



Neutral Citation Number: [2023] EWHC 584 (Fam)

Case No: **FD22P00789**

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 10/03/2023

**Before :**

**MR NICHOLAS CUSWORTH KC**  
**(SITTING AS A DEPUTY HIGH COURT JUDGE)**

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**IN THE MATTER OF THE CHILD ABDUCTION & CUSTODY ACT 1985**

**AND IN THE MATTER OF 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS**  
**OF INTERNATIONAL CHILD ABDUCTION**

**AND IN THE MATTER OF THE SENIOR COURTS ACT 1981**

**AND IN THE MATTER OF THE CHILD E**

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**MANI SINGH BASI for the Applicant**

**The Father appeared in person**

Hearing dates: 9<sup>th</sup> - 10<sup>th</sup> March 2023

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**Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment was handed down in private on 10 March 2023. It consists of 32 paragraphs and has been signed and dated by the judge.

The judge hereby gives leave for it to be reported.

**Mr CUSWORTH KC:**

1. This judgment follows a final hearing in proceedings under the Hague Convention 1980, within which a mother, has applied for a summary return to Spain of her daughter E aged 5 years She has a sister, R, who was born in May 2022, and is cared for by the mother. She is not the subject of these proceedings.
2. The father opposes the application. He has appeared before me in person, although he is represented in concurrent Spanish proceedings which I will deal with later in this judgment. The mother, who appeared by videolink from Spain was represented by Mr Basi of Counsel.
3. I have dealt with this application on the basis of submissions only. Although the father has raised issues of consent in response to this application, neither party invited me to hear oral evidence under oath. I have received and read much of a full bundle of documents which extends to nearly 500 pages, in which are contained 2 statements from each party. I have heard oral submissions from the father, and from Mr Basi.
4. Aside from raising the issue of consent, the principal defence on which the father relied before me was that E was not in fact habitually resident in Spain on the date when he accepts that he travelled with her from that country to England, taking her from the care of her mother. That date was 30 November 2022.

5. The father's case. The father relies on the accepted history that, until June 2022, E had been habitually resident in England, and his case is essentially that her connections here were and have remained sufficiently strong to outweigh any connections which she may have made in Spain between June and November 2022, and that consequently, she never lost her habitual residence here. His case that she remained habitually resident in England throughout 2022 is supported, he says, by the fact that he himself contacted ICACU in September 2022 and alleged that E's retention by her mother in Spain was in fact wrongful under the terms of the convention. Once he had brought her back to England at the end of November 2022, he gave notice in December to withdraw those proceedings.
6. He also sought to argue that E's strong connections with England now militate in favour of not making an immediate return order, but rather a delay until the end of the current school year in June 2023. If I do find that E was habitually resident in Spain immediately prior to her removal last November, however, and that a return order is merited, that question is one which should properly be considered by the court in Spain, which is already seised of issues relating to her welfare, with the father's involvement as I will explain. The father has already agreed in those proceedings to an immediate return and to agreed arrangements for contact with E over that period.
7. The father also stated that E's current connections with England were much stronger than those currently in Spain, where she had only been in school between late September and the end of November. However, the question for the court on an application such as this, where the removal took place less than 12 months ago, is not as to E's current habitual residence, but rather as to where she was habitually resident immediately before her removal from Spain.
8. Other Proceedings. That the father was to oppose this application was by no means clear up to the start of the hearing before me. On 7 March 2023 – 2 days prior to the date of this hearing – another hearing had taken place in Spain in proceedings initiated by the mother, at which the father and mother were both represented by Spanish lawyers. I received a translated copy of the Spanish order, which is expressed to be

temporary, or interim. The key elements of its translated contents are set out as follow:

*At the start of the hearing the parties stated that they had reached an agreement in relation to the measures that would govern the separation of the couple, specifically in relation to the custody of the underage children and the maintenance allowance in favour of these children.*

*In fact, they agreed that it was in the best interest of their children E and R that the custody of both children was granted to the mother and visits arrangements in favour of the father were established. The father would pay 300 euros for each child per month as maintenance allowance in favour of his children and half of the extraordinary expenses*

*Given that the child E is currently residing in England with her father, the parties agreed that the father was going to hand in the child to her mother on the third week of March of this year.*

*From that date the following ordinary visits arrangements for the father in relation to the children are adopted:*

*Up to the month of June of this year, the father will be able to visit his children one weekend per month and inform the mother of the weekend chosen on the last five days of the previous month. The father must also state the duration of the visit, which may last up to six days. The visits will take place in Spain in the place where the mother is residing.*

*With regard to the child E, the visits may take place with overnight stay. With regard to the child R, the father may visit her during the day without overnight stay.*

9. So, it was clear that in the Spanish proceedings the father had not only agreed, through his solicitor, to accept the jurisdiction of the Spanish court to make orders in

respect of E, but had also agreed that there should be a custody order in favour of her mother, and that he would return her to the mother in the third week of March. He further consented to provision making arrangements for him to see both children after that had happened up to June of this year – the month to which he has now suggested to me that E’s return to Spain should be delayed – and then beyond into 2024.

10. When I asked him how he justified this dramatic change of stance, he told me that significant pressure had been applied by the judge in Spain, indicating to his solicitor that no order would be made there which separated the two sisters, whereupon he said the terms of this agreement were negotiated and arrived at. Before me, he nevertheless questioned whether the Spanish court should have jurisdiction at all over E. I asked him whether he would seek to appeal or set aside the order in those circumstances, and he told me that he would only consider whether to make such application after the conclusion of this hearing. I therefore will treat the Spanish order as un-appealed.

11. Given that the Spanish court is clearly currently exercising jurisdiction over E, with her father’s ostensible consent, and has recorded his agreement to a return for her in no more than 12 days from today, the father’s ability to resist a return order in this country on the basis of Article 13 would appear limited, although I will address the issue of consent under that Article later. His principal argument however is as explained as to E’s habitual residence.

12. Habitual Residence. Article 4 of the 1980 Hague Convention provides that:

*"The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights."*

13. The relevant legal principles regarding habitual residence are well established, and were comprehensively collected by Hayden J in *Re B (a minor) (Habitual Residence)* [2016] EWHC 2174 (Fam) at paragraph 17.

*"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 emphasised that the factual enquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (A v A, Re KL).*

iii) *In common with the other rules of jurisdiction in Brussels IIR 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)); Re B (para 42) applying Mercredi v Chaffe at 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 (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 (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 (Re KL, Re R and Re B);*

vii) *It will be highly unusual for a child to have no habitual residence. Usually a child lose a pre-existing habitual residence at the same time as gaining a new one (Re B) (emphasis added);*

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 (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 (Re R and earlier in Re KL 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 (Re R) (emphasis added);*

xi) *The requisite degree of integration can, in certain circumstances, develop quite quickly (Art 9 of BIIR envisages within 3 months). It is possible to acquire a new habitual residence in a single day (A v A; Re B). In the latter case Lord Wilson*

*referred (para 45) 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 (Re R).*

*xiii) ...*

14. Lord Wilson in *Re B (A child)* [2016] UKSC 4, had said this in relation to the transfer of a child from one habitual residence to another, as referred to by Hayden J in *Re B* (above) at [17] (viii):

*[46]...The identification of a child's habitual residence is overarchingly a question of fact. In making the following three suggestions about the point at which habitual residence might be lost and gained, I offer not sub-rules but expectations which the fact-finder may well find to be unfulfilled in the case before him:*

- (a) the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state;*
- (b) the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and*
- (c) were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it.*

15. These are the principles that I apply in determining this question. In this regard, it has to be said, the situation for E was not straightforward in the summer of 2022.

16. For the first years of E's life, it is common ground that she was habitually resident with her parents in England, where the family home was. In 2021 the mother fell pregnant with R, who presented as a high-risk pregnancy. The mother's case is that in February 2022 she told the father she wanted to give birth in Spain. She says that she

also informed the father of a wish to separate at that point, but he denies this. I do not need to make a determination of that issue.

17. It is certainly the case that, on 1 March 2022, the mother sent an email seeking to clarify E's position about schooling in Spain. She then stated that she would be coming to Spain with her at the end of April. The mother says that she proposed a move to Spain or France at this time, and that the father was aware 'at every step'. Again, he says he was not aware of the school plans, or the intended separation, at this stage. I remind myself that the father's involvement in these plans, whilst relevant, is not an essential element in E's integration. The mother was told that E would not be able to start at school in Spain until the following September, so it was agreed between the parents that she would stay in Spain to give birth, but that E would return to England to commence the school summer term with the father.
18. R was born early, in 2022, and the father and E therefore in fact returned to Spain on 4 June, earlier than expected. The father remained until 20 June, when he returned to England, leaving E with her mother. The mother says that the parents agreed that she would collect the remaining of her and E's belongings when the mother had to travel to England for ongoing orthodontic treatment in the following August, or failing that the father would make arrangements to send them to her. At that point, there was clearly an understanding that the parents would be living separately going forward. I do not accept the father's suggestion that E was expected to return to England at the end of the holiday.
19. Prior to his departure, the mother says that the father signed a document to register E at the local Town Hall. It is dated 20 June 2022, and records that the mother is authorised: *'...to proceed to carry out on my behalf any formality in relation to my daughters ... that requires my consent or physical presence, including but not limited to:*
  1. *Registering my daughters E and/or R as residents in any borough where they decide to establish their residence permanently, either in Spain, France or any European or international city/town.*



2. *Enrolling my daughters E and R in any school or college, either in Spain, France or any European or international city/town.*
3. *Requesting the renewal of the passport or National Identity Card of my daughters E or R and where appropriate.*
4. *Leaving with my daughters E and R and travelling with them to any part of the world without my presence.'*

20. Whilst the father does not accept that he did sign this document, he does acknowledge in his statement dated 14 December 2022, that he had accepted that the children were staying in Spain. The father said: *'I did not agree for the Applicant to keep my daughters in Spain. However, there were no other options for me other than accept it at the time since my parental rights were deprived by the Applicant and her family. So I decided to act on my children's best interests and even lie if required in order to safeguard my children's well-being and access to public support while I fight for the case on the tribunal...'* It is clear that a significant level of planning for the children's life in Spain was underway.

21. On 5 July 2022, the mother says 'by mutual decision' but after the father's return to England, E was registered at school, a procedure for which (the mother states) the authorisation of both legal guardians is required. Through this, E was registered at a bilingual English-Spanish school. From 12 August 2022, E had a Spanish ID card with her address. From 23 September she began to attend the school in Spain. Whilst the father protests that his was not happy about this at the time, this was nevertheless what was put in place for E and was clearly a process of significant integration for her into a life in Spain, and a clear move away from her former life in England.

22. At the same time the mother says that the father made no effort to come to Spain to spend time with either child between 20 June and 20 August 2022, 2 months later. In fact, the father returned to Spain on that later date, just as the mother was in England collecting her and E's remaining possessions in the UK. Within a few days, the tensions in the relationship between mother and father had already reached a head, with the father taking serious issue with the children's maternal grandparents after an incident on 23 August. This led to court proceedings, which came to a hearing on 29

August 2022. The father then returned to England, and promptly contacted ICACU, alleging that the mother was unlawfully retaining E in Spain.

23. On 23 September 2022, E as indicated commenced schooling in Spain. Notwithstanding his reference to ICACU, the father on various occasions sent messages to the mother in which he expressed the firm position that his daughters were staying in Spain and that her would not be seeking to remove E. Notwithstanding his apparent unhappiness, there can be little doubt that as the autumn progressed, E's integration into Spanish life continued. The mother describes swimming and Karate classes, and lists an array of cousins and friends with whom she had regular contact. Whilst the absence of the father must have been unsettling for her, and the many ties and friendships that she had doubtless left in England in June would have been easy to pick up again, by late November E had been in Spain for nearly 6 months.

24. The father makes the point that E was used to having summer holidays in Spain, and that those would not historically have come close to have provided a change to her habitual residence in England. That is right, but what happened in the summer and Autumn of 2022 for E, with or without the father's support or blessing, was as I find of a fundamentally different character to a summer holiday spent visiting family.

25. Throughout this time, E was in the primary care of her mother, who was intent on settling her into a new Spanish life. This life is fulsomely described by the mother between paragraphs 32 and 35 of her statement dated 13 January 2023, and whilst I accept that she is no doubt straining to paint a rosy picture of her daughter's integration, I do accept that at E's age a 6-month period is a significant one in which to absorb her new life, and one couched with significant stability. Whilst the English roots which she was shedding would no doubt have remained in some measure, I am quite satisfied that by 30 November 2022, E was sufficiently integrated into her Spanish life to have become habitually resident in Spain, and no longer in England.

26. This conclusion is further supported by the Spanish court's acceptance of jurisdiction in the current proceedings in that jurisdiction, and the father's own acceptance of that

court's jurisdiction to date in concluding the agreement which is recorded in the order of 7 March 2023.

27. Consent. The father has also claimed that the mother in fact consented to his removal of E from Spain, on 30 November 2022. The relevant legal principles to this defence under Article 13 of the Convention have recently been summarised by Peter Jackson LJ in *Re G (Abduction: Consent/discretion)* [2021] EWCA Civ 139 at paragraph 25 and 26, and do not require restating here. Suffice it to say that the father has the burden of demonstrating that the mother clearly and unequivocally consented to the removal. Yet he wrote a message to her, on the day of his return to England with E, 30 November 2022, saying: *'E and I are on our way to England for a few days. I hope you understand it and don't make any drama... I have no intention of separating her from you or R.'*

28. From this it is clear that the mother did not know in advance that the father would be taking E on that day, and further, that she was initially told that it would be only for a few days, and not any permanent separation. There is thus clear evidence that prior to the removal, the mother neither knew nor consented to it taking place. Immediately following the removal, the mother contacted the Spanish police. On the contrary, there is no clear evidence beyond the father's assertion of any consent on her part to this removal. I do not accept that the mother consented to E's removal from Spain.

29. Return. Under Article 12 of the 1980 Hague Convention:

*"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."*

30. I am, as explained, satisfied that E was habitually resident in Spain immediately before her removal to England by her father on 30 November 2022, a removal to which the mother did not consent. There is no issue but that the mother was exercising

rights of custody over E prior to that removal, and the removal must therefore be considered to have been wrongful under Article 3. I must therefore order that E be returned to Spain forthwith.

31. In fact, this outcome is one to which the father has already himself consented only three days ago before the Spanish court, as already explained. The parties then came to an agreement that the return would take place in the third week of March 2023, and I see no good reason why that agreement should not be fulfilled. I will therefore direct that E must be made available to be returned to Spain by no later than 22 March 2023, 12 days hence.

32. Rather than leave the father to effect E's return, the mother through Mr Basi asks that he make her available for collection by the mother in England, by delivery to her solicitors, for her to take her back to her home in Spain. Given all of the circumstances, I am satisfied that that is wholly appropriate and in E's best interests and I will so direct.

10<sup>th</sup> March 2023