



Neutral Citation Number: [2023] EWHC 1783 (Fam)

Case No: FD23P00212

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2023

Before :

MISS KATIE GOLLOP KC
SITTING AS A DEPUTY HIGH COURT JUDGE

Between :

	FJ	<u>Applicant</u>
	- and -	
	LT	<u>Respondent</u>

Ms Miriam Best (instructed by **Makin Dixon**) for the **Applicant**

Ms Anita Guha (instructed by **Dawson Cornwell LLP Solicitors**) for the **Respondent**

Hearing dates: 19-20 June 2023

Approved Judgment

This judgment was handed down remotely at 2PM on 13th July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MISS KATIE GOLLOP KC

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Miss Katie Gollop KC :

1. This is an application under the Child Abduction and Custody Act 1985 for a summary return order under The Hague Convention on the Civil Aspects of International Child Abduction 1980 (“the 1980 Hague Convention”). It concerns a child, who I will call Maria, now aged 5 years, who was born in England and who has dual Polish and UK nationality. Maria is currently living in England with her father (“the father”) who is the respondent. The applicant mother (“the mother” born in 1986) is Polish and she seeks the summary return of Maria to Germany. The application is opposed by Maria’s father (born in 1989) who is also Polish. The father has settled status in the UK and the mother does not.
2. The mother asserts that at the end of a holiday in England to which she had agreed, the father wrongfully retained Maria there in breach of their agreement that he would return Maria to Germany on 5 January 2023, and to her care there the following day. The mother also contends that Maria was habitually resident in Germany immediately before the asserted wrongful retention.
3. The father resists summary return on the grounds that at the date on which he retained Maria in England, she was not habitually resident in Germany, accordingly his retention of her outside that jurisdiction was not wrongful. Further or alternatively, and this is his primary ground of resistance, the mother consented to Maria remaining with him in England. Acquiescence, raised in the father’s statement, is not pursued. Needless to say, the mother denies that she provided her consent at any time.
4. The substantive issues that I have to decide are as follows:
 - a) Was Maria habitually resident in Germany immediately before the asserted breach of custody rights on 6 January 2023?
 - b) If she was, has the father proved, to the civil standard, that the mother clearly and unequivocally consented to Maria remaining in England with the father after that date?
 - c) If consent is proved, should I nonetheless exercise the discretion, which is at large, by ordering Maria’s return to Germany?

5. In summary, I find that Maria was habitually resident in Germany on the date of alleged wrongful retention. I also find that on a balance of probabilities, the mother consented to her being retained in England by the father. Finally, I have not exercised my discretion to return Maria to Germany. It follows that she will stay in England, pending the resolution of the currently stayed welfare proceedings in the Luton Family Court.
6. In the case of *Re G (Abduction: Consent/Discretion)* [2021] EWCA Civ 139, [2021] Fam 634 Lord Justice Peter Jackson observed that: “*Consent is an exception that is infrequently pleaded and still less frequently proved.*” In deference to the rarity of this decision, and because it is highly fact specific, I have set out the relevant events at some length.

Evidence

7. On the morning of the hearing, counsel informed me that they were agreed that I should hear oral evidence on the issue of consent alone. That was a sensible and helpful agreement. Both parties’ statements were materially incomplete and important documents, which required to be addressed before they could be properly understood, were not touched on at all. Absent oral evidence, I would not be in a position to decide the issue of consent fairly. In the event, the evidence I heard proved pivotal.
8. As the mother raised issues of domestic abuse in her statement, I invited consideration of special measures. Both parties attended the hearing in person, the mother was screened throughout, and gave evidence from behind the screen. Both parties had interpreters. I heard evidence from the father in the morning, from the mother in the afternoon and submissions the following day, starting with those of the father. I reserved my decision.
9. For the purposes of determining the application I read court orders and documents in both these proceedings and those in the Luton Family Court, the latter containing a statement from the mother. I read a statement from the mother’s solicitors, who had been instructed by the International Child Abduction and Contact Unit, a statement from the father, and a statement in response from the mother. Each parent’s statements exhibited electronic

messages exchanged between them, other documents, and photographs of Maria with friends and relatives in both Germany and England.

Background

10. The parents are Polish nationals and both were raised in Poland. The Father came to England in 2011 and the Mother in around 2012/2013. They met in England at a party in 2016, started co-habiting in 2017, and Maria was born in England in May 2018. They did not marry but I am told the father has parental responsibility. Maria is the first child of each of them and their only child. She has relatives living in Poland, Germany and England.
11. When the Covid-19 pandemic started, the parents decided to return to Poland and on around 6 April 2020 the family travelled there to live in the father's flat in his village. The father worked on a construction site, and the mother worked in the home and was Maria's primary carer. Maria went to nursery and the mother produces a letter from the nursery which speaks highly of her as a reliable, caring and emotionally responsive parent who was greatly involved in her daughter's life, and the nursery community.
12. The family spent just over two years in Poland. The parents agree that this was not a straightforward time for them but for different reasons. The mother says that this was when cracks in the relationship became significant. She says that the father was frequently intoxicated, verbally and emotionally abusive, and controlling of her. She was unhappy and sought help, and there is a letter stating that she had five sessions of therapy at a Family Aid Centre. The Father said that it was a happy time for the family but he found it difficult to adjust to living in Poland. He attributes this to the fact that he had spent the preceding nine to ten years in England, and become accustomed to a different lifestyle.
13. In around June 2021, and for a period of two to three months, the mother went to Germany to work taking Maria with her. They stayed at Maria's maternal grandmother's house in an area outside Frankfurt. This is the same house to which they returned around a year later, and which they were living in when Maria left Germany on 20 December 2022. The mother still lives there.

14. In May 2022, with the pandemic restrictions substantially over, the father was keen for the family return to England and resume living there. The mother says that all such decisions were made by him, and her views were not taken into account. She says she had little choice but to go along with what the father wanted since he was the sole owner of the flat.
15. Since they had nowhere to live in England (they had previously rented) the move had to be made in stages. It was agreed that the father would go ahead to find somewhere for the three of them to live, and while he was making those preparations, the mother and Maria would once again stay with the maternal grandmother in Germany. The parents estimated that it would take about three months to make the necessary arrangements.
16. The flat was put on the market, the father's scooter and car were sold, and he moved to England on around 28 May 2022 taking some of the family's possessions. The mother, Maria, and the family dog remained in Poland. The father returned for a couple of days in mid-June when the sale of his flat went through. He took their remaining possessions, including many of the mother's clothes, her winter coats, important documents such as her tax records, and many of Maria's toys and clothes, to England and put them in storage. None of these items needed to go to Germany because both parents anticipated that the mother and Maria would have relocated to England by the time the winter came.
17. In her written evidence, the mother said that she and Maria travelled to Germany on 16 June, directly after the flat was sold. However, in oral evidence, after her attention was drawn to plane tickets produced by the father, she agreed that in fact they left Poland one calendar month later. On 16 June, the mother and Maria travelled to the grandmother's holiday home in Poland where they stayed for a month and on 10 July, the father joined them there for a week. In oral evidence, the mother recalled that he came over to help her sister who was building a house. On around 16 July 2022, Maria, her mother, grandmother and step-grandfather, plus the dog, drove to Germany, to the grandmother's house where the mother and Maria had stayed the preceding summer. Also living in the house were the mother's other sister and her two daughters.

18. It was during the period from 16 July to December 2022, that the relationship deteriorated and entered into, what is described in the Father’s skeleton argument, as “a state of flux”. Unsurprisingly, the plan for the family to relocate to England also entered a state of flux.
19. When he arrived in the UK at the end of May, the father rented a room in the Wembley area. In his statement, he explained that he did not rent a flat immediately in order to save as much money for the family as possible and that evidence was unchallenged. He worked full time in the construction business owned by his sister and her husband. There are messages between the parents indicating that in August, the Father shared with the mother pictures of flats that he was looking at in the Dunstable area where his sister and her family lived. The mother indicated a preference for one of them. He took some steps in preparation for the mother’s arrival such as enquiring about what would be necessary to obtain settled status for her, ascertaining that there may be a tax position to be rectified, and the fines that would need to be paid.
20. The mother told me, and I accept, that she started work soon after arriving in Germany. She gained medical insurance which she hoped would also cover Maria. At some point that employment ended and she started a new job, which she still occupies, which commenced on 23 January 2023.
21. As I have said, the parents’ original plan had been to reunite in October, after about three months apart. On 4 October the father was making enquiries about a specific flat, including whether a dog would be permitted. Then, on 11 October 2022, the mother sent the father an electronic message asking for more time:

“I miss you too [love emoji] Please give me some time till the end of November.....We will come, I will find a job, Maria will go to school.....And we will live there permanently..... We have been apart for so long, we can take it for a while longer you’ll see [kiss and hug emoji] I gotta go change my clothes now, cause I’m already at work. See you later”.

22. She told me in oral evidence, and I accept, that she was unhappy in the relationship. She said that on around 15 October, she telephoned the father and told him that things were over between them. Over the next three weeks or so, the parents had discussions about

childcare arrangements in the event of living separately in different countries. The first message in evidence was on 18 October, when the father wrote to the mother saying: “*Swap with me, stay on your own and I will take Maria.*” Two days later, he made a surprise visit to Germany, arriving on 20 and leaving on 23 October 2022. He stayed in the grandmother’s house in the same room as the mother and Maria.

23. During the visit, he asked if Maria could spend Christmas and New Year with him in England. The mother agreed to this request. He therefore purchased four tickets: one on 19 December for him to travel to Germany, two on 20 December for him and Maria to fly to London, two on 5 January 2023 for him to return Maria to Germany (arriving in Frankfurt on 5 January at about 2pm), and one on 6 January for him to return to London alone. The mother was aware of the dates.
24. The parents agree that this was not a successful visit so far as their relationship was concerned. The father found the mother cold towards him, and in oral evidence the mother said “*there were no emotions*”. One night he awoke and found she was in another room having a telephone conversation. He suspected that she had a boyfriend and there were arguments. When the mother was asked about a possible affair in cross examination, she denied it. She said that she had met a new circle of friends, male and female, through work, and the individual the father was suspicious of was no more than a good friend.
25. At this point, it was seriously in doubt as to whether the family would be reunited in England, as planned, or whether the separation would become permanent. On 2 and 3 November, the Father sent the Mother the following messages:

“...you have decided that you are staying in Germany and I have accepted it as I don’t want to fight but your chances regarding me are all used up...Maria must be going to nursery and school and if you can’t cope with it then I will happily take her with me”

“If you have decided that you are staying in Germany then I want Maria to go to the nursery. I will have day off on Saturday so I will pack your stuff and Maria’s as well but I will leave some here so she can have some left at mine”

26. On 3 November, the mother messaged him saying that he could be sure she would not stop him from visiting, and that he did not need to send money for Maria's upkeep but only to buy clothes as she was growing. There were messages about the father returning the mother's possessions which were in storage in England, and the cost of that.
27. On 7 November 2022, there was an electronic message conversation between the parents. The screenshots made available are incomplete and start in the middle of the conversation which was preceded by a video call. The conversation contains the following exchange:
- "M: Just a bit longer and we will come back to London. Then she will be close and you will be able to normally hug her*
- F: It was supposed to be different, I would be able to hug you both every day*
- M: It was my fault that everything went wrong. I want to go back to the UK, because that's where it was the best and still is. I don't want to wander around anywhere anymore."*
28. The father says the mother told him that she intended to come back to London in January. Since that was not far away and there was the Christmas period to contend with, he set about flat hunting in earnest. Between 7 and 20 November there are messages from the father to the mother seeking administrative help with renting, a message in reply from the mother with a screenshot of her passport, and messages where the father sent the mother pictures of furniture he had in mind for the flat. On 20 November 2022 he entered into a tenancy agreement for a one bedroom flat. On 26 November 2022 the mother sent a message asking him to look for a particular type of kettle.
29. On 19 December 2022, as had been agreed in October, the father arrived in Germany to collect Maria, again staying overnight at the house. The following day, the grandmother and her partner drove the father and Maria to the airport and they flew to England. The mother did not go as she had to take the dog to the vet. Among the documents provided by the mother is a account in Polish handwritten by the grandmother, which has been translated. In that, the grandmother says: *"At the station where we (including my partner) have dropped [the father and Maria] he was assuring us that we will see each other again after New Year. However, it did not happen. I believe that he planned it all."*

30. On 22 December, the mother travelled with her mother to Poland and they stayed there until 6 January 2023. Also on 22 December, the father made an online application for a place at the primary school attended by his niece, Maria's cousin. He says that he spoke to the mother about the choice of school, which they agreed on, and he kept her fully informed. The mother says that she had no idea about any such application and only found out that Maria was attending school in England when she caught sight of a school bag during a videocall in 2023.
31. The father says that he and Maria spent Christmas Eve at his sister's house, where their mother (Maria's paternal grandmother) was visiting. They made a video call to the mother in Poland to exchange customary seasonal greetings during which the two of them discussed the arrangements for the mother's return to England. He says that the mother suggested that on a date in January she would send the dog to the UK by courier service, and she would fly over that same evening. As a result of the passage of time, he was uncertain of the date she gave. However, in his application to the Luton Family Court, made on 11 January, he states that the date provided by the mother was 9 January.
32. During the conversation on Christmas Eve, he says that they agreed that it made no sense for him to bring Maria back to Germany on 5 January, when the mother would be joining them in the UK on 9 January. Therefore, they decided that Maria would stay in England on and after 5 January, and the return flights would not be used. He told me that he cancelled them on 27 December. He also told me that as a result of the mother telling him that she was going to come to the UK on 9 January, his mother deferred the date of her return to Poland so that she would be in England to greet Maria's mother when she arrived. He said his mother started getting things ready for Maria's mother arrival, putting her clothes in the wardrobe.
33. In her written and oral evidence, the mother denied that any such conversation took place, whether on Christmas Eve or any other date. However, in her statement she did say that she knew, before 5 January, that Maria might not be returned to her: "*After the Respondent had left with Maria, he started telling me that he was not going to return her. I did not believe him at first. However, after the New Year the Respondent kept saying it and made communication difficult by not taking my calls.*"

34. At about 10.15pm on 26 December, the parents had a row. The father had been trying to get through to the mother on the phone but she was busy speaking to her friends and he felt ignored. They had a five minute videocall, which was heated, and which he followed with angry messages accusing her of lying. The Mother replied saying:

“Like I said

“I am coming in January and I hope everything will be back to the way it was!”

35. In her statement, the mother says she sent this message because, *“I was afraid that if I did not tell him that, he would keep Maria with him and not return her to me.”*

36. On 27 December the father took Maria on holiday to Tenerife, travelling with his sister and her family, and they returned to England on 1 January 2023. In his statement he says that he had invited the mother to join them, and asked her about what plans they should make for a family summer holiday. This evidence was not challenged by the mother.

37. The next date in the chronology is Friday 6 January 2023. It will be recalled that this is the date on which the mother asserts that it had been agreed that the father would return Maria to her care in Germany. He sent the mother an untimed message on 6 January as follows:

“Normal family and it will be normal at home with love and honesty, so come over”

38. At around 9.40am there is this exchange (I was told that the drive from the house in Poland to that in Germany takes about nine hours):

“M: We left around an hour ago

F: OK

M: Has your mum got internet?

I will call since I still can and I am in Poland.

F: Yes, yes she is at home and she has”.

39. And this exchange at around 10.35am:

“F: And would you like to talk to me when I have a break?

M: Why would I not want to

F: So in around 20 minutes then”.

40. At about 5.50pm on 7 January there were these messages:

“F: That address is for the courier??

You’re sending parcels or what?

M: I am not sending a parcel yet

F: Is it for you or the dog?

M: The dog

F: So they have finally contacted you?

M: I have called them several times today, but they wouldn’t pick up.

They picked up when I called them earlier.

I will be calling them again tomorrow, so that they won’t suddenly say they don’t have any vacancies left

They said that I can call them ever 2-3 days before

I will be calling them tomorrow

F: And why don’t you want to send your stuff?

M: I just don’t want to do it yet

F: You can’t afford it? Or you’re planning to go back?

Then send Maria’s things, the ones which are left”

41. In his statement, the father says that the next morning (8 January), the mother phoned him and told him that she had decided not to come to London and to stay in Germany. She also demanded that he return Maria to her care which he declined to do. He says that he was shocked, and his mother was so worried she gave him medicine to relax. Maria was distressed because she thought that her mother was coming the following day, and he had to tell her that she was not coming at all. He asked his mother to extend her stay to the end of January so that she could look after Maria while he arranged flexible working hours, and made necessary arrangements for Maria’s care and education.

42. At 8.45am on Monday 10 January 2023, the mother sent the father this message:

“I did not fool anybody and definitely not Maria! You knew that I did not want to go back to London because for a while we were not getting on. I will tell you again that you should have bring her back to Germany on the 6th and without consulting it with me you have cancelled the ticket. Bring Maria back!”

43. On 11 January, the Father issued an application for a Child Arrangements Order and a Prohibited Steps Order. Between that date and the end of the month, he registered Maria with a GP, applied for Child Benefit (which he started to receive in February), and obtained a school place for her at the desired school, with her starting there on 27 January.
44. There was a hearing in the Family Court application on 8 March 2023 which the mother attended remotely. She informed the court that she had an application for Maria’s return pending in the German Courts. Confirmation of that application was received on 28 March and the proceedings in Luton were stayed. The mother’s application under the Child Abduction and Custody Act 1985 was made on 12 April.
45. I return now to events on 6 and 7 January and the messages. The father referred to them in his statement, and they were clearly of central importance to the issue of consent and what was in the minds of the parties at the time. In her statement in response, the mother provided a paragraph by paragraph rebuttal of the father’s account but she did not address the paragraph in which the father referred to the messages on 6 and 7 January, or the messages themselves. This was a notable omission. Also notable by its absence, was any evidence or information at all, about what the handover arrangements were for the return of Maria to her mother’s care in Germany on 6 January.
46. The skeleton argument on the mother’s behalf dated 15 June contends: *“M believed that Maria would be returning to Germany on the 05.01.2023 pre-booked flight”*. This was her position at the start of the hearing. In oral evidence she was asked whether it was right that she was in Poland on 6 January, and it was at this point that her case changed. In reply, and for the first time, the mother said that between 2 and 4 January the father called her and told her that he had cancelled Maria’s return flight to Germany and they were not

coming back. She said she was very concerned. She had been intending to return to Germany on 5 January but stayed in Poland an extra day, trying to obtain legal advice.

47. As to the messages on 6 January, she said that she was in Poland driving back to Germany, she knew that Maria was at the father's flat in England with her paternal grandmother, and she knew that the father was at work. She was asking about whether the grandmother had an internet connection at the flat because she wanted to speak to Maria and it was convenient to use the internet, rather than a mobile network, to make the call.
48. When asked about the communications starting on 7 November 2022, when she said she was coming to live in England, up to those on 7 January 2023 concerning arrangements for relocation of the dog, she said that they were all "*empty words*". It was the father's intention to return to England, not hers, and she only sent messages saying she was coming because of pressurising phone calls in which "*he threatened that if I was not going to be with him, he would take my child.*" She said that the father always knew she didn't want to go back to England. However, when asked why, when the father told her he was staying with Maria in England and had cancelled the return flights, she did not immediately instruct him to bring Maria back as planned, she said she did not do so "*because I was certain he would bring her back on that flight*".

The Law

49. I start with the 1980 Hague Convention. Article 3 states the circumstances in which removal or retention of a child will be wrongful:

"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.*

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.”

50. Article 12 sets out the circumstances in which an order for the immediate return of a child wrongfully removed or retained must be made:

“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.”

51. Article 13 provides exceptions to those circumstances:

“Notwithstanding the provisions of the previous article, the judicial or administrative authority of the requested state is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—
(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention
b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”

Habitual Residence

52. In their skilful written submissions, counsel highlighted that the issue of habitual residence has been before the Supreme Court five times between 2013 and 2016. At paragraph 17 of *Re B (A Child)(Custody Rights: Habitual Residence)* [2016] EWHC 2174 (Fam), [2016] 4 WLR. 156, Hayden J summarised the legal principles:

“i) The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (A v A, adopting the European test).

ii) *The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasized that the factual inquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (A v A, In re L).*

iii) *In common with the other rules of jurisdiction in Council Regulation (EC) No 2201/2003 ("Brussels IIA") its meaning is "shaped in the light of the best interests of the child, in particular on the criterion of proximity". Proximity in this context means "the practical connection between the child and the country concerned": A v A, para 80(ii); In re B, para 42, applying Mercredi v Chaffe (Case C-497/10PPU) EU:C:2010:829; [2012] Fam 22, para 46 .*

iv) *It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (In re R).*

v) *A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (In re LC). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence, which is in question and, it follows the child's integration which is under consideration.*

vi) *Parental intention is relevant to the assessment, but not determinative (In re L, In re R and In re B).*

vii) *It will be highly unusual for a child to have no habitual residence. Usually a child loses a pre-existing habitual residence at the same time as gaining a new one (In re B).*

viii) *In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move (In re B —see in particular the guidance at para 46).*

ix) *It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there (In re R and earlier in In re L and Mercredi).*

x) The relevant question is whether a child has achieved some degree of integration in social and family environment; it is not necessary for a child to be fully integrated before becoming habitually resident (In re R) (emphasis added).

xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (article 9 of Brussels IIA envisages within three months). It is possible to acquire a new habitual residence in a single day (A v A ; In re B). In the latter case Lord Wilson JSC referred (para 45) to those “first roots “ which represent the requisite degree of integration and which a child will “ probably “ put down “ quite quickly “ following a move.

xii) Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (In re R).

xiii) The structure of Brussels IIA, and particularly recital (12) to the Regulation, demonstrates that it is in a child’s best interests to have an habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence; As such, “if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former” (In re B supra).”

53. In his decision in *E v D* [2022] EWHC 1216 (Fam), Macdonald J stated that:

*“20.Habitual residence must be established on the basis of all the circumstances specific to the individual case (Case [C-523/07 \[2010\] Fam 42](#)). With respect to those circumstances, in *Re A* (Area of Freedom, Security and Justice) and [Mercredi v Chaffe \[2011\] 2 FLR 515](#) , the Court of Justice of the European Union identified*

the following, non-exhaustive, list of circumstances that might be relevant in a given case:

- i) Duration, regularity and conditions for the stay in the country in question.*
- ii) Reasons for the parents move to and the stay in the jurisdiction in question.*
- iii) The child's nationality.*
- iv) The place and conditions of attendance at school.*
- v) The child's linguistic knowledge.*
- vi) The family and social relationships the child has.*
- vii) Whether possessions were brought, whether there is a right of abode and whether there are durable ties with the country of residence or intended residence.*

....

21....

- vi) In circumstances where the social and family environment of an infant or young child is shared with those on whom she is dependent, it is necessary to assess the integration of that person or persons (usually the parent or parents) in the social and family environment of the country concerned.*
- vii) In respect of a pre-school child, the circumstances to be considered will include the geographic and family origins of the parents who effected the move.”*

Wrongful Retention

54. In *Re H (Minors)(Abduction: Custody Rights)* [1991] 2 AC 476 at 499, Lord Donaldson MR considered children who have been wrongfully retained in a contracting state other than the state of their habitual residence. He said that such a child:

“has first been removed rightfully (e.g. under a court order or an agreement between its two parents) out of the state of its habitual residence and subsequently retained wrongfully (e.g. contrary to a court order or an agreement between its two parents) instead of being returned to the state of its habitual residence. The wrongful retention of a child in one place in the state of its habitual residence, instead of its being

returned to another place within the same state, would not be a wrongful retention for the purposes of the Convention. The typical (but not necessarily the only) case of a child within category (2) is that of a child who is rightfully taken out of the state of its habitual residence to another contracting state for a specified period of staying access with its non-custodial parent, and wrongfully not returned to the state of its habitual residence at the expiry of that period.”

55. In *Re G (Abduction: Withdrawal of Proceedings, Acquiescence, Habitual Residence)* [2007] EWHC 2807 (Fam), Sir Mark Potter, President, said that:

*“48. For the purposes of the Convention, retention is an event which occurs on a specific occasion rather than enjoying its usual and wider connotation of a continuous state of affairs. It occurs when a child who has previously been for a limited period of time outside the state of its habitual residence is not returned to that state on the expiry of that limited period: *Re H*, [Re S \(Minors\) \(Abduction: Custody Rights\)](#) [1991] 2 AC 476 at 499–500.”*

Consent

56. In *Re G* [2021] Peter Jackson LJ reviewed the relevant case law, starting with *Re P-J (Children)(Abduction: Consent)* [2009] EWCA Civ 588, [2010] 1 WLR 1237, before distilling the principles:

“25. The position can be summarised in this way:

(1) The removing parent must prove consent to the civil standard. The inquiry is fact-specific and the ultimate question is: had the remaining parent clearly and unequivocally consented to the removal?

(2) The presence or absence of consent must be viewed in the context of the common sense realities of family life and family breakdown, and not in the context of the law of contract. The court will focus on the reality of the family's situation and consider all the circumstances in making its assessment. A primary focus is likely to be on the words and actions of the remaining parent. The words and actions of the removing parent may also be a significant indicator of whether that parent genuinely believed that consent had been

given, and consequently an indicator of whether consent had in fact been given.

(3) Consent must be clear and unequivocal but it does not have to be given in writing or in any particular terms. It may be manifested by words and/or inferred from conduct.

(4) A person may consent with the gravest reservations, but that does not render the consent invalid if the evidence is otherwise sufficient to establish it.

(5) Consent must be real in the sense that it relates to a removal in circumstances that are broadly within the contemplation of both parties.

(6) Consent that would not have been given but for some material deception or misrepresentation on the part of the removing parent will not be valid.

(7) Consent must be given before removal. Advance consent may be given to removal at some future but unspecified time or upon the happening of an event that can be objectively verified by both parties. To be valid, such consent must still be operative at the time of the removal.

(8) Consent can be withdrawn at any time before the actual removal. The question will be whether, in the light of the words and/or conduct of the remaining parent, the previous consent remained operative or not.

(9) The giving or withdrawing of consent by a remaining parent must have been made known by words and/or conduct to the removing parent. A consent or withdrawal of consent of which a removing parent is unaware cannot be effective.”

57. Importantly, in the context of this case, he went on to explain the last principle and the reasons why a withdrawal of consent of which a removing parent is unaware, cannot be effective:

“26.All of these matters are well-established, with the exception of the last point, which did not arise for consideration in the reported cases. As to that, there are compelling reasons why the removing parent must be aware of whether or not consent exists. The first is that as a matter of ordinary language the word 'consent' denotes the giving of permission to another person to do something. For the

permission to be meaningful, it must be made known. This natural reading is reinforced by the fact that consent appears in the Convention as a verb ("avait consenti/had consented"): what is required is an act or actions and not just an internal state of mind. But it is at the practical level that the need for communication is most obvious. Parties make important decisions based on the understanding that they have a consent to relocate on which they can safely rely. It would make a mockery of the Convention if the permission on which the removing parent had depended could be subsequently invalidated by an undisclosed change of heart on the part of the other parent, particularly as the result for the children would then be a mandatory return. Such an arbitrary consequence would be flatly contrary to the Convention's purpose of protecting children from the harmful effects of wrongful removal, and it would also be manifestly unfair to the removing parent and the children."

Discretion

58. Where one of the defences to mandatory immediate return is proved, the discretion as to whether to order return of the child to the country in which they were habitually resident at the time the child was removed or retained is at large (*Re M (Abduction: Zimbabwe)* [2007] UKHL 55, [2008] 1 AC 1288 paragraph 43).
59. The Court of Appeal provided the following guidance in *Re G* [2021] EWCA Civ 139.

"39. In their leading work, Lowe, Everall and Nicholls, International Movement of Children: Law Practice and Procedure , 2nd ed (2016), para 23.36, the authors note these decisions and refer to Baroness Hale's observation in In re M [\[2008\] AC 1288](#) about discretion in consent cases: "Notwithstanding the above comment, once consent is established it will be relatively difficult to persuade the court to order a return.

....

41. To sum up, the exercise of the discretion under the Convention is acutely case-specific within a framework of policy and welfare considerations. In reaching a decision, the court will consider the weight to be attached to all relevant factors, including: the desirability of a swift restorative return of abducted children; the

benefits of decisions about children being made in their home country; comity between member states; deterrence of abduction generally; the reasons why the court has a discretion in the individual case; and considerations relating to the child's welfare.

42. In a consent case, the better view is that the weight to be given to the policy considerations of counteracting wrongful removal and deterring abduction may be relatively slight, while the weight to be attached to home-based decision-making and comity will depend critically on the facts of the case and the view that the court takes of the effect of a summary return on the child's welfare.”

Analysis and Findings

60. Before turning to the issues, it is convenient to consider the date of wrongful retention. Wrongful retention occurs not when a child is not returned to the care of a custodial parent, but when a child is not returned to their state of habitual residence. In the present case, the mother asserts that the father had agreed to bring Maria back to Germany on 5 January, and return the child to her care on 6 January. As I go on to explain, I find that Maria was habitually resident in Germany. It follows that the date of asserted wrongful retention is 5 January 2023.

Habitual Residence

61. The father's primary submission was that after leaving Poland in mid-July 2022, Maria had no country of habitual residence, though he also suggested, not strongly, that she could have remained habitually resident in Poland immediately before the asserted wrongful retention.
62. At the end of May, Maria said goodbye to her father and must have been told that he was leaving to go to another country. In June 2022, she witnessed the flat being packed up and cleared, and must have had a sense that it was no longer her home. Her father took away all the things from the flat in boxes. After a month in the countryside in Poland, she went to the house in Germany she had visited before. On arrival in Germany, Maria continued to live in a Polish community in a Polish speaking household. It is likely that her habitual residence did not shift immediately to Germany and that this was a process that took time.

63. The authorities tell us (see *Re B* paragraph 17(v)) that a child will usually, not always, have the same country of habitual residence as the parent caring for them, and Maria was living with her mother in Germany. She was also of pre-school age (had she been in England she would have started school in September 2022; in Germany I was told that school starts at age 6 years) and therefore it is relevant to consider the mother’s degree of integration, though the focus throughout is on that of the child. The mother quickly found work in Germany, formed new friendships with colleagues, and obtained health insurance. I find that the mother became habitually resident in Germany quickly after arriving there in July.
64. Maria joined a household that was already settled in Germany. Her aunt and cousin were living there as well as the grandmother and her partner. Her cousin was already at Kindergarten or school and Maria would play with her and her school friends. There is evidence of a Polish community in the town, and the family was part of that. The extended family she had joined was fully integrated into the social environment in Germany.
65. I accept that deeper social integration into society outside the home could have been achieved, had her parents come to a final decision about whether she was to stay there or relocate to England. For example, because the father did not want her to start Kindergarten if she was going to be leaving Germany imminently, she did not attend. Had she done so, Maria would have formed her own friendships and started to learn German which did not happen. However, the law requires “some degree”, not full, integration and that is amply demonstrated on the evidence.
66. Turning to the father’s position, the skeleton argument on his behalf says: “...if the court accepts the Father’s case that the child moved to live in England on 20 December 2022 pursuant to the parental agreement, the child’s habitual residence shifted back to this jurisdiction on, or imminently after, 20 December 2022.”
67. In discussion, Ms Guha accepted that that could not be right because on the father’s case, the agreement that Maria would remain in England after 5 January was reached on Christmas Eve, while she was in England. Following this argument through, Maria would have had to acquire habitual residence in England between the evening of 24 December

2022 and 5 January. As noted above, she and the father were in Tenerife between 27 December and 1 January and therefore there were only about six days available.

68. The legal principles tell us that integration can happen quickly but I do not find that Maria had the requisite, if any, degree of integration into a social and family environment in England immediately before she was retained here on 5 January. She had come for a holiday and was expecting to go back to her grandmother's house to live with her mother. What exactly she understood about any change of plan for her to stay in England and not go back to England is unclear but it is unlikely, in my judgment, that she understood that she would not be returning to life in Germany. I keep in mind that she was born and spent the first two years of her life here but in December 2022 she was still only 4 years old and will have had little recollection of her time here as a baby and toddler. This must have been an exciting time for Maria but it was also an unstable one, not least because this was the first occasion when she had been separated from her mother for any length of time. There was Christmas, followed by a winter sun break, then back to England, and then the news that her mother would not be joining them. All of the evidence suggests, and I find, that it was not until after 8 January 2023, when the mother communicated her intention to stay in Germany, that Maria started to acquire some degree of integration into life in England.
69. I do not accept that this is one of those very rare cases where the child had no country of habitual residence at the relevant time. I accept that when she arrived, her parents intended that her time in Germany would be a short stop gap between leaving Poland and moving on to a new home in England. However, after they arrived, the situation changed and the stay was extended. Parental intention is only one factor to be considered and in any event, there was a time in October when the parents were actively considering a future in which the mother and Maria lived in Germany indefinitely. For the reasons I have explained, I am satisfied that on 5 January 2023, Maria had a sufficient degree of stability, and integration into the environment in Germany, for that to have become her country of habitual residence.

Consent

70. Before turning to the specifics, I address the mother's overarching explanation of her thoughts and actions in the critical period between October 2022 and 10 January 2023. This is that: she was unhappy in the relationship which she experienced as abusive, she had tried to end it but the father had not taken no for an answer, he threatened that if she did leave him he would take Maria and she would not see her daughter again, and therefore she found it easiest to appease him by telling him what he wanted to hear, namely that they would live together again as a family in England, despite her having no intention of moving there.

71. The mother has provided documentary evidence of her seeking counselling in Poland as a result of unhappiness in her domestic situation. She ended the relationship in October 2022 and there was a separation. I found the father to be a determined, hardworking, efficient and energetic man who does not lack self-confidence. There was a power imbalance and the mother came across as a quieter personality. It is easy to see that she may have found it difficult to persuade him to alter course once his mind was made up. His messages show that he was insecure about the relationship whilst they were living apart, suspicious of other men, and jealous of her new friends. Those he sent her in late January contain vitriolic attacks on her character and are evidence that he is capable of being verbally and emotionally abusive when angry. I also accept that during their two pandemic years in Poland (which country the mother had left seven years earlier) she was in a vulnerable position. She was living in the flat of which he was sole owner, with sole care of a toddler while he was out at work, and financially dependent on him. It may have been a lonely time as well as an unhappy one.

72. However, that situation changed when she moved to Germany. She quickly obtained a job and was earning her own money, she had loving and reliable childcare on tap because she was living with her own mother, she had secure, family owned accommodation, with family around her who could provide emotional support, and she had new friends who were nothing to do with the father. As to Maria, she was the custodial parent and she had possession of Maria's travel and identity documents. That being the case, her evidence that she feared the father would take Maria away from her was difficult to understand. He had no practical way of doing so and she was in a position to refuse him access to her mother's house. That evidence was also inconsistent with her oral evidence that even after the father told her he was not returning Maria, she was certain he would bring her back.

73. The messages in October and early November show that at that time, the mother had three choices on the table. She could stay in Germany and Maria could live with the father in England. He could stay in England and she and Maria could settle in Germany, with Maria attending Kindergarten. Or the three of them could live together in England. I find that this was a genuine, unconditional opportunity for her to effect a final separation, if that was what she wanted to do. I do not accept that the choice she communicated to him on 7 November was the product of telephoned blackmail, threats or pressure. I find that the father would rather have had no romantic relationship with the mother, than one in which she was a half-hearted, unwilling participant. In more than one message he stated his desire for love, trust and honesty. He wanted the three of them to resume their pre-pandemic life in England but not at the cost of more arguments and a repeat separation: obtaining a reunited family by duress would have been counter-productive.
74. After 7 November, relationship difficulties persisted, as the argument on 26 December attests. However, I find that while she may not have been enthusiastic about resuming full time cohabitation, and may have doubted whether they could make the relationship work, reuniting the family in England was and remained her freely made, preferred choice out of the three available options.
75. I do not accept her evidence that all of the messages she sent after 7 November 2022, in which she re-affirmed her decision and engaged in planning for a life together in the UK, were merely placatory. I also reject her suggestion that the father knew, or suspected, that whatever she said in her messages and on the telephone, she never intended to come to the UK. Her words and actions throughout the following two months were all consistent with her holding to the decision she had made. She ended the argument on 26 December with an emphatic reassurance: *“I am coming in January and I hope everything will be back to the way it was!”* There is no evidence at all that the mother equivocated after 7 November.
76. What has happened here is so unusual that it is unsatisfactory to offer no formulation as to why the mother did what she did. What follows is not a finding of fact – I am not required to determine motivation – rather it is my sense, having seen and listened carefully to both parents, about what may have been going through her mind. When asked why she had

agreed to Maria going to England for the Christmas holiday if it was true that she was worried about him removing Maria from her care permanently, the mother said that she wanted Maria to have a relationship with her father. Given the coldness between them when he made the brief, unhappy visit in October, this was a conspicuously child centred decision. After he had left, she had time and space to weigh up her choices. With her head, she made the decision that she thought was best for Maria, and that was for the three of them to live together as a family again. In her heart, she knew her relationship with the father would not work. As hard as she could, she suppressed her feelings, and, perhaps, her wishes to continue her new, independent life in Germany. She stuck with the decision to reunite the family in England until the last moment, and then could not go through with it. I do not consider that she intended to delegate care of Maria to the father, much less to abandon her daughter. It would seem that when 9 January loomed, she was in a horrible muddle and made a panicked phone call without thinking through the consequences.

77. Her message of 10 January was not, in my view, a fabrication but rather a rewriting of history in the light of the realisation of what the situation had brought about. She did fool the father, and through him Maria, because she fooled herself. He did not know, and had no way of knowing, that she did not want to go back to London. That was because she was telling him – and trying to persuade herself - that she did, and he believed her. He did consult her about the cancellation of Maria's return ticket to Germany and she agreed to it. Looking back, she bitterly regretted not telling him between Christmas and 5 January, that they were not relocating after all, and that he would need to bring Maria back as previously agreed.
78. Where matters are in dispute, I prefer the evidence of the father. I do so because his account of events is clear, corroborated by documents such as plane tickets, and consistent with the messages between the parties, and his actions at the relevant time. He had a strong command of the details of events being an organised person who is good at planning. On the issue of consent, the mother's credibility was fatally damaged by her concession that the father told her, sometime between 2 and 4 January, and certainly before 5 January 2023, that he would be retaining Maria in England. She had no plausible explanation as to why, if she was opposed to and did not consent to that, she did not

immediately protest. Her silence between 2 and 10 January, can only be explained by the fact that she agreed to Maria staying where she was, in England.

79. I make the following findings of fact:

- a) On 7 November the mother told the father that she had decided that the three of them would live together in England, and that she would arrive some time in January;
- b) Acting on that information, the father found a flat where the landlord was content for all of them to live, and furnished it. He consulted the mother about these actions and she knew and agreed to them;
- c) When the father and Maria left Germany on 20 December, he was intending to return her there on 5 January and did say to the grandmother that they would see each other again in the New Year;
- d) On Christmas Eve, the mother told the father that her plan was to send the dog on the morning of 9 January and fly over later that day. As a result, they agreed that Maria should stay on in England with him. This was the mother's choice of date and the consent she gave to the father retaining Maria in England on and after 5 January was clear and unequivocal;
- e) Acting on that agreement, on 27 December the father cancelled Maria's return flight to Germany and told the mother at around the same time that he had done so. He also asked his mother to stay in England longer than she had intended so that she would be at the flat when the mother arrived and she did so;
- f) When, on 5 January 2023, Maria stayed in England with the father and was not returned by him to Germany, the mother's clear and unequivocal consent remained operative and it was an agreement he believed he could safely rely on;
- g) Prior to receiving her call on 8 January, the father had no appreciation that the mother would not come to England as agreed. He was shocked when she told him that she was not coming, and her change of heart came out of the blue.

80. Accordingly, this is one of those rare cases where the retaining parent has both pleaded and proved consent. It follows that what occurred on 5 January 2023 was an agreed and planned relocation of Maria from Germany to England, and not a wrongful retention.

Discretion

81. As consent is proved, I must take account of the effect of a summary return to Germany on Maria's welfare, the weight to be given to the policy issues being relatively slight. She has been living in England in 2023 for almost exactly the same amount of time that she spent in Germany in 2022. In addition, she was born in England and spent the first two years of her life here. Importantly, she attends school and a report from her Headteacher states that: "*She has settled into school routines and is learning English.*" (There is no evidence that she had started to learn German.) She celebrated her fifth birthday in England and her father arranged a small party to which Maria invited an English school friend. She has a GP in England, attends swimming classes and has an aunt and cousin living nearby. She lives in a flat which her father chose with her in mind, and the majority of her toys and clothes from Poland are here because he brought them to England in preparation for her planned relocation. Her degree of integration into the social and family environment in England is considerable. Her father has spent most of his adult life in England, has settled status here, strong family and other ties to the UK, is permanently employed here, and no longer owns a property in Poland. There is no doubt that her life here is stable.

82. I conclude that Maria's best interests are properly met by her remaining in England pending disposal of the proceedings in the Luton Family Court, or agreement by her parents as to the arrangements for their shared care of her.