the other parent to believe, that he was not asserting or going to assert his right to summary return and were inconsistent with such return.*” (*In re H and Others (Minors) (Abduction: Acquiescence)* [1998] AC 72).
86. Given my findings on consent I do not need to address acquiescence and it would be somewhat artificial to make findings on such a counterfactual position. However, if necessary I accept that the father would not have established acquiescence since there was some evidence that the mother had contacted lawyers about abduction on 3 August 2017. Although the mother delayed in making an application for custody, she was taking steps to obtain custody in the period up to the issue of her application in July 2018. The father was aware of these steps from September 2018.

Did XY become settled in India?

87. Article 12 of the Hague Convention provides:

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

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.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.”

88. The father maintained that XY was settled in his environment in India having lived there for over 3 years, and been enrolled at both nursery and primary school. The mother questioned the situation on settlement whether her account was accepted or not.
89. The guardian considered that the question of settlement would turn on the outcome as to which parent’s account of events was to be believed. The guardian recognised that the situation was difficult and she had been unable to see the child or parents in person due to the pandemic. She considered that XY’s settlement depended on his primary attachment as he was so young and she had been unable to establish what links he had with the community.
90. The guardian considered that if the father was telling the truth then XY was settled in India but if the mother’s account was to be preferred then he was probably not psychologically settled there. She said that his degree of settlement is undermined by the absence of a

relationship with his mother. If the mother’s account is preferred then if “*the abrupt and total loss to XY of his primary carer is correct, then this separation from her, coupled with a complete absence of any narrative for XY about his mother and why she was absent from his life inhibits his ability to be genuinely psychologically settled in this environment*”.

91. The mother’s counsel relied on this analysis to justify an order to return the child to the USA even if the mother’s account was rejected. I accept the father’s submission that this analysis was overly technical and legalistic. The assessment of a child’s settlement must be child-centred and holistic (*AL v SM* [2020] 2479 (Fam)). In this sense it is focused on welfare considerations.
92. The absence of a relationship with a left behind parent will be an important consideration in determining whether a child is settled. However, the question of settlement in this case should not turn on which parent was telling the truth or whether the father provided an appropriate narrative for the mother’s absence, or even whether XY had a relationship with his mother. This risks overstressing the meaning of the settlement exception under the Hague Convention (which is a question of fact), and also the useful application of the test of psychological settlement. It could also interfere with the apparent purpose of Article 12 in introducing a child-centred question of fact as to the child’s actual level of settlement. It also meant that the guardian’s analysis of settlement was complex, and contingent on what happened in 2017.
93. The question as to whether a parent has procured the child’s removal by consent or deception is addressed under Article 13. The question as to whether the parent has appropriately explained the left behind parent’s absence and maintained a relationship may be very relevant in considering the appropriate order at the discretion stage. Such questions are central to a welfare assessment and broad, prospective views will be useful. However there is perhaps a danger if these questions dominate the factual question as to whether the child was settled so as to engage the Article 12 exception. Concealment has been introduced into settlement but it relates more directly to the way the child is absorbed in the new environment. In addition, it is not expressly covered elsewhere so there is good reason for taking it into account in assessing the quality of the child’s settlement.
94. There may be a link between a parent’s deception (both regarding the other parent and the child) and the child’s actual level of settlement and psychological wellbeing (both in the present and the future). The guardian’s counsel referred to *AH v CD* but this was a case with firm evidence of obvious and damaging chaos in a child’s life that would undoubtedly affect his psychological wellbeing.
95. In most cases involving a summary assessment the guardian may not be well qualified to draw inferences as to the present or future psychological effects of a situation on a child, especially where the evidence shows that the child has broadly been well cared for in his environment.
96. It was not necessary for me to depart from the guardian’s conclusions because I accept the father’s account. In a more borderline case the conclusions on settlement would be more difficult to draw where the analysis hinges entirely on who is telling the truth on abduction.
97. The guardian’s counsel submitted that XY had not been given an adequate explanation by the father for his mother’s absence. The paternal grandparents had told her that they

considered he was too young to comprehend the issue of his mother's absence and wished to avoid causing him distress. The guardian said this demonstrated a lack of recognition of the importance of promoting XY's relationship with his mother, and his need for a narrative that acknowledged her and gave a sensitive account as to why she was not involved in her life. She recognised that the paternal grandparents' concerns were shaped by cultural context but said they were not alert to XY's potential need for therapeutic or professional support, and they lacked an understanding of his emotional needs. The father submitted that the father's family's approach was fair and should not prevent a conclusion that XY was settled in India, or that they were unable to meet XY's needs.

98. A judge or social worker in London with limited information is not well placed to dictate what the family in the relevant environment in India should have done in the past to explain his life story (or assess its psychological impact), especially with a young child and one that has been well cared for at an emotional level. The guardian had limited evidence as to what had happened to either parent since XY had arrived in India in 2017. The experienced social workers found it difficult to manage the explanation in London. XY's situation in India was probably even more delicate at a cultural level. The maternal grandmother had seen XY at a wedding but not stepped in. There was no evidence of denigration of the mother by the father and his family. The father had not corrected XY when he called the paternal grandmother mummy (the name he used for her), and XY sometimes called her grandmother. The father had shown XY photos of the mother on a couple of occasions, and explained this was his mum or mummy, P mummy (P being the mother's nickname), while the father's mum or mummy was XY's grandmother (using the more familiar Gujarati term). Both sides of the family in India appeared to show restraint and some sensitivity. In London XY had little difficulty in understanding who his mother was, and referred to her as P mummy with the guardian. He immediately adjusted well to spending time with his mother when video contact started. On a summary assessment I would be reluctant to criticise either side of the family in relation to how they introduced the mother into his life.
99. The guardian had a difficult job in assessing XY's situation. She was faced with complex and stark choices. Any criticism of her analysis is directed more at the legal issue of what questions and standards to apply rather than her judgment as to his current or prospective welfare (which is dealt with below).
100. The question of whether XY was settled in India is essentially a question of fact. Here there was no material concealment alleged after the removal. XY was living with the father and the paternal grandparents for almost 3 and a half years. His father was his primary attachment figure but the grandmother was also assuming a significant caring role. I accept the father's evidence that he was making friends in his community, had attended nursery school, and was expecting to have started school at an international primary school but it shut due to the pandemic. He had visited the school and was expected to enrol in April 2021 when it reopens. The guardian's evidence was that he was a well cared for child who adapted well to foster care, an indication that he has benefitted from previous secure and positive attachments. He has created bonds with the foster carer and her family, and engaged well in many activities with her, and all the evidence suggests that he is ready for school. He is a bright, lively and social boy who has developed good relationships and engages well in activities. He was starting to put down roots in the community and

expecting to be at school there. I am satisfied that he was physically, emotionally and psychologically settled with the father and paternal grandparents in India.

If the mother had rights of custody at the relevant time, but the father has established an exception to return, how should the court exercise its discretion?

If the mother's 1980 Hague Convention application fails, should the court nonetheless order XY's return to the USA in the exercise of its inherent jurisdiction? Is it in XY's best interests to be returned to the USA?

101. The court's discretion under the Hague Convention and its inherent jurisdiction are not identical. It is generally difficult to justify an order to return where the exception of consent and also settlement have been established. The same considerations would be relevant under the inherent jurisdiction where welfare is more clearly the guiding consideration (and the policy of the Hague Convention is not in play). It was not suggested that the exercise of discretion on the different bases (an exception under the Hague Convention or the court's inherent jurisdiction) would give rise to a different outcome in this case.
102. The father's case was that XY needed to return to his home and should not be subjected to any further disruption, especially where the mother was untested and her immigration status was precarious. The mother submitted that it would be in XY's interests to live in the USA given that he was a US citizen, his mother was based there, and there was a serious likelihood that XY would not have any contact with his mother if he lived in India. She also suggested that the father might be involved in the extradition and criminal proceedings in the US for several years and it would be better for him to be in the USA with his mother and also with the possibility of seeing his father in custody rather than being in India with grandparents.
103. The guardian's view, in brief summary, was that if the mother's account was to be believed then he should be returned to the USA and if the father's account was preferred he should be returned to India, even if the father is not yet there and there are doubts as to whether the grandparents would promote his contact.
104. It was common ground that XY's future is not in the UK but the guardian took into account the prospect of an adjournment where XY would stay in the UK in order for a further assessment to be made of welfare considerations if the findings on the Hague Convention application were not clear cut. She took into account that if XY returns to India, the likelihood at this stage is that he would be without his father and in the care of his grandparents. This would be significantly different to his previous circumstances given the absence of the person who had become his primary carer and attachment figure. She considered that it was XY's father that he seeks out and wishes to return to. The guardian also took into account that the mother has indicated that she would return to India if this meant she was able to care for XY.
105. The guardian considered that the appropriate options depended on the facts found and explored the options both ways. She considered that sending XY to the USA would cause further disruption to XY and could not be justified in circumstances where the mother had knowingly agreed to his removal, and had lied in alleging abduction. The guardian

considered that this would mean that he would be placed in the care of a mother who has not been consistent in her commitment or her capacity to care for him. If she had not been truthful about the circumstances that gave rise to his life in India, and this action had led to the arrest and imprisonment of the father, and had led to XY being placed in foster care then she had caused serious harm to XY. The guardian said she would not have confidence in the mother's ability to prioritise XY's needs. To send XY to the USA in that scenario would present risks to his welfare. She acknowledged the risk that XY would not have an on-going and meaningful relationship with his mother. However, greater harm would arise from the alternative of placing him with the mother in the USA since she is someone he is not familiar with and whose actions have caused him harm. The guardian accepted that while the father's family have not promoted contact with the mother, it could not be said they had deliberately obstructed it. The guardian was concerned that the mother had wilfully obstructed the father's relationship, whereas at worst the father's family had omitted to promote her relationship with XY. This was very different to a deliberate separation and severing of XY's relationship with her.

106. In forming the view that XY should not be returned to the USA the guardian also took into account that the mother has not cared for XY since he was 8 months old and the usual safeguarding precautions have not been taken regarding her or the family members she live with. She also had regard to the fact that the mother's immigration status is unclear.
107. Following the father's arrest XY has experienced big changes that he needs to understand. The guardian was correct in her recommendation that XY must continue to be supported to understand what is happening, and prepared in advance for further change.
108. I agree with the guardian's analysis which is firmly based in XY's welfare, and I adopt it. I am satisfied that XY should not be returned to the USA, and an order should be made for his return to India.
109. XY has been through a difficult time and he needs to return to his home and he will be cared for by his paternal grandparents, and his father in due course. It is very fortunate that XY has settled so well with the foster carer and learnt English. His well-being is thanks in large part to the skilled work of the foster carer, the local authority, the guardian and also the good parenting that XY has received from his father and the grandparents. This enabled him to adapt better than might be expected.
110. These proceedings have shown that XY now needs to have a relationship with his mother in his life. This was the firm view of the guardian and reflects his long term welfare, whether he stays in India or eventually returns to the USA. His father, grandfather and grandmother gave evidence on oath that they will support contact between XY and his mother both in India and remotely. The father said he will promote the relationship. Having given such evidence they will be expected to keep their word.

Conclusions

111. For reasons set out above I am satisfied that the mother's Hague Convention application for XY's return to the USA should be dismissed, and no such order should be made under the inherent jurisdiction either. It is in XY's best interest that he be returned to India to the care of his grandparents until his father can join him. It is also in his best interest that video contact with the mother continues and that he spends time with her if she goes to India.