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Case No: FD23P00504

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/12/2023

Before :

THE HONOURABLE MR JUSTICE COBB

Between :

CA
- and -
RA

Applicant

Respondent

Re J (Habitual Residence: Acquiescence)

Clare Renton (instructed by **Birmingham Legal Limited**) for the Applicant (father)
Paul Hepher (instructed by **Duncan Lewis**) for the Respondent (mother)

Hearing dates: 4 & 5 December 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 8 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE COBB

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.

THE HONOURABLE MR JUSTICE COBB :

Introduction

1. The application before the court, issued on 3 October 2023, concerns one child, J, a boy born in February 2021, so he is 2 years 10 months old. He is the only child of the applicant (“the father”), and the respondent (“the mother”). The application is brought under the 1980 Hague Convention On The Civil Aspects Of International Child Abduction (“the 1980 Hague Convention”) as incorporated by Schedule 1 of the Child Abduction and Custody Act 1985.
2. The father seeks the summary return of J to Canada. The mother opposes the application.
3. For the purposes of the application, I have read the core bundle of filed documents, and a supplemental bundle of Canadian court materials. I have received the written and oral submissions of counsel. In their written documents, both counsel raised the possibility of me hearing oral evidence on the issues of acquiescence, consent and/or habitual residence, but in the end did not pursue this. Having heard the oral submissions of counsel, I indicated I would (unusually) find it useful to hear short and focused oral evidence (which indeed I did hear) on two short and discrete points:
 - i) Whether, and if so when, the father knew that the mother had made an application for child benefit for J in England (a factual issue which, it seemed to me, may be relevant to the father’s alleged acquiescence in J’s stay in this country, and/or to the question of J’s integration here);
 - ii) The circumstances in which the father apparently acquired a 25% share in his parents’ property (it is agreed without the knowledge of the mother) at the very time (April 2023) when *he* says (this is not entirely confirmed by the mother) that the mother was purportedly considering returning to Canada, albeit conditionally – notably one of the conditions was that she would *not* move back to the paternal grandparents’ home.

Background

4. The father is 34 years old; he was born in India and is now a Canadian national. He has lived in Canada for approximately 15 years, and currently resides with his parents in Ontario. The mother is 30. She is a British national who was raised in England; she now has a Canadian permanent residency card. The parties met on-line in about 2013; the father was in England at that time, studying law. The parents became engaged in 2017, and married in this country in 2019. They moved to Canada in January 2020. Both parents worked there. In February 2021, their only child, J, was born.
5. From January 2020 until December 2022, the parties lived together with the father’s parents; the parties have different perspectives on whether this was a source of support for the couple (as the father maintains), or a source of conflict and tension for them (as the mother maintains). As the parents were both working, J was cared for at times by the paternal grandparents. It is apparent that the mother was not entirely happy with this arrangement.

6. The mother visited her family in England on two occasions during the marriage, including for an extended period with J from October 2021 to January 2022.
7. The parents' relationship appears to have been in many respects an unhappy and difficult one. In WhatsApp (social media) messages which I have read, the father questions the mother whether they did "the right thing" by marrying; the mother refers to the father as "always getting angry" with her, and how he has no respect for her. The mother asserts that there were repeated incidents of domestic abuse including, on at least three occasions, physical abuse; it is apparent (again, from WhatsApp messages) that in mid-2022 the father was suicidal; he described how he believed that he had ruined the mother's life by bringing her to Canada, and recognises that they had "made each other cry more than happy" during the marriage.
8. On 22 December 2022 the parties had a significant argument; the paternal grandparents became directly involved. There are allegations of physical assaults, shouting and abuse. It seems that the family had fallen out over the level of the mother's contribution to the family budget; the paternal grandparents did not work, and the father was then a student, so the household was reliant on her earnings to a large extent. This plainly caused friction.
9. Following this incident, the father and/or the father's parents appear to have spoken with the mother's mother, and it was agreed that the mother and J would forthwith travel to England. It is the mother's case that the father contacted a number of the maternal relatives and informed them that he was booking a "one-way ticket" for the mother "and the kid"; the father maintains that he could only afford a one-way fare because of the steep cost of flights at short notice in the Christmas period.
10. The father provided the mother with a statutory declaration with which to travel, which stated that she and J were travelling "for the Christmas holidays". In WhatsApp exchanges relevant to this, she questioned why he had asserted that the mother and J were to be going for the 'Christmas Holidays'. He responded by pointing out (perhaps somewhat facetiously) that it would not be sensible (for immigration purposes) to state that she was leaving because they had 'argued'; she suggested that in the alternative he could declare a 'vacation'. The mother asserts that the couple spoke that evening and the father had told her that he did not see a future for them together. She says that he had suggested that 'we' (i.e., they) needed space; in WhatsApp communications later, she said that she "needs space", to which he replied, "take space whatever".
11. The mother and J travelled to England on 23 December 2022. The mother took a large amount of luggage, including many of J's belongings, but by no means all.
12. The mother contacted her employer on the day of her departure to tell them that she was unwell and suffering stress in her marriage, and could not be in work. Shortly thereafter the employer spelled out the options for her return; taking it shortly, the mother accepted an arrangement whereby she would be on extended leave. The employer made clear that she would need to be back in work by 7 February 2023 at the latest. A week before this date, on 31 January 2023, the mother contacted her employer to tell him that she wanted to discuss matters with her husband in relation to a return on 7 February; the employer told her that 7 February was a "hard deadline". It appears that the parents did indeed speak. On 2 February 2023 she contacted her employer to hand in her notice. When the mother sent the father a message on 2 February confirming

that she had handed in her notice, he simply acknowledged this with the comment: 'OK'.

13. Meanwhile, on 27 December the mother had written to J's day care provider in Canada cancelling the day care provision for him, and telling them that she was "unsure when I'm going to return".
14. On 6 January 2023 there was an exchange of WhatsApp messages about child support; the father said that he could only send the mother one-half of the Canadian child benefit. It is the mother's case that the parents then had a telephone discussion in which they had agreed (a) that the relationship was at an end, and (b) that the mother could/should, with the father's encouragement, claim Child Benefit for J in England. The father told me in oral evidence that the conversation about claiming child benefit in England occurred later (March); he also said that while he did not 'encourage' the mother to apply for benefits in this country, he wanted to "keep his options open", and "was going along with" her application for benefits in England. He told me that he did not regard it as "a big deal" that she would apply for child benefit in England. On 7 February 2023 the mother applied for child benefit.
15. On 1 March the father sent the mother a letter containing her mobile phone sim card; in the letter he says this: "I look forward to visiting you and J in summer/fall hopefully" (emphasis by underlining added).
16. On the following day, 2 March, he sent the mother a message by WhatsApp which ends with the words "I will not even force you to come back never!". This is potentially significant but regrettably neither parent was able to provide me with the context (or earlier message train) linked to this message and I am therefore unable to attach much weight to it.
17. On 31 March the father told the mother by WhatsApp that he had submitted his 'vacation request', and told her that he was hoping that "it's approved soon" and "once it is approved then we can plan my trip together if you want". It later transpired that the vacation proposed for the father to visit England was for 7-11 August 2023.
18. On 19 April, in an exchange of messages between the parents, the father said that he was always asking the mother to come back, and then materially:

"I want to know what's the future and how often I can see him if u r not coming back." (emphasis by underlining added).
19. On or about 21 April, at the mother's explicit request, the father helped the mother to close her TD Canada Trust joint bank account in Canada.
20. It is the father's case (certainly in the Canadian proceedings) that in April 2023, the parents spoke by telephone and the mother told him that she would return to Canada if (a) the father left his parents' home; (b) J would be cared for in professional daycare (not at any time by the father's mother); and (c) she would not be responsible for any household expenses. The mother says that it was the father who was seeking to impose conditions on her in relation to finances and living arrangements. Irrespective of who suggested the conditions, there was plainly no accord between them about the terms of

any return. Whether the father's account is right or wrong, it now transpires (the mother did not know about this until the eve of this hearing when the bundle of Canadian materials was filed) that the father had facilitated his father's borrowing against the equity of the home which they all occupied, and as a result had acquired a 25% interest in the same. Mr Hepher argued (with some force) that this acquisition effectively put paid to the couple living elsewhere if the mother were to return.

21. On 12 May, the father and mother communicated by WhatsApp about the clearing of the mother's and J's belongings from the paternal grandparents' home. The father had arranged to send much of it to England, and the "luggage pick up" was said to be in a few days' time. The father says, "I can send u anything u may need to buy there". The mother identifies items which she did want, and those (mainly the nappies, which J had grown out of) which she did not.
22. On 16 May, according to the mother, the father asked the mother again if *he* could bring J to Canada in the autumn for a few months.
23. On 20 May it transpires that there was a heated exchange on the phone. An exchange of messages followed in which the father told the maternal grandmother "tell her [the mother] to be there forever" (emphasis by underlining added).
24. The father then consulted lawyers, and took steps to seek the return of J to Canada.
25. On 11 July 2023, the father issued proceedings in Canada; no orders have so far been made in that jurisdiction. By his application he claimed sole parental responsibility for J, and proposed that the mother should have no contact with J for three months. Ms Renton told me that the father thought that this was 'fair' as he had been deprived of contact with J for three months by this time; even though Ms Renton told me that this had been 'awful' for him (no mention was made of the impact on J), he nonetheless proposed it for the mother, acknowledging (I assume) that it would correspondingly be 'awful' for her (and J). In the court documentation he proposed that the paternal grandparents be involved in J's care. The father asserts in the documents that the parties have been separated since 20 May 2023 ("and there is no reasonable prospect of reconciliation").
26. At or about the same time, the father made an application to the Central Authority in Ontario Canada for the summary return of J.
27. On 3 October 2023 the father's solicitors in this country initiated this application. The case was listed for directions before Moor J. He set down this hearing.
28. On 16 October 2023, the mother issued domestic Children Act 1989 proceedings in her local Family Court. These have rightly been stayed.

The parties' cases

29. The burden is on the father to prove that the mother has retained J in this country in breach of his rights of custody. He maintains that J was, at the date of retention, habitually resident in Canada. His case is that he agreed to the mother and J visiting this country at Christmas 2022 for a trip of up to three weeks. He says that thereafter he sought to encourage the mother to return, but she did not do so; he accepts that the

marriage broke down in May 2023. He is not clear as to when precisely he says the wrongful retention occurred; Ms Renton has (sensibly in light of the evidence) presented the case during the hearing on the basis that it was probably in or about May 2023.

30. The mother maintains that:
- i) By the date of the retention at the end of May 2023 (when the father insisted on J's return), J was habitually resident in England;
 - ii) The father consented (by mutual agreement) to J being moved to live in England;
 - iii) The father acquiesced in J remaining in England after January 2023;
 - iv) A return of J to Canada would expose him to a grave risk of physical or psychological harm, or otherwise place J in an intolerable situation. She asserts that she has been the victim of domestic abuse.

Findings of fact on disputed issues following oral evidence

31. Having heard the oral evidence of the parties, I am satisfied that the father and mother discussed the issue of child benefit on 6 January 2023 as the mother told me. I find that the father was at least expressly content to “go along with this” (his wording) and told the mother so. It is in fact likely, given the limited funds available to the parties, that he encouraged her. As a result, the mother then applied for benefits for J in this country (no later than early February).
32. I also find that the father did not tell the mother of his alleged acquisition of the 25% share of his parents' property in Canada. She only discovered this when the Canadian court materials were disclosed.

Habitual residence

33. The law in this area is well-known. Article 3 of the Hague Convention reads as follows:

“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”. (Emphasis added)

Article 12 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”.

34. Given that counsel agree on the applicable law in this case in relation to habitual residence, I do not propose to rehearse it here at any length. It is essentially a question of fact, but the cardinal principles which I have applied in this case have been drawn from a number of cases including but not limited to: *Proceedings brought by A* Case C-523/07, [2010] Fam 42, *Mercredi v Chaffe* (Case C-497/10PPU) [2012] Fam 22), *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 60 [2013] 3 WLR 761, *Re LC (Children)* [2013] UKSC 221, *Re B (A Child)* [2016] UKSC 4, [2016] AC 606; *Re B (A Child)(Custody Rights: Habitual Residence)* [2016] 4 WLR 156; *Re J (a child) (Finland: habitual residence)* [2017] EWCA Civ 80, *Proceedings brought by HR* [2018] 3 W.L.R 1139, at [54] and [45]; *Re M (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105, and the recent comments of Moylan LJ from *Re A (A Child) (Habitual Residence: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 659.
35. Insofar as it is appropriate to do so, I set out the key legal principles on which I have reached the decision in this case:
- 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;
 - ii) The test is essentially a factual one;
 - iii) It is possible for a parent unilaterally to cause a child to change a habitual residence by removing the child to another jurisdiction without the consent of the other parent;
 - iv) A child will usually but not necessarily have the same habitual residence as the parent who cares for him. 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;
 - v) Parental intention is relevant to the assessment but not determinative;
 - vi) It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative;
 - vii) It is not necessary for a child to be fully integrated before he becomes habitually resident;
 - viii) The requisite degree of integration can, in certain circumstances, develop quite quickly.

36. It is, as I earlier mentioned, broadly agreed that the date for determination of habitual residence in the instant case is May 2023. Mr Hephher pins it to 20 May 2023 when the parents rowed; it was after this date that the father declared (within the Canadian divorce application) that the relationship was at an end with no hope of reconciliation. I should add that it is also agreed that at that time, there were plainly features of J's life which indicated that his habitual residence had remained in Canada, where he had spent the majority of his life prior to December 2022, and where his father and paternal family were living.
37. However, the mother points to the following aspects of the undisputed history which suggest that J had achieved some (i.e., sufficient) degree of integration into life in England for his habitual residence to have changed by May 2022:
- i) J was not a stranger to England; he had visited for at least one extended visit in the past (October 2021 – January 2022) (>3 months); therefore, when he returned on 23 December 2022 it is reasonable to assume that he more swiftly integrated into life in this country than if he had never been to this country before;
 - ii) In December 2022, J had travelled to this country with his father's agreement;
 - iii) J has been living at the mother's family home since his arrival in December 2022 in a situation of some 'stability'; the mother (J's primary carer) is plainly very happy there;
 - iv) In this period, J has come to know well his extended maternal family (cousins and grandparents, aunts and uncles);
 - v) J has been enrolled in, and is currently attending, a variety of clubs (swimming, football, library), participating in religious customs and culture at the Sikh temple, and involved with the maternal family in the wider community;
 - vi) J has been registered with a GP since 19 January 2023 and dentist since about the same time;
 - vii) J was enrolled into nursery in February 2023 with the father's knowledge; he has friends there;
 - viii) With the father's knowledge, the mother applied for, and has in fact been in receipt of, child benefit in England from around June 2023 (backdated to February 2023);
 - ix) The mother has herself settled back into English life and works full time.
38. I am satisfied that in combination the matters set out in §37 (i)-(ix) above demonstrate that by 20 May 2023 (which I assess to be the date of the alleged retention) there was a sufficient degree of integration of J into life in this country for him to have become habitually resident in England.
39. On this basis, the application of the father fails.

40. As I have heard argument on the balance of the issues, and in order to offer clarity on these other aspects for the parties, I go on to consider the mother's further arguments.

Consent

41. It is the mother's case that the father consented to the mother bringing J here and remaining here with him indefinitely. In oral submissions, Mr Hepher all but dropped the argument, rightly so in my judgment. I can take this relatively shortly. I have had regard to the summary of the law set out in Peter Jackson LJ's judgment in *Re G (Consent; Discretion)* [2021] EWCA Civ 139, in particular at [24] and [25]. Mr Hepher accepts there was no explicit discussion about how long J would be away when he left Canada on 23 December 2022; he has to accept that this was not a long pre-planned trip, rather it was arranged in haste in order to take the heat out of a very difficult situation. Mr Hepher accepts that the lack of consensus about the length of the time J would be away from Canada would be an essential – and, as it happens, absent – building block of any agreement.
42. I do not find on the evidence that there was a clear and unequivocal agreement to J moving to, or remaining in, this country.

Acquiescence

43. The mother raises the alternative argument that the father acquiesced in J's retention and enduring stay in England, and the burden of proof is on her to establish on the balance of probabilities that this is so.
44. Lord Browne-Wilkinson's summary of the law in *Re H and Others (Minors) (Abduction: Acquiescence)* [1998] AC 72, at 90 is still regarded as the appropriate primary authority:

“(1) For the purposes of Art 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill LJ said in [*Re S (Minors) (Abduction: Acquiescence)*] [1994] 1 FLR 819 at 838: "the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact".

(2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.

(3) The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a

question of the weight to be attached to evidence and is not a question of law.

(4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent clearly is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced.”

45. This test has been more recently considered in *JM v RM (Abduction: Retention: Acquiescence)* [2021] EWHC 315 (Fam) at [43]-[53], where Mostyn J started his discussion of the relevant law by referencing the Oxford English Dictionary definition of the word:

“[45] ... according to the OED "to acquiesce" means "to agree, esp. tacitly; to accept something, typically with some reluctance; to agree to do what someone else wants; to comply with, concede". The word carries with it a much greater sense of passivity; of acceptance of a state of affairs by doing nothing; of tacit compliance. In ordinary language it obviously covers active consent *ex post*; but it also covers passive acceptance by just "going along with" the proposal”.

Mostyn J went on to draw on the speech of Lord Browne-Wilkinson (also at [45]):

“In his speech Lord Browne-Wilkinson stated at p.87:

"What then does article 13 mean by "acquiescence?" In my view, article 13 is looking to the subjective state of mind of the wronged parent. *Has he in fact consented* to the continued presence of the children in the jurisdiction to which they have been abducted?" (my emphasis)

Here Lord Browne-Wilkinson is clearly using acquiescence in its first sense. However, at p.89 he says:

"In my judgment, therefore, in the ordinary case the court has to determine whether in all the circumstances of the case the wronged parent has, in fact, *gone along* with the wrongful abduction." (My emphasis)

Here he is using acquiescence in its second sense.”

Adding at [46]:

“... to succeed in a defence of acquiescence, it is not necessary to show more than the second sense of its meaning, namely that the left-behind parent has passively gone along with the removal or retention”.

46. The *ordinary* case of acquiescence is one where the left-behind parent has subjectively consented to, or has gone along with, the continued presence of the child in the place to which they had been taken. The *exceptional* case is that identified by (4) in the quote at §44 above, where the left-behind parent did not subjectively acquiesce, but where their outward behaviours:

“... showed clearly and unequivocally that the left-behind parent was not insisting on the summary return of the child”, (emphasis by underlining added),

in which case, as per Lord Browne-Wilkinson:

“... he cannot be heard to go back on what he has done and seek to persuade the judge that, all along, he has secretly intended to claim the summary return of the children.” (*Re H* at p.88)

47. Materially (as Mr Hephher pointed out) in the father’s own witness statement, he appears to accept that there is indeed evidence of acquiescence in the relevant period. The father asserts that it is not enough to make out the article 13(b) exception. Specifically, he says:

“Anything I said or did that suggested I had accepted [J] do not come back is only part of the picture between January and May 2023.”

“... if I did write anything to suggest that [J] did not have to come back, it was against the background that I was desperate”.

48. In my judgment, the father did indeed give a strong indication over the weeks/months following the mother and J’s arrival in England that he was accepting that J need not return to Canada. Against the backdrop of J having left a difficult environment in the paternal family home in Canada where the parents were in conflict, on a one-way ticket, it seems to me that the father then acquiesced in J’s continued retention in this country. This is evidenced in the following ways, in combination:

- i) The parties discussed the mother applying for child benefit and a British passport for J on 6 January 2023; his evidence is that “it was not a big deal” and that although he did not encourage her to apply, “I was going along with it”. I find it significant that, within only a few days/weeks of their arrival in this country the parents were agreed that the mother should claim state benefits for J in England; this did not suggest that they were here for three weeks, or a short holiday of similar length;

- ii) By early February at the latest the father knew that the mother had handed in her notice with her employer in Canada; he appeared to take no exception to this; indeed, in this regard he co-operated with her requests for help in returning the hardware to her former employer;
 - iii) The father knew that J was enrolled in nursery in England, and did not object;
 - iv) In March 2023 he asked the mother to send pictures “once in a while”;
 - v) The father assisted the mother in closing the joint Canadian bank account in April 2023;
 - vi) The father told the mother in a letter dated 1 March that he was planning to visit her and J in the summer or the autumn (“fall”); this could only be consistent with the mother and J remaining here until the autumn of 2023, and potentially beyond;
 - vii) On 19 April 2023 the father wrote to the mother: “I want to know what’s the future and how often I can see him *if u r not coming back*” (my emphasis); this indicates, in my judgment, his acceptance of the current arrangement. In fairness, the father points in the same exchange to the fact that he was asking her to come back... though this is not in itself inconsistent with his acquiescence to her remaining;
 - viii) Later the father sent a message to the mother confirming that he would be visiting England between 7-11 August 2023 (confirmed in the evidence in the Canadian proceedings);
 - ix) In April 2023 the father (who now has a modest income as a paralegal in a law firm) apparently acquired an interest in the paternal grandparents’ home; he knew or reasonably ought to have known at the time that this would be wholly contrary to the mother’s wishes, and (on his own case) would make it less likely that he would be able to fulfil one of the mother’s asserted conditions for return (i.e., for them to be able to afford to live elsewhere);
 - x) On or about 12 May 2023, the parents collaborated with each other in plans for the father to ship many of J’s belongings, toys, and clothes to England;
 - xi) On 20 May 2023 the exchange of messages concludes with the father saying, “tell her to be there forever”.
49. Taking all of these matters set out in §48 above together, even if (contrary to my earlier finding) J was habitually resident in Canada throughout the relevant period and at the point of retention, I find that the father had by the time of the wrongful retention (20 May 2023) subjectively acquiesced in J remaining in this country. In the alternative, I am satisfied that by his words and actions from January 2023 onwards the father had clearly and unequivocally led the mother to believe that he was not asserting or going to assert his right to the summary return of J. I adopt Lord Browne-Wilkinson’s formula: justice requires that the father be held to have acquiesced by his words and conduct, and in this regard the article 13 exception is made out.

Article 13(b) and Protective measures

50. The mother alleges that:
- i) She has been the victim of repeated domestic abuse, including coercive behaviour and emotional abuse;
 - ii) On at least three or four occasions, the mother maintains that she has been physically assaulted by the father and/or his family (dates in 2021 [date unspecified], July 2022, November 2022, 22 December 2022);
 - iii) J has been the victim of physical abuse from the father's family;
 - iv) J has been the victim of domestic abuse by witnessing abuse of her;
 - v) J has lived in a toxic environment where the paternal grandparents were abusive to her.
51. The allegations may be true but they are not well particularised; there is no corroborative evidence of them. There has been little focused attention at this hearing to the proposed protective measures. However, given my earlier findings, I do not need to deal with them.

Discretion

52. The outcome of this case turns on my finding that at the material time, J was habitually resident in England.
53. If the outcome of this case were to have turned on the father's acquiescence, then I would need to consider whether I would exercise my 'discretion' to order J's return to Canada. In this regard, I have regard to the speeches in the case of *Re M (Abduction: Zimbabwe)* [2007] UKHL 55 at §43, as to which I highlight:
- “... in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare.”
54. I have further considered the judgment of Peter Jackson LJ in *Re G (Abduction: Consent/Discretion)* [2021] EWCA Civ 139 at §41:

“...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.”

55. This is a case where, if I had been required to exercise discretion, I would have done so by declining to order the return of J to Canada. An order for return now would not achieve the ‘swift’ outcome contemplated by the Convention; J has been in this country now for very nearly one year, more than 1/3rd of his entire life. I would be returning J to a very uncertain future in Canada given the low level of financial and emotional support which would be available for the mother and J there; plainly relations between his parents, and between the mother and the paternal family, which have rarely been good, are now extremely poor. I cannot, further, ignore the fact that in 2022, the father told the mother that he believed that he had “ruined” her life by having persuaded her to move to Canada in the first place (see §7 above).
56. There are proceedings issued in this country which can be promptly re-instigated, and I am confident that welfare orders can now be considered with proper expedition in the Family Court in this country. These orders should swiftly be directed towards placing the father’s time with J on a secure footing.

Conclusion

57. For the reasons set out herein, I determine that the application for a return of J to Canada is dismissed. I give leave for the judgment to be reported, though do not consider that it contains any point of new legal principle.
58. I would be grateful if the parties could draw up and agree the relevant order to give effect to this decision.

[End]