



Neutral Citation Number: [2022] EWHC 3546 (Fam)

Case No: FD22P00202

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: Thursday 23 June 2022

**IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985**  
**INCORPORATING THE 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 1996 HAGUE CONVENTION ON JURISDICTION,**  
**APPLICABLE LAW, RECOGNITION AND ENFORCEMENT AND COOPERATION**  
**IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE**  
**PROTECTION OF CHILDREN**

**Before:**

**MR D DIAS OC**

**(Sitting as a Deputy High Court Judge)**

-----

**Between:**

**JC**

**Applicant**

**- and -**

**DF**

**Respondent**

-----

**MR ALISTAIR PERKINS (at trial); MR JONATHAN EVANS (for judgment)**  
**(instructed by **Brethertons LLP**) for the **Applicant****  
**MR DANIEL DODD (instructed by **Allington Hughes Limited**) for the **Respondent****

Hearing dates: 15, 16, 17 and 23 June 2022

-----

**APPROVED JUDGMENT**

MR D DIAS QC

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.

**Dexter Dias QC :**  
*(sitting as a Deputy High Court Judge)*

1. This is the judgment of the court.
2. I subdivide it into ten sections and an appendix, as set out in the table below, to explain the court's reasoning:

<b>Section</b>	<b>Contents</b>	<b>Paras.</b>
<b>I.</b>	<b>Introduction</b>	4-12
<b>II.</b>	<b>Procedural history</b>	13-23
<b>III.</b>	<b>Law</b> <i>(1) The Convention</i> <i>(2) Thirteen axioms of fact-finding</i>	24-30
<b>IV.</b>	<b>Issues</b>	32-33
<b>V.</b>	<b>Evidence</b>	35-70
<b>VI.</b>	<b>Assessment of witnesses</b>	71-83
<b>VII.</b>	<b>Submissions</b>	84-101
<b>VIII.</b>	<b>Discussion</b> <i>(1) Rights of custody</i> <i>(2) Breach</i> <i>(3) Habitual residence (21 July 2021)</i> <i>(4) Wrongful retention</i> <i>(5) Habitual residence (28 July 2021)</i> <i>(6) Psychological harm</i> <i>(7) Intolerability</i> <i>(8) Child objections</i> <i>(9) Discretion</i> <i>(10) Inherent jurisdiction</i>	102-171
<b>IX.</b>	<b>Conclusion</b>	172
<b>X.</b>	<b>Disposal</b>	173-77
<b>Appendix</b>	<b>Answers to questions posed by issues</b>	

3. **Anonymity.** To protect and preserve the Article 8 rights to private and family life under the European Convention on Human Rights of parties and children in this case, extensive anonymisation has been used. I emphasise that the names (and initials) used are not remotely like the names of the real people involved – and deliberately so.

## **§I. INTRODUCTION**

4. On 27 June 2021, tragedy struck a young family.
5. A mother of two young boys died in Portugal. She was called Edite. She is also referred to in the papers as Carla, but for the purposes of this judgment I will call her Edite. In August 2020, Edite was diagnosed with terminal colon cancer. From the time of her cancer diagnosis until her death, the boys lived with Edite’s mother, their grandmother, in Portugal. The grandmother was also looking after Edite while this was happening. The father of the boys was living in England and did not return to Portugal, save for one trip in October 2020, when he visited Portugal for about a week or so. When Edite died on 27 June 2021, he returned to Portugal on 30 June. He stayed there for approximately three weeks and then took the children with him to England. That was on 21 July 2021 and thus about a month after Edite’s death. The legitimacy of his removal of the children is what this case is about.
6. It is impossible to see this as anything but a very sad story. The emotional impact on these two children must be tremendous. Nobody can doubt that. The grandmother wants the boys back in Portugal. She says that this was her

daughter's dying wish: that she should continue to bring up the children with her in Portugal. Their father wants them to stay in England, where they have made a home together.

7. Everybody agrees that they are lovely boys. Bruno is aged 7 and loves football. He is keen on [a certain Premiership football club] and also supports one of the great Portuguese teams - and loathes their age-old rivals. Claudio is 11 and he likes playing the computer game Fortnite.
8. All parties agree that the Portuguese proceedings (under the jurisdiction of the Portuguese Republic), which have been ongoing for some time, will be the ultimate arbiter of the living arrangements for these children. Therefore, this court must decide whether a summary return order should be made forthwith, or at least after the end of the English school term at the end of July 2022. Return can be subject to limited delay "in accordance with the child's welfare" (*R v K (Abduction: Return Order)* [2009] EWHC 132 (Fam) at [21], per Ryder J (as then was)). Since the Portuguese court will determine the issues as agreed by the parties, the real focus of this application is the period until the Portuguese court can make those decisions on an interim and then longer-term basis.
9. The parties are as follows. The applicant in these proceedings is the children's grandmother Joana Edite Da C. She prefers to be called Ms C and, of course, I will do that. She has been represented during the hearing by Mr Perkins of counsel, but Mr Evans is representing her today and I am very grateful to him for stepping in. The respondent, and the children's father, is Daniel F. He is represented by Mr Dodd of counsel. I must commend all counsel for their exceptional assistance to the court.

10. The children have lived with their father in the United Kingdom since that removal on or about 21 July 2021. They are settled living with their father and have attended school in [a northern city]. They like it there and like living in the United Kingdom. It must be said that Mr F deserves a great deal of credit. It appears that the boys are doing well at school and the Cafcass officer in the case, Ms Gwynne, has said that that is unlikely to have been the case if there had been issues at home. So, unquestionably, since the boys have come to this country, Mr F has looked after them well. There can be a little doubt about that, and I proceed on that basis.
11. Claudio is in his final year of primary school and therefore would be due to move to secondary school in September 2022. I have equally no doubt that both Mr F and Ms C love these children. When I mentioned in court that I had met the boys and that they were wonderful children, both parties were deeply moved and tearful. It reminds the court, not that this tribunal needs reminding, that these cases are full of emotion and create heartbreak and genuine distress in so many directions.
12. As indicated, I met the boys on a video conference, introduced by Ms Gwynne of Cafcass. I emphasised to the children that there were rules like there were rules at school. This was not a time to get evidence, but was the chance for the boys to meet the person who was going to make such an important decision in their lives and for them to ask about the procedure. They did that. They are boisterous boys, if I can put it that way, full of life and energy. I told the children at the end of our meeting that I would do everything I could to tell them as soon as possible my decision about whether they would stay in England or return to

Portugal. If at all possible, by the next Thursday. That was going to be Thursday 23 June 2022 - today. With the outstanding assistance of counsel and the Clerk of the Rules (listing office), I have kept my promise to the boys.

## **§II. PROCEDURAL HISTORY**

13. After the father removed the children to England in July 2021, the grandmother did not know where they were. She almost immediately took steps to enforce what she believed were her rights to care for the children. Therefore, on 25 July 2021, Ms C made an urgent application to the Tribunal Judicial da Comarca Do [city in Portugal] seeking interim custody of the children.
14. On 28 July 2021, there was the order of this judicial tribunal, (the “Portuguese court”), granting temporary residence to Ms C and investing parental responsibility of the children in her.
15. On 4 August 2021, the applicant saw pictures on Facebook suggesting that the children were in England, but did not know where they were.
16. On 13 September 2021, Ms C submitted an application to the central authority in Portugal.
17. On 29 October, Ms C’s Portuguese lawyer promptly wrote to Mr F seeking his compliance with the Portuguese court order and requesting that he return the children to Portugal. Mr F did not; he has not since.
18. On 16 March 2022, Ms C issued Hague Convention proceedings seeking the summary return of her grandchildren to Portugal.

19. On 21 March, the process server attempted to personally serve Mr F at his last known address, but a neighbour indicated that he had moved two or three months previously.
20. On 24 March, there was the order of Stephen Trowell QC, sitting as a Deputy High Court Judge, which directed that Ms C file a schedule of protective measures and Mr F file an answer and a statement in support of that answer.
21. On 31 March, the respondent father was personally served with the Hague Convention proceedings.
22. The case came in front of this court on 12 April. Morgan J made an order directing that Mr F file an answer and statement in support, that Ms C file a statement in response, that the Portuguese central authority provide information relating to timescales in respect of the proceedings in Portugal and how the children would be heard within those proceedings.
23. On 15 June 2022, the matter was listed for a final hearing with a time estimate of three days which is how this case came before me for trial. However, what was not appreciated until the last afternoon of the final hearing was that the children's mother Edite had petitioned the Portuguese court before she died. I will and must come to that. This development completes the procedural picture.

### **§III. LAW**

#### **(1) The Convention**



24. The pertinent law around the Hague Convention 1980 is settled in its vital architecture and not in dispute between parties. In very short order, by way of essential legal context, I would emphasise that the deep philosophy and explicitly stated objects of the Convention are unmistakable: the summary return of children taken from their country of habitual residence to another country without the consent of the left-behind parent or person with rights of custody. The Preamble to the Convention makes plain the vice it is designed to combat:

“to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence.”

25. This is not the place for extensive and laborious recitation of that which is not disputed. I never find that useful. But should interested members of the public read this judgment, they should know that the following provisions of the Convention form the structure of this case and indeed virtually every Hague proceedings case. (I have provided the emphasis as relevant to the particular issues arising in this case.)

#### Article 1

The objects of the present Convention are –

- a) **to secure the prompt return of children wrongfully removed to or retained** in any Contracting State; and
- b) to ensure that **rights of custody** and of access under the law of one Contracting State **are effectively respected** in the other Contracting States.

#### Article 3

The **removal or the retention** of a child is to be considered **wrongful** where –

- a) **it is in breach of rights of custody** attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was **habitually resident immediately before the removal or retention**; and
- b) at the time of removal or retention **those rights were actually exercised**, either jointly or alone, or would have been so exercised but for the removal or retention.

#### Article 12

**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.**

#### Article 13

Notwithstanding the provisions of the preceding 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 –

- (1) 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.** (*often called “Art. 13(1)(b)”*)

The judicial or administrative authority may also refuse to order the return of the child if it finds that **the child objects to being returned** and has **attained an age and degree of maturity** at which it is appropriate to take account of its views. (*often called “Art. 13(2)”*)

26. Thus, judicial authorities are obliged to “act expeditiously in proceedings for the return of the child” (Art. 11). Ordinarily, the child should be returned “forthwith” (Art. 12(1)). But as Baroness Hale pointed out in *Re D (A Child:*

*Abduction Rights and Custody*) [2006] UKHL 51, at [68], “There are some cases, albeit few in number, where this is not the case”. The deceptively simple question before me is whether the situation of the children in this case falls into that limited category.

27. For, as can be seen, there are exemptions – “defences” to return, where, to use the language of Art. 13, the requested State “is not bound to return the child”. This includes where the child would be exposed to a grave risk of harm or where the child would “otherwise” be placed in an “intolerable situation”. The Convention is not blind to this. It should never be mechanistically enforced and become, as Lady Hale put it, “an instrument of harm”: *Re D* at [52].
28. I flesh out these governing legal principles at various points of the judgment as necessary, citing key passages from the burgeoning jurisprudence that surrounds the Convention. I have considered particularly decisions on “inchoate rights”, such as those the applicant claims to have, examining carefully the Supreme Court judgment of Baroness Hale in *In re K (A Child) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 29, more recently considered by MacDonal J in *NT and RT v HT and MT & others* [2021] EWHC 3231 (Fam). At the invitation of Mr Perkins, I considered the Court of Appeal’s decision in *Re A, B and C (Children)* [2021] EWCA Civ 451 and the judgment of Macur LJ, in particular at [57], articulating the tripartite structured approach set out there.

## **(2) Thirteen axioms of fact-finding**

29. The resolution of this case must necessarily involve the making of a series of factual determinations. My decisions on the facts are fundamentally grounded in the following axioms I have drawn together from a wide range of relevant authority:

- (1) The burden of proof rests exclusively on the person making the claim (she or he who asserts must prove) – the applicant in the overall proceedings; the respondent to establish any particular Convention exception;
- (2) Each determination is governed by the conventional civil standard of a balance of probabilities;
- (3) The court must survey the “wide canvas” of the evidence (*Re U, Re B (Serious injuries: Standard of Proof)* [2004] EWCA Civ 567 at [26] per Dame Elizabeth Butler-Sloss P (as then was)); the factual determination “must be based on all available materials” (*A County Council v A Mother and others* [2005] EWHC Fam. 31 at [44], per Ryder J (as then was));
- (4) Evidence must not be evaluated “in separate compartments” (*Re T* [2004] EWCA Civ 558 at [33], per Dame Elizabeth Butler-Sloss P), but must “consider each piece of evidence in the context of all the other evidence” (*Devon County Council v EB & Ors.* [2013] EWHC Fam. 968 at [57], per Baker J (as then was));
- (5) The process must be iterative, considering all the evidence recursively before reaching any final conclusion, but the court must

start somewhere (*Re A (A Child)* [2022] EWCA Civ 1652 at [34], per Peter Jackson J (as then was)):

“... the judge had to start somewhere and that was how the case had been pleaded. However, it should be acknowledged that she could equally have taken the allegations in a different order, perhaps chronological. What mattered was that she sufficiently analysed the evidence overall and correlated the main elements with each other before coming to her final conclusion.”

(6) The court must decide whether the fact to be proved happened or not.

Fence-sitting is not permitted (*Re H* at [32], per Lady Hale);

(7) The law invokes a binary system of truth values (*Re H* at [2], per

Lord Hoffmann):

“If a legal rule requires a fact to be proved (a “fact in issue”), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.”

- (8) There are important and recognised limits on the reliability of human memory: (a) our memory is a notoriously imperfect and fallible recording device; (b) the more confident a witness appears does not necessarily translate to a correspondingly more accurate recollection; (c) the process of civil litigation subjects the memory to “powerful biases”, particularly where a witness has a “tie of loyalty” to a party (*Gestmin SCPS S.A. v Credit Suisse (UK) Ltd* EWHC 3560 (Comm) at [15]-[22], per Leggatt J (as then was));<sup>1</sup>
- (9) The court “takes account of any inherent probability or improbability of an event having occurred as part of the natural process of reasoning” (*Re BR (Proof of Facts)* [2015] EWFC 41 at [7], per Peter Jackson J); “Common sense, not law, requires that ... regard should be had, to whatever extent appropriate, to inherent probabilities” (*Re H* at [15], per Lord Hoffmann);
- (10) Contemporary documents are “always of the utmost importance” (*Onassis v Vergottis* [1968] 2 Lloyd’s Rep. 403 at 431, per Lord Pearce),<sup>2</sup> but in their absence, greater weight will be placed on inherent probability or improbability of witness’s accounts:

---

<sup>1</sup> The *Gestmin* principles approved variously (but see next footnote), including *R (Bancoult No.3) v Secretary of State for Foreign and Commonwealth Affairs* [2018] UKSC 3 – see Lord Kerr at [103], where they were said to have “much to commend them”; however, the Court of Appeal subsequently stated that *Gestmin* is “not to be taken as laying down any general principle for the assessment of evidence ... [instead] It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory” (*Kogan v Martin* [2019] EWCA Civ 1645 at [88-89], per Floyd LJ).

<sup>2</sup> It must be remembered that *Onassis*, like *Gestmin*, was a dispute about recollection of business conversations, where typically there will commercial documentation. Ryder LJ sounds a necessary warning note about “simply harvesting obiter dicta expressed in one context and seeking to transplant them into another” (*Re B-M (Children: Findings of Fact)* [2021] EWCA Civ 1371 at [23]).

“It is necessary to bear in mind, however, that this is not one of those cases in which the accounts given by the witnesses can be tested by reference to a body of contemporaneous documents. As a result the judge was forced to rely heavily on his assessment of the witnesses and the inherent plausibility or implausibility of their accounts.” (*Jafari-Fini v Skillglass Ltd* [2007] EWCA Civ 261 at [80], per Moore-Bick LJ);

And to same effect:

“Faced with documentary lacunae of this nature, the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence” (*Natwest Markets Plc v Bilta (UK) Ltd* [2021] EWCA Civ 680 at [50], per Asplin, Andrews and Birss LJJ, jointly).

(11) The judge can use findings or provisional findings affecting the credibility of a witness on one issue in respect of another (cf. *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408).<sup>3</sup>

(12) However, the court must be vigilant to avoid the fallacy that adverse credibility conclusions/findings on one issue are determinative of another. They are simply relevant:

---

<sup>3</sup> At [120], per Males LJ, “once other findings of dishonesty have been made against a party, or he is shown to have given dishonest evidence, the inherent improbability of his having acted dishonestly in the particular respect alleged may be much diminished and will need to be reassessed.” A dishonesty case, but I discern no valid reason a different kind of impairment to credibility, such as unreliability or inaccuracy, is not capable of the same approach. It is an application of the principle of judging evidence in the context of all other evidence.

“If a court concludes that a witness has lied about a matter, it does not follow that he has lied about everything.” (*R v Lucas* [1981] QB 720, per Lord Lane CJ);

Similarly, Charles J:

“a conclusion that a person is lying or telling the truth about point A does not mean that he is lying or telling the truth about point B...” (*A Local Authority v K, D and L* [2005] EWHC 144 (Fam) at [28]).

(13) Decisions should not be based “solely” on demeanour (*Re M (Children)* [2013] EWCA Civ 1147 at [12], per Macur LJ); but demeanour, fairly assessed in context, retains a place in the overall evaluation of credibility: see *Re B-M (Children: Findings of Fact)* [2021] EWCA Civ 1371, per Ryder LJ:

“a witness’s demeanour may offer important information to the court about what sort of a person the witness truly is, and consequently whether an account of past events or future intentions is likely to be reliable” (at [23]); so long as “due allowance [is] made for the pressures that may arise from the process of giving evidence” (at [25]).

30. This is not the place to treat the ongoing debate about the significance or otherwise of demeanour. I emphasise that my approach is to place limited store in the way people “appear” in the witness box as a reliable or infallible guide to



their truthfulness. I certainly do not judge this case “solely” on the basis of it. Instead, I have in mind the cautionary note sounded by Macur LJ in *Re M* at [12]:

“It is obviously a counsel of perfection but seems to me advisable that any judge appraising witnesses in the emotionally charged atmosphere of a contested family dispute should warn themselves to guard against an assessment solely by virtue of their behaviour in the witness box and to expressly indicate that they have done so.”

Thus I have examined what the witnesses say in the context of everything else they and everyone else has said and what else is known from the documents.

31. These were the principles I used to analyse the evidence, to which I shortly turn.

#### **§IV. ISSUES**

32. From the law and the particular facts of this case, I identified the issues that follow - ten of them. These were ventilated with counsel, ultimately agreed, and I heard submissions about each of them systematically:

- (1) Has the grandmother proved that at the time of removal from Portugal on 21 July 2021 she had rights of custody?
- (2) Has she proved that the removal on 21 July 2021 was in breach of her rights and wrongful under Art. 3 of the Hague Convention 1980 purposes?
- (3) If (1) and (2) are proved, where was the children’s habitual residence immediately before removal?

- (4) Has the grandmother proved that the children were retained in the United Kingdom on or after 28 July in breach of the rights of custody of:
  - (a) Ms C herself; and/or
  - (b) The Portuguese court;
- (5) If (4), where was the habitual residence of the children immediately before the date of wrongful retention?
- (6) Has Mr F proved the psychological exception?
- (7) Has Mr F proved the intolerable situation exception?
- (8) Is the child objection exception established in this case?
- (9) If an exception or exceptions have been proved, how should the court exercise its discretion?
- (10) If the Hague Convention 1980 is not engaged, should the court order return under the inherent jurisdiction?

**Applicant case on issues**

33. It is submitted that Ms C has rights of custody under Portuguese law. She has been caring for the children since August 2020 before the father removed them secretly without the boys even saying goodbye to her. Immediately before the boys were removed, they were habitually resident in Portugal where they had lived. She was exercising rights of custody. She did not consent to the removal. In fact, the opposite. She wanted the children to remain with her so she could bring them up in Portugal as was her daughter's last wish. The Portuguese court and/or Ms C, in any event, had rights of custody as of 28 July 2021. Thus, from

that point, there was a wrongful retention in breach of those rights of custody. There are no Convention exceptions. Therefore, it is unnecessary for the court to consider the inherent jurisdiction. Should the court do so, the welfare interests of the children demand their return to Portugal.

**Respondent case on issues**

34. The father submitted that Ms C did not have rights of custody when he removed the children on 21 July 2021. Mr F was, as father, the sole surviving parent and in Portuguese law, he had exclusive rights of custody. All the rights in respect of the children's care were therefore vested in him. He was, thus, within his rights to take the children with him to England where he had been living. So as of 28 July, Ms C was not exercising her rights of custody. The children have become settled in England. Mr F will not return to Portugal. Therefore, for these reasons, there would be a grave risk of psychological harm because of the disruption to the lives of the boys and the ensuing separation from their father. The children would similarly be exposed to an intolerable situation. Claudio has attained sufficient age and maturity for the court to take into consideration his views. He objects to return. Any discretion should be exercised in favour of refusing a return. The children are settled here. They are living with their father and he has looked after them well. The children's welfare under the inherent jurisdiction requires that they remain in this country.

**§V. EVIDENCE**

35. My approach is to follow what the Court of Appeal held in *Re B (A Child) (Adequacy of Reasons)* [2022] EWCA Civ 407. McFarlane P said at [58] that a judgment is “not a summing-up in which every possibly relevant piece of evidence must be mentioned” (Proposition (4)). Thus, I focus on what is important. But the evidence was complex, conflicting and contentious and will benefit with recitation in its main features to make the court’s assessment intelligible. The sources of evidence include the bundle (313 pages), and an updating bundle (19 pages). As indicated, there were further documents about the Portuguese proceedings filed on the last afternoon. Parties provided several position statements and written submissions of great assistance. I read everything. Indeed, one of the reasons that I indicated that this judgment would be reserved for a short time was to give the court an opportunity to reflect carefully on these important matters and the detail of the evidence in front of it.
36. In terms of witnesses, I met the children. But the purpose was not to elicit evidence or to hear objections. It was simply so they could meet the decision-maker and have the court procedure explained to them. Though Mr Perkins objected to the court meeting the children, the court ruled that there should be a meeting. Mr Dodd was in favour of it. It is a matter of broad discretion. I judged that the children should feel included as they wished. However, in accordance with governing guidance, I made it clear that the meeting was not to gather evidence and there would be “no secrets” (see: President of the Family Division Guidance, April 2010, “It cannot be stressed too often that the child’s meeting with the judge is not for the purpose of gathering evidence.”). The necessary safeguards were in place. The Cafcass officer attended; a note was

taken and approved by the court and then circulated. The court is very grateful to the lawyers who assisted in this respect, Ms Jones and Ms Gaunt.

37. There was a fundamental dispute between parties about what actually happened when Mr Pereira returned to Portugal at the end of June 2021. There was a dispute about what was agreed about the boys, whether Ms Silva had rights of custody and whether she was exercising them at the point of removal. I found it impossible to resolve these issues on the papers. I fully recognise that the court will “rarely”<sup>4</sup> direct oral evidence in (potential) Hague cases and that oral evidence is “very seldom ordered” (*C (Children) (Abduction: Article 13 (b))* [2018] EWCA Civ 2834 at [37], per Moylan LJ, citing *Re K (Abduction: Case Management)* [2011] 1 FLR 1268 at [13], per Thorpe LJ). Parties have no right to call witnesses. But the court has a discretion to permit or even order it (*Re K (Abduction: Child’s Objections)* [1995] 1 FLR 977). Indeed, in *Re K*, Thorpe LJ stated at [14] that:

“There are of course rare cases which demand the opportunity for the judge to hear from the parties on a narrow issue that is in contention. Classically oral evidence will be limited to those cases where the issue for the court is whether or not an agreement was reached between the parents sufficient to establish the defence of consent. “

---

<sup>4</sup> See, for example, Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings (2018) at §3.8: “The court will rarely make a direction for oral evidence to be given. Any party seeking such direction for oral evidence will need to demonstrate to the satisfaction of the court that oral evidence is necessary to assist the court to resolve the proceedings justly.”

I find that this case falls into that exceptional or “rare” category; its factual disputes are equivalent to those mentioned by Thorpe LJ: were there any rights of custody being exercised? Even if so, was there consent? I permitted limited oral evidence.

### **Sarah Gwynne**

38. Sarah Gwynne is a Cafcass officer and a family court advisor who is based in London with the High Court Cafcass Team. Her report is dated 23 May 2022. I have found it most helpful and am grateful to her for her hard work. She saw the children separately: Bruno, the youngest brother, for 35 to 40 minutes; Claudio, the older boy, longer, for an hour and a quarter. She said that they are lovely boys. They are well-behaved and respectful. I am bound to say I reached precisely the same conclusion.
39. The boys were clear. She said they wanted to stay in their father’s care. Claudio wanted to spend time with his mother’s family, but that was “if everyone was happy” and they treated his father “well”. The boys were very clear that they want to live where Mr F is living. Initially, they said they wanted to stay in England and then when Ms Gwynne asked them if Mr F returned to Portugal whether they would go back with him, they said yes. So their wishes, she judged, were very closely related to where Mr F was living.
40. When she was asked questions on behalf of Mr F, she said that the decision that any summary return was not in the interests of the boys was “difficult”. Her recommendation was that they should not return so long as the children could keep a relationship with the family in Portugal. The children had been in

England for ten months. They might have spoken differently, she thought, about the grandmother ten months ago, but there has been that period of separation. However, Claudio was able to say that Ms C had played a role in their lives, and Ms Gwynne's judgment what was that Ms C had played a big part in his life. These children, she said, had already had to cope with a substantial amount of upheaval. So it would impact them if there was a further change now, that is by returning to Portugal.

### **Ms C**

41. The next witness was Ms C. Ms C lives in Portugal and she has lived at her present address for three years. She provided three documents to the court - two statements, and a schedule - and said that the boys had lived with her from August 2020 until their removal against her wishes in July 2021. During that period, Mr F lived in England. Also, during that period, there was no discussion with the father about where the boys would live and who should look after them, and where they should go to school. Mr F left the children and they stayed with her and she never discussed with him or he never sought to discuss with her any of these important matters. He visited Portugal in October 2021 when people realised how ill her daughter Edite was. When he visited again, however, he did not discuss the arrangements for the boys.
42. She said that she and her daughter had a very good relationship. In October 2021, Ms C was the one who was, as she put it, "always by her daughter's side". Edite was admitted to hospital on 11 September and she came out about a week later. After she left hospital, she asked Ms C not to allow the children to leave

Portugal because she knew that if the father took the children with him, he would not allow Ms C to see the children again.

43. While Edite was increasingly unwell, it was Ms C who had the day-to-day care for the boys. She said she was glad to do it because she was their grandmother. She had always cared for the children since they were born and it is her obligation as their grandmother to look after the grandchildren, and equally, while her daughter was still alive, to look after her daughter. She did so. She said her daughter asked her:

“If anything happens, please, mum, look after the children.

Please don't let the children leave Portugal.”

44. Edite said that on 26 June 2021. That was the day before she died. They had, however, discussed it before then countless times as Ms C knew her daughter was very unwell. So when Edite died, Mr F was told of her death on the same day, that is 27 June. After that, he did not say that the boys should not continue to be cared for by Ms C. So she simply continued looking after the boys as had been happening in accordance with her daughter's wishes.
45. When Mr F did come to Portugal, there was a meeting. That was on 14 July. At the meeting, Mr F and Ms C both had their lawyers there. An agreement was reached. It was that the boys should spend three days with Ms C and then three days with Mr F, but the agreement was not in writing because the lawyers were saying that it was not worth it because they, that is the lawyers, should trust each other's words about what was agreed. During the meeting, both Mr F and his solicitor “showed an interest” in removing the boys from Portugal. Ms C was asked the question, “Did anyone actually suggest that the boys would actually



be removed from Portugal?” She said Mr F and his lawyer showed an interest in removing them, but nobody said they would *actually* remove the children from Portugal. She said if she believed it was a risk he would take the children out of Portugal, she would have spoken with her solicitors about getting an injunction sooner.

46. The boys had identity documents and Mr F wanted to get them. He said that was because the boys needed to have identity cards for a wedding that was going to take place that weekend and they needed to be tested for Covid. This was a message Mr F sent after the 14 July meeting via a telephone call. His solicitor kept insisting that they hand over the identity cards. For the three days that the boys were with Mr F, her solicitor had the identity cards, but they were never actually given to Ms C. The meeting on 14 July was about 45 minutes to 60 minutes and it was attended also by her brother, the boys’ uncle, Pepe.
47. On 14 July, Mr F’s solicitor told him to take the boys to see their grandmother and they came for about an hour on the 14<sup>th</sup>. They actually returned to her on the 17<sup>th</sup> and then she returned them on the morning of the 19<sup>th</sup>. The boys went to their father with only a rucksack and a tracksuit and their tablet (devices). She is not sure if they took their favourite soft toys. She thought they did, but cannot be sure. Therefore, when she last saw them on that day in July 2021, her relationship with the boys was “so good”, as she put it, it was a loving relationship. Bruno was asking her for kisses and hugs, and he was always saying to her, “Give me a kiss. Give me a hug.” She had no secrets from them and so Claudio spoke to her and said they were going on holiday for three days to the Algarve. He said they were taking a plane there. She presumed that was

why the boys needed identification documents. However, she never thought that Mr F would take them out of the UK. She believed at the end of the holiday in the Algarve the boys would come back and simply resume living with her. They were registered at the school they had previously attended, and the school registration named her house as their home address.

48. When she was asked questions on behalf of Mr F, she said that she had solicitors with her at the meeting on 14 July because “Daniel”, that is what she called Mr F, is a person of “two words”. That means he is not reliable. She had not spoken to him since October 2021 because he had mistreated her daughter. When she went to the meeting, she wanted to keep the children with her in Portugal. Even though he was their father, she was the one who had raised the children and they had always lived with her. It was put to her that at the meeting the agreement was that they would spend three days with each of them as a temporary agreement and she agreed that that was the case. However, it was then put to her that it was only going to be a temporary agreement while he stayed in Portugal. In other words, it would not be the case when he left. She said:

“Yes, but nobody ever said he would be leaving and taking the children with him. The children were supposed to stay with me. I always thought that the children would stay and I would raise them, and Mr F knows I have treated them very well.”

49. It was put to her that in the meeting, he said he would take the children back to England and she said:

“No, he said he wanted to take the children, but he did not say he was going to take the children.”

She did not want him to take the children as not only was she the one who raised them, it was her daughter's wish that they stayed in Portugal with her.

50. She was asked how important the role of a father is and she said:

“I don't know, but I believe that the role of the mother is more important. The children do not have a mother. They have a grandmother but, of course, the role of the father is also important.”

51. She was asked about what was actually said at the meeting and she said she wanted the children to stay with her and she said at the meeting itself:

“Don't take the children away.”

She said that she would stay with the children.

52. She was asked, “Well, why was it then that you agreed to share time three days each with Mr F in Portugal?” and she said:

“Because this was agreed with the solicitors until things were resolved. That was until a court in Portugal reached a decision about the residency of the children, but the children's residency was in Portugal. I never thought he would take the children away without telling anyone.”

53. She was asked, “Do you remember him saying he was going to take the children back to England?” and her answer was:

“No, he’s lying. He said he was thinking of it. That was all. Not that he would do it.”

She says there is a “long distance”, in other words a big difference, between saying he has an interest in taking them away to actually taking them away and, in particular, without telling anybody that he was going to do it. It was put to her, “You are the person who is lying about this” and she said:

“I did not want to reach the stage of having to call Daniel a liar, but he is not telling the truth.”

54. It was put to her that it was discussed at the meeting that as he was the sole surviving parent, he was the only person with legal responsibility for the children and she said “no”. She was sure that that did not happen. She always expected them to live with her.
55. On the evening of the 18<sup>th</sup>, which was a Sunday, she was told by one of the boys that they were going on holiday with their father to the Algarve but no solicitor or adult told her.
56. On the 19<sup>th</sup>, Daniel called or messaged Pepe to say he needed the identity cards to go to a wedding and he needed the boys to be tested for Covid. So Pepe got the identity documents from the solicitors and gave them to Mr F. It was put to her that Mr F had said he wanted the identity cards so he could go places with the children, public facilities and restaurants, and had said nothing to do with a holiday in the Algarve. Her answer to that was:

“I can only say what the children said to me.”

57. She was asked questions by the court and said:

“If he had said to me, as he claims, that he was going to take the boys from England, I would have asked my solicitor to start an injunction as soon as possible because I wanted to respect my daughter’s wishes that she had asked me so much for. They were that I should be the one to raise the children and not to let them leave Portugal.”

58. She said that every day the children spent time with their father they would sleep at her house, then from 12 July they would sleep at their father’s. He was living at his aunt’s house, but the children did not actually want to spend time sleeping with their father in that way.

**Mr F**

59. The last witness was Mr Daniel F. He provided a statement on 11 May 2022 at p.199 of the bundle. Right at the outset of the evidence, he said there was an issue about the extent to which he could adopt his statement because there were inaccuracies and errors in it. Whilst his counsel Mr Dodd believed there was one correction which was at para.15, Mr F stated there were other things that were not right. So the court gave him permission, with the assistance of the interpreter, to go through the statement. I judged it the most expeditious way to get to the bottom of what, in fact, he said was wrong in his statement. The court adopted that procedure even though he had begun his evidence because time was very limited. He referred to the last two sentences of para.15 which were:

“I agreed to attend the second meeting. This did not go ahead as despite me attending the location requested, no maternal family members attended.”

That that was incorrect, that the content is not truthful, and he said that there might be some misunderstanding with the translation.

60. He also pointed out that there was an issue with para.16. That was with respect to the Portuguese solicitor arranging for the children to be returned to his care and to secure the identification documents on behalf of the children. He said in his statement at para.43 this:

“I am reluctant to say that I would travel back to Portugal as I do not in any way consider this to be in the best interests of the children. I believe that such an order would cause them significant emotional harm. I have no accommodation in Portugal. My stepmother does reside in Portugal. I would be able to stay with her for a few days but that would certainly not be a long-term solution. I would need to seek rental accommodation both for myself and the children. I am currently in receipt of Universal Credit. I am not employed. I do not have the funds to secure such accommodation.”

61. At p.198 of the bundle, his statement says:

“Before August 2020, Edite was already ill. There were medical appointments, but we were never told she was suffering from cancer.”

He said:

“Me and my wife were working together at a nursery/care home. She was a chef. I was a care assistant. I started seeing her losing weight. We sat down and asked for her family to support her in Portugal. I returned to the United Kingdom after booking her a hospital appointment in Portugal, but I do not know what the issue with her was. We reached an agreement which the maternal family knew which was for her to recover and for the children to return to the United Kingdom where we had our life. I went to Portugal after her death. There was a meeting on 30 June. It was attended by my niece and also by Pepe, her brother, and also Pepe’s solicitor and myself. At that meeting on 30 June, I said what I wanted to happen to the children, which was to keep the same deal I had with my wife which was to return the children with me to the United Kingdom. At that meeting, I did not mention any dates. I felt intimidated as they mentioned some documents which were already signed in court, a document that had already been signed by my wife. There was then a second meeting on 14 July. At this meeting, Ms C was present. I made it clear that my intention was to bring the children to the United Kingdom as had been agreed with my wife and we agreed that in Portugal, we would spend three days with each of the children. I did not say that I would be taking the children to England because during that period I was in Portugal, I felt they were keeping the children from spending time with me.”

62. He was asked about a wedding in the Algarve and he said:

“Yes, there was a wedding but it was in the city. It was my niece’s wedding. I have never said to anyone I was going to take the children to a wedding in the Algarve.”

63. The court asked him to clarify what his case was as Mr Dodd quite properly expressed that he had some professional difficulty about his instructions. When the court asked Mr F for that clarification, he said that the wedding was on a farm in a town, but not far away. It was not in the Algarve. The Algarve is quite a long distance away. He was asked, “Well, where was this wedding?” and he said:

“I don’t remember where it was.”

64. He was asked questions on behalf of Ms C. He said he did not know who was looking after his children between August and October 2020, but he said that his relationship with his wife was good and they were happy. But because of the illness, they had to decide things urgently. After his return to England in October 2020, he had no idea, he said, how often he spoke to her. He was pressed about this. It was put to him by Mr Perkins, “Is it true between October 2020 and June 2021 you did not speak to Edite?” and he said:

“We only had conversations via messaging.”

He was pressed again and then he accepted that he never spoke to her between leaving Portugal in October 2020 and her death in June 2021. He also accepted, when pressed, that he did not speak in that period at all to Ms C.



65. So before Edite died, he was asked about what the relationship was. Mr Perkins pressed him. The court had to intervene because he would not answer counsel's question which was a perfectly proper question for Mr Perkins to put. Eventually, he stated:

“I have to accept that the relationship was over and I feel the maternal family could have given me more support.”

66. He went on to say:

“If the court orders that the boys have to go back to Portugal, at this moment it is very difficult to make a decision about what I would do, whether I would go back as well.”

The court asked him what, in fact, his final position was and he said:

“I can't go back. Very respectfully, I can't go back to live in Portugal.”

67. He was asked about the simple choice. If the court did order a return, either the boys would live with their grandmother in Portugal or he would go back and the boys would live with him and his answer to what he would do in that situation is:

“I would have to speak to Ms C about this.”

He said he has lost all his trust in her.

68. It was put to him that Edite had made an application to the Portuguese court before she died asking the Portuguese judge to make decisions about the boys and he said:

“I don’t know what’s happening and I don’t have the documents. The person who was representing me as my solicitor did not make me aware of what was happening. The boys arrived to see me for contact in Portugal with a small rucksack and a tracksuit and little else. They might have had a tablet each.”

69. Ms C’s case was put to him, in terms, by Mr Perkins. It was put to him, “You have broken the agreement by abducting these children in secret by deceit,” and he said in response:

“I acted in accordance with their mother’s wishes.”

70. So that concludes the evidence from the three live witnesses.

## **§VI. ASSESSMENT OF WITNESSES**

### **Ms Gwynne**

71. I found Ms Gwynne to be a thoughtful and dedicated professional. She has given a lot of thought to what is best for the children. She had obviously agonised about whether to conclude that returning or remaining was best for these boys. It was a “close call” for her. She demonstrated, I am bound to say, a laudable degree of professional caution and humility in her judgements. I found her to be an impressive witness, but she was clearly conflicted about what

was the right decision in the best interests of the children, whether to return or stay in the United Kingdom. It was by a tight margin that she thought that they should stay.

**Ms C**

72. Ms C. Ms C attended remotely and with the assistance of an interpreter. I have no doubt that from August 2020 she looked after her daughter at home for most of the time as she tragically moved towards her death. As Edite deteriorated, she had to look after the children almost exclusively because her daughter could not assist. Recalling these very sad events, Ms C became very upset.
73. What is telling is how Mr F obtained the identity cards for the boys. He, of course, needed them to take the boys out of Portugal. They were handed over by Ms C's solicitors to Mr F's but why were the identity documents handed over? If Ms C is correct, this was deceit and subterfuge by him to facilitate the removal of the children. She was seeing the boys for approximately three days at a time and he was as well, but the children's home remained at her house as it had been for almost a year. Nearly all their possessions remained there, a point that Claudio made to me when we spoke at the meeting. No one disputes this.
74. She took the children to see Mr F as agreed on 19 July. They had very little, save for a rucksack and maybe a tablet, and maybe a soft toy. They left on 21 July. When they did so, the boys did not say goodbye to their grandmother. Claudio had told her, and I accept her evidence as truthful about this, that he understood that they were going on holiday for three days to the Algarve and were taking a plane. That obviously required identification documents, but I

accept that she never thought Mr F would take them to the United Kingdom. She was expecting, and the children were expecting, to come back to her after the holiday in the Algarve that Claudio had spoken about. In evidence, of course, at one point Mr F accepted that he was going to take the children on holiday, but I find that the children were expecting to return to Ms C's home at the end of this.

75. I find that the detail of her account was persuasive and indicates, looking at the evidence as a whole and in context (*Devon County Council*), that there was here a clear deception by Mr F. I will come to the rest of it shortly. However, it makes little sense that the boys would be taken out of Portugal without saying any goodbyes to their grandmother and the rest of the Portuguese family. They had lived with her for almost a year. I find it inherently improbable (*Re H; Re BR*). I also accept that if the father was going to remove the children to the United Kingdom, that Ms C would have sought an injunction to prevent it. She believed that she had rights of custody in the boys. She loves them and did not want to be separated from them not least because, and I accept her evidence on this, her daughter's dying wish repeatedly expressed to her was that the boys should stay in Portugal and be brought up by her. I find this fact supported by the proceedings Edite filed with the Portuguese Court (contemporaneous documentation capturing her wishes: *Onassis v Vergottis*). At no point prior to the removal on 21 July and indeed after it was there any communication to formalise the position or to document what had happened with the removal. There is nothing of that kind before the court.

76. Further, it appears that after his arrival in the United Kingdom, Mr F, as Mr Perkins graphically put it, “went to ground”. This is inconsistent with someone acting transparently in accordance with his rights and consistent with what had been agreed or at least stated clearly to Ms C. It was only when one member of the family saw some pictures on Facebook that Ms C knew that the children had been taken out of Portugal and were, in fact, in England. She said and the court accepts that she did not want to reach the stage of calling Mr F a liar, but she said he is not telling the truth about the meeting on 14 July.
77. Her credibility about her account of that meeting is strengthened by her accepting that in the meeting, Mr F was stating an intention that he wanted to take the children to the United Kingdom. She could, of course, have said he never mentioned anything like that, but her evidence was more nuanced and detailed and she accepted – reasonably - that he had an intention but he never said he was actually going to do it. That is credible. I find that her credibility about this supports and strengthens her credibility on other matters (*Arkhangelsky*). When a lie would have bolstered her case, she chose to tell the truth.
78. I strongly prefer her account of events of the 14 July meeting to his. Also, a holiday in the Algarve is something she was told about by Claudio. I accept that evidence - it is supported by the fact that Mr F accepted that he was taking the children for a holiday and his account is undermined by his changing stories and the inexplicable failure to say where his niece’s “wedding” actually was. It is plain that the children believed they were going to the Algarve and Claudio therefore told his grandmother about it. Again, the fact that this cover story was

only told to the children makes sense if it was part of a deceit because Mr F would not want his lawyers involved in all the lies. So it was a communication between Mr F and his son about the holiday. It worked. Ms C was deceived and identity documents were handed over and the boys were secretly removed to England.

**Mr F**

79. Mr F was very fidgety in the witness box and in constant motion, but his demeanour and superficial presentation on matters were of little significance to me as signposts to the truth (*Re M (Children)*). I am bound to say that I found Mr F to be an affable and respectful person.
80. With regard to 20 October, his statement states that his wife was “distant” from him when he made that single trip to Portugal, yet in evidence he denied it and said they had a good relationship. This is a clear and important inconsistency. In fact, it was plainly a lie. The reason he had to maintain this falsehood is because he claimed that in the meeting in Portugal on 30 June 2021, he gave them, that is the maternal family (including Pepe, the uncle) and not Ms C directly who was not at the meeting, what he called “his idea” which was to keep the same deal he had with his wife - to return to a life in the United Kingdom with the children. This simply could not have been true because the relationship with Edite, as he finally accepted when he was pressed, was over. Indeed, he accepted also that not only was the relationship at an end, but he did not speak to Edite *once* between October 2020 and her death at the end of June 2021. However, he would not answer questions directly whether he did, in fact, speak to her. It took the court asking him the question repeatedly but clearly

before he did agree what was obvious: that he had not spoken to his wife before she had died. How could they then be on good terms?

81. Thus, in key particulars, his evidence is inconsistent and improbable. He said, for example, that he did not know what was happening in Portugal with the proceedings, but his own legal team sent the documents three days before and they indicated that Edite had started proceedings in Portugal about the boys' future being decided by the Portuguese courts. It is inconceivable that his lawyers would not tell him about these vital matters. His evidence that his lawyer "probably did not make me aware of it" is simply implausible. This is the heart of this case. It was put on his behalf to Ms C that he made it plain at the 14 July meeting that he was going to take the children from Portugal. It is difficult to reconcile this with his concession documented in a recital to the order of Morgan J dated 11 April 2022 that:

"Moved the children from the Portuguese Republic in July 2021  
without the consent of the applicant." (B44)

82. His account of the Algarve trip and his reasons for seeking the children's travel documents were false and inconsistent. He denied mentioning the Algarve yet his son Claudio, I accept, did mention it to Ms C. I found that Mr F did not tell the truth about the events after his arrival in Portugal following his wife's death. He tried to create a false story suggesting Ms C knew that he was going to take the boys imminently out of Portugal. She did not. Instead, I have no doubt that he created a false cover story to get the identity documents which involved a fictitious trip to the Algarve. He told Claudio about the Algarve trip and that was the reason Claudio told his grandmother about it.

83. It was put to Ms C, and she gave evidence before Mr F, that he wanted the identity documents to take the children to restaurants and public facilities and that it was nothing to do with an Algarve holiday. This was contradicted by his oral testimony and what his son told Ms C. This thicket of lies was a pretext for his ghosting the children out of Portugal. I directed myself in *Lucas* terms and did not use any single lie as an expedient to reject the rest of Mr F's evidence. I judged it as a whole, in full context, looking at wide canvas of the evidence in the round and not in separate compartments (*Re U; Re T*).

## **§VII. SUBMISSIONS**

84. I have received extensive and immensely helpful written submissions from counsel. I have considered their nuanced arguments in great detail. That was one of the reasons I indicated that I would reserve in this case. My summary of the arguments focuses upon key submissions, but is not exhaustive and not intended to be.

85. **Issue 1, rights of custody.** Mr Perkins submitted that Ms C had accrued rights of custody by increasingly assuming the primary care of the children. That was from August 2020 until the death of her daughter at the end of June 2021. The father had delegated his care of his sons, or he had abandoned them by his relocation to the United Kingdom. The rights of Ms C were inchoate but meet the *Re K* test.

86. On behalf of Mr F, it is submitted the father, as the sole surviving parent, in accordance with Portuguese law (Art.1901-1, Portuguese Civil Code) is vested



with all parental responsibility. The father therefore was exercising his legitimate legal responsibility in relation to his children and was not breaching any court order.

87. It is accepted that Ms C clearly had been involved in the care of the children for a considerable period of time, but Ms C was not exercising primary care of the children. She was sharing responsibility for the children with the father who had a legally recognised right to determine where the children should live and how they should be brought up. The father had not abandoned the children. There was no legal or official recognition of the role of Ms C and Ms C does not therefore fall within the category or definition of an individual who has inchoate rights of custody over the children.
88. **On issue 2:** has Ms C proved that removal on 21 July 2021 was in breach of her rights of custody and wrongful for Art. 3 purposes? On her behalf, it is submitted that given that she had inchoate rights of custody, removal from Portugal was in breach of them and therefore was wrongful for Art. 3 purposes.
89. On behalf of Mr F, it is submitted that since Ms C had no rights of custody, there could be no wrongful removal and Art. 3 is not engaged.
90. **Issue 3, habitual residence:** it was agreed that immediately before the 21 July removal, the habitual residence of each of the children was in Portugal.
91. **Issue 4: was there a wrongful retention as of 28 July 2021 in breach of the rights of custody of (a) Ms C and/or (b) the Portuguese court?** On behalf of Ms C, it is submitted that both she and the Portuguese court had rights of custody as of 28 July 2021. She was exercising her rights of custody until Mr F removed

the children and Art. 3 is engaged on this basis even if the court does not find a wrongful removal as per issue 1.

92. On behalf of Mr F, it is submitted that as of 28 July, Ms C did not have any rights of custody. It is accepted that the Portuguese court itself “could have acknowledged rights of custody following the grandmother commencing proceed proceedings in Portugal” (see p.3 of Mr Dodd’s skeleton). In so far as the operation of Art. 3, as at 28 July, the retention of the children in the father’s care was not unlawful. Limb 2 of Art. 3 is not proved. Ms C was not exercising her rights of custody because the children were in England.
93. **Issue 5 is agreed:** the habitual residence of the children immediately before 28 July 2021 was in Portugal.
94. **Issue 6: psychological harm.** Since the burden of proof falls on the retaining parent I deal with submissions on behalf of Mr F first for each of their pleaded exceptions to the Convention. He submitted that there are two bases for psychological harm. First, he has now indicated that he will not return to Portugal. That would entail a separation from their father for the children and that would expose the children to the grave risk of psychological harm. Second, the children are settled in the United Kingdom. Leaving their home here, their friends and their school would inflict further psychological harm on them to the requisite degree to meet the exception test.
95. Further, Ms Gwynne reached the conclusion that the children had been through a lot and further disruption, such as relocation to Portugal, would adversely impact them. Also, Claudio reported to Ms Gwynne concerns about the circumstances of his mother’s death and the care arrangements during their

mother's illness. On behalf of Ms C, it is submitted that there is no psychological harm remotely near to the necessary threshold standard. The court should reject Mr F's statements about not returning. These are acts of "holding a gun to the court's head" as Mr Perkins put it. In any event, the children would return to the home of their grandmother. They had lived there for almost a year and that would be until the Portuguese court made the decisions that all parties agree the Portuguese court should make, both in the interim and in the longer term. There would not be a grave risk of psychological harm and any discretion, even if there existed any, should be exercised in favour of summary return.

96. **Issue 7: intolerability.** Mr F relies upon his submissions with respect to psychological harm as does Ms C.
97. **Issue 8: child objections, Art.13(2).** On behalf of Mr F, it is submitted that it is clear that Claudio objects. He has attained sufficient age and maturity for the court to take his views seriously. Thus, the discretionary gateway is open, and taking into account all the circumstances, the court should not order return.
98. Ms C submits that Claudio does not object as a question of fact. What he has expressed is, in fact, a preference. Therefore, the discretionary gateway is not open. Even if it was, the court should order summary return.
99. **Issue 9: discretion.** If any exception is proved, Mr F submits that all discretionary decisions should be made in favour of refusing return. Ms C argues exactly the opposite. Discretion should be exercised in favour of ordering summary return.

100. **Issue 10: inherent jurisdiction.** On behalf of Ms C, it is submitted that this does not arise because Art. 3 is engaged and no exceptions have been proved or established. However, if the court had to consider inherent jurisdiction, it would inevitably come down strongly in favour of determining that the children's welfare interests demanded a return to their home country which is Portugal.
101. On behalf of Mr F, it is submitted that the children are now settled in the United Kingdom. Their father will not return to Portugal. Their welfare demands that any discretion under the inherent jurisdiction is exercised to authorise them remaining in the United Kingdom. This submission is bolstered by Ms Gwynne's professional conclusion that the children remaining in England would be better overall in their welfare interests.

## **§VIII. DISCUSSION**

102. I now analyse each of the issues in order.

### **(1) Rights of custody**

103. I have indicated that I strongly prefer Ms C's evidence to Mr F's about the events following his return to Portugal. I have found that Mr F has lied about the nature of the meetings and subsequent arrangements about getting the travel documents. I have directed myself carefully about *Lucas* and fully weighed the axiom of Charles J in *A Local Authority v K, D and L*. What happened was that Mr F did not actually tell Ms C that he was going to *in fact* take the boys out of Portugal, let alone immediately. He invented a false story to get possession of the children's identification documents. This was deliberately. He wanted to

to remove the children clandestinely from their home in Portugal to the United Kingdom for good. It must be obvious from the above that Ms C did not consent to the boys leaving Portugal and, indeed, this possible exception or “defence” was not advanced ultimately at the final hearing.

104. The fact that Ms C almost immediately sought urgent relief from the Portuguese court supports her case. On 25 July, after removal on the 21<sup>st</sup>, she applied to the court for that urgent intervention. That indicates not only did she have rights of custody but that she was exercising them. Her rights of custody were inchoate but inchoate rights have been recognised by the court (see *In the Matter of K (A Child) (Northern Ireland)* [2014] UKSC 29 and the judgment of Lady Hale).
105. Inchoate rights arise in this case because Ms C was caring for the boys for almost a year in Portugal. She was also looking after her own daughter, their mother, who was dying of cancer. The amount of caring of the boys that Edite could have provided her sons must have been limited indeed. I carefully examine the rubric for inchoate rights as enunciated by Lady Hale in *Re K* from [59] onwards (1) Ms C was undertaking parental responsibility towards the children; (2) she was the primary carer for the children for months; (3) Edite was dying and was too ill to exercise any effective parental responsibility; (4) Mr F was exercising none; (5) in that void, Ms C stepped forward.
106. Edite, as she got increasingly ill, delegated her parental responsibility to her mother. I find that Mr F effectively abandoned the children. He did not visit them once between August 2020 and the end of June 2021 save for a week or so in October. He lied about the nature of his relationship with Edite at the time of that visit. He spoke to his sons on WhatsApp from time to time for two

minutes, but he did not speak to his wife or to Ms C who was looking after his sons. Eventually, after much pressing, he accepted all of this, but he was trying to present a different and deliberately false picture to the court. The purpose of it was to shore up his claim that Ms C had agreed with him to take the children to England. She had not. He was also trying to suggest that she was not exercising her rights of custody at the time of the removal. She was. She issued proceedings in Portugal promptly and I accept Ms C's evidence about her daughter's dying wishes.

107. All this points to the fact that Mr F was not telling the truth. I have indicated that I have directed myself in accordance with *Lucas*. I have tried to consider if there is any alternative explanation for his untruths. He does not accept that he has not told the truth. The only reason that he would have told these lies is to conceal what was in fact happening and his being fearful of the true picture emerging.

108. With the limited contact he had with Edite and her mother, Mr F could have received precious little information about his sons, about their lives, about their progress at school, their concerns, their troubles, their dreams. I find that he had delegated his care of the children and had affectively abandoned his sons. He did not have to know how the proportion of care was provided by his wife and his mother-in-law and, in fact, it is quite clear that this was shifting constantly in the direction of Ms C, but that matters not for the *Re K* rubric. I accept Ms C's evidence that she had to undertake the majority of the childcare and especially as Edite's death tragically approached. I also accept Ms C's evidence that Edite wanted her mother to look after the children and for the boys to stay

in Portugal. This is all supported by Edite issuing proceedings in Portugal before her death (*Onassis* contemporaneity). It is supported by the evidence of Ms C whose testimony I found convincing and truthful and by Ms C urgently issuing proceedings in Portugal once the boys were removed, without her consent, against her wishes, and against the wishes of their mother.

109. Lady Hale clarified that there must be some form of official recognition of the person claiming inchoate rights of custody. Here, the children were living at Ms C's home. They were registered with a school there and with the Portuguese authorities. An example given in *Re K* itself is the fact that the grandparents there were receiving benefits in respect of the child. That shows it is not necessary for there to be a court finding of parental responsibility for inchoate rights to be found by the court.

110. It would be extraordinary, given Ms C's consistent and comprehensive caring for the children in those heartbreakingly difficult times, if she did not accrue rights of custody. These children were not abandoned by her. They were not destitute. Instead, they lived safely under her roof. They were fed and tended to by her and went to the school in Portugal, at which they were registered to her house.

111. Last, there must be every reason to believe that the status quo prior to the wrongful removal would be restored. That is precisely what happened. On 28 July 2021, the Portuguese court granted temporary residence to Ms C in recognition of the previous life circumstances of the children. The question of rights of custody should ultimately be a question of law for the home jurisdiction. On this point, I have received no expert evidence from Portugal,

no report from a Portuguese legal authority that is definitive. No witness has been advanced or even sought to be called. However, these are summary proceedings and this is not necessary (*T v T and Ors (Inchoate Rights of Custody)* [2021] EWHC 3231 (Fam) at [44], per MacDonald J).

112. Therefore, applying the test in *Re K* carefully, I have sufficient evidence before me to conclude beyond doubt, in my judgment, but, in any event, to the civil standard, that at the point of the children's removal from Portugal, Ms C did have rights of custody. In reaching this conclusion, I carefully consider Mr F's claim that once he returned, he was sharing care with Ms C and thus she could not have rights of custody. However, I find that this is a distortion of what actually happened.

113. The home of the children remained with Ms C. All their possessions were at her house. They left her home for the last time on 19 July with virtually nothing, fully expecting to return to it and continue living there. The agreement with the children is they would visit and stay with their father for three days at a time but then they would return to their home which was Ms C's house. That is very different to caring for the children to the extent of sharing rights of custody. This is particularly so given the impermanency of Mr F's stay in Portugal, the fact that his accommodation was not settled, and that he had no job or income in Portugal. This was very far, I find, from Ms C giving up her rights of custody or having them extinguished.

114. What happened was that a sensible solution was pragmatically reached about the children seeing their newly arrived father. It was a reasonable compromise made by Ms C in the best interests of the children. They had just lost their



mother to cancer. This reasonableness was then exploited covertly by Mr F to wrongfully remove the children. I reject the submission that Ms C either did not have rights of custody or lost them once the boys began spending time with their father. It is more complex than that simplistic characterisation because it ignores two things. First, the extensive history of Ms C's care of the children and the fact it was ongoing. Second, the deceit and subterfuge Mr F engaged in to get the children out of Portugal. That was because he knew that taking them to England would be against the wishes and the rights of custody of Ms C, but he proceeded to do it anyway.

**(2) Breach (of rights of custody)**

115. Has Ms C proved that removal on 21 July 2021 was in breach of the rights of custody and wrongful for Art. 3 purposes? In *T v T*, MacDonald J decided that an absentee parent, having delegated rights of custody, simply cannot remove a child as a consequence of, as the judge put it, “a sudden reassertion by the father of their official rights” (see [38]). That would be a breach of the inchoate rights of custody. In this case, I find that the actions of Mr F are conceptually equivalent to those of the parent in the case of *T v T*. They are in breach of Ms C's rights of custody. Since Ms C has proved it was a wrongful removal, the burden of proof falls upon Mr F to prove an exception.
116. The Art.13(1)(a) exceptions are threefold. She has not acquiesced in the previous court order in front of Morgan J. Mr F agreed a recital that he did not rely upon consent. It is unclear what his stance towards whether Ms C was not exercising her rights of custody. It seems to be that he is suggesting her rights of custody, if any, were extinguished when he returned. That was because of

his priority of parental responsibility, he submits. In issue 1, the court has rejected the submission. Thus, I find that Ms C's rights of custody were, in fact, breached and Art. 3 is engaged.

**(3) Habitual residence (21 July 2021)**

117. It is agreed that immediately before 21 July, the habitual residence of the children was Portugal.

**(4) Wrongful retention**

118. It strikes me that there are three fundamental problems with Mr F's submissions in respect of wrongful retention. First, the second line of Art. 3 expressly states that rights of custody would have been exercised but for the removal. Here, I find that Ms C would undoubtedly have exercised her inchoate rights of custody but for the wrongful removal. Second, Mr Dodd realistically accepts that the Portuguese court "could have acquired" rights of custody. I find that it did. I received no submissions about how the rights of custody the Portuguese court acquired were rendered inapplicable or extinguished especially as the court in Portugal has continued to progress proceedings even though the children have been in the United Kingdom. If the argument is that they were not being exercised, the same point applies. The court in Portugal would have exercised its vested rights of custody but for the wrongful removal. I find, therefore, that both Ms C and the Portuguese court had rights of custody as at 28 July 2021. They would have been exercised but for the removal and then wrongful retention.

119. The third problem is the use of the word "unlawful". On behalf of Mr F, it introduces an unnecessary and irrelevant consideration. The Convention

question is whether the retention was wrongful: that is in breach of rights of custody. There were rights of custody possessed by both Ms C and the Portuguese court. My conclusion, therefore, is that the retention of the children in England was a wrongful retention for the purposes of Art. 3 as of 28 July 2021.

**(5) Habitual residence (28 July 2021)**

120. It is accepted that the children were habitually resident in Portugal immediately before 28 July 2021.

**(6) Psychological harm**

121. The two grounds of psychological harm advanced are (1) separation from Mr F; (2) leaving the United Kingdom where the children have settled. As to (1), it is submitted on his behalf that this is the “real issue” with regard to harm. I find Mr F’s evidence about whether he would return to Portugal improbable in *Re H* terms. I make it plain that the court cannot order his return, but it can order the return of his children. He was asked as directly as it was possible to ask him what he would do if such a return order were made by the court. His written evidence, as Mr Dodd tactfully put it on his behalf, “was not the clearest”. In fact, he equivocated in both written and oral testimony. His stance was not convincing. Finally, he stated on oath that:

“I can’t do that, respectfully. I can’t live in Portugal. I can’t go back and live in Portugal.”

122. In the written submission filed on his behalf, his position was said to have firmed up. I quote from Mr Dodd’s skeleton:

“The father will not return to Portugal whether for a short or long period of time to live with the children. This somewhat stark position would clearly therefore engender a separation of the children from their father.”

It is submitted by Mr Perkins that this is sheer “brinkmanship”.

123. I am mindful what Coulson LJ stated in *Re A-M (A Child: 1980 Hague Convention)* [2021] EWCA Civ 998 at [32]:

“Although the process of reasoning will start with an assumption that the taking parent’s allegations are true, *that is not the end of the process*. As part of its overall evaluation, the court will consider the ‘nature, detail and substance’ of those allegations, in order to determine the maximum level of risk to the child...”

(emphasis provided)

124. In a footnote, the judge observes that the phrase “nature, detail, and substance” comes from the “Guide to Good Practice” under the Convention of 25 October 1980 and the Civil Aspects of International Child Abduction, Part 6, Art.13(1)(b) at §40.
125. I find that I cannot take Mr F’s increasingly adamant protestations about his not returning to Portugal at face value. I found his position unconvincing and internally inconsistent. The credibility of his answers is further weakened by the lies he told the court about the meeting in Portugal and about the clandestine nature of the removal of the children (*Arkhangelsky*). It is part of a picture of deceit. These have been highly strategic actions and lies and are directed

towards achieving his goal of keeping the children in the United Kingdom no matter what.

126. I have full regard to *Lucas* and what Charles J said about point (a) and point (b), but I find that there is a course of conduct here. There is a unity and clear underlying theme in Mr F's subterfuge and deceit. I find his increasingly strident comments about refusing return of apiece with his grand overall plan. They are devised as a further obstacle put in front of the court to obstruct the return of these children.

127. Ultimately, however, he loves his sons. He said so. I am certain of it. The idea that he would not return to the land of his birth and their home country for the relatively short time it will now take for the already well-advanced Portuguese proceedings to be resolved in one direction or the other is just not credible. I conclude that from his equivocations at court when asked this direct question that, at the end of the day, the strength of his bond with his sons is likely to prevail. Also, I note what he told Ms Gwynne, in terms, noted in her report at para.47:

“Although he says he has no financial means to fund accommodation or flights for him and the children, nevertheless, Mr F expresses a degree of willingness to return if ordered to do so by the court.”

128. I observe, of course, that this court cannot order his return, but certainly the children's. If he were to return, and that would be his choice, he could, as he indicated, stay with relatives, whether it is stepmother or an aunt, in Portugal at least on a temporary basis initially. He did stay in Portugal, of course, for

several weeks after his wife's death in the summer of 2021. The boys could stay and sleep at Ms C's house which was their home for almost a year before Mr F secretly removed them. The children can spend a great deal of time with him in Portugal until the Portuguese court makes its decision about arrangements for them. Thus, I find there is a strong chance that if a return order were made, Mr F would, in fact, accompany the children back to Portugal.

129. I emphasise that it is not for this court to dictate arrangements in Portugal, but it can and must do its best to anticipate what the position on the ground would be in order to assess the impact upon the children. If, as is likely, Mr F does return with his sons, the separation basis of psychological harm falls away completely. I find that this is very likely what will happen if a return order were made in respect of the children.

130. However, there is a second basis. The children have settled in the United Kingdom to a significant extent and have received positive school reports which Ms Gwynne states is a reflection of the good parenting that Mr F has provided. Does the combination of the uprooting effect broadly construed, along with any separation from Mr F if he refuses to accompany the children back to Portugal, amount to a grave risk of psychological harm? I find that Mr F has not proved this on the balance of probabilities. While the boys would prefer to stay with him, I do not find that their returning to their home country when they are native speakers, to the home they have lived in with their grandmother for almost a year before their covert removal from Portugal, and where they will be cared for again by their grandmother who loves them does expose the children to the grave risk of psychological harm. The risk must be grave. There is, it is

recognised by the courts, a connection between the gravity of the risk and seriousness of the adverse impact (see below).

131. Even if the father did refuse to return to Portugal with them, they could speak to him on the phone and see him by via video several times a week as they would wish and while Mr F may not return to live in Portugal until the Portuguese court determined in the case, he might return for a few days at least from time to time to see his sons. There are cheap flights available to Portugal as there are too many other European destinations if booked with budget airlines in advance. The court can certainly take judicial notice of that. It is just a matter of common knowledge and common sense. Subject to mitigating the risk of further abduction, there is no reason why he could not have an opportunity in Portugal to be with his sons and to share fun times with them. However, the ultimate arrangements, I emphasise, are a matter for the Portuguese court.

132. What is significant is that the adjective “grave” attaches to the risk, but the term “grave risk of harm” must be taken as a whole. What the Convention requires is a level of seriousness of impact on the child that would amount to an intolerable situation or the equivalent level of psychological harm. Indeed, it would be puzzling if there were different standards. There are not. That is precisely why the words “or otherwise” are used in the construction of the Article:

“...or otherwise places the children in an intolerable situation.”

That implies an equivalence. See the Guide at para.34 where the Canadian authority of *Thomson v Thomson* [1994] 3 SCR 551 (20 October 1994) of the Supreme Court of Canada is noted. There, the court in Canada held that physical

or psychological harm contemplated by the first clause of Art.13(1)(b) is harm to a degree that amounts to an intolerable situation.

133. The Guide also cites *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, particularly at [33], per Lady Hale and Lord Wilson, delivering the judgment of the court:

“...the risk to the child must be ‘grave’. It is not enough, as it is in other contexts such as asylum, that the risk be ‘real’. It must have reached such a level of seriousness as to be characterised as ‘grave’. Although ‘grave’ characterises the risk rather than the harm, there is in ordinary language a link between the two...”

134. I take into account at all points Ms Gwynne’s observation that the children have endured a lot and returning to Portugal would impact them. That is inescapable. The question is the level of impact and to what extent it can be mitigated. There is no evidence before me that they could not cope. As Ms Gwynne stated herself, they could “slot back in” in life in Portugal. I have no doubt that they would get support from their grandmother and their Portuguese family and, indeed, the Portuguese authorities. The principle of comity makes that plain. This court must – and can - rely upon the authorities in Portugal.

135. Ms Gwynne noted that Claudio expressed concerns about the circumstances of his mother’s death and the care arrangements in Portugal. None of these amount to serious concerns about the children receiving the necessary support in Portugal. I take into account Ms Gwynne’s conclusion that, on balance, it was not in the interests of the children to return to Portugal. She found it a very difficult decision to reach. It was obvious that, in her mind, it could have gone



either way. In cross-examination she stated that this conclusion was on the basis that the children would continue to have a relationship with their Portuguese family. This is far from certain.

136. I have little confidence if the children stayed in the United Kingdom and the spotlight from these proceedings moved on that contact would be maintained sufficiently. It may well dwindle again. I am not convinced, as Mr Dodd submitted, that Mr F is committed to ensuring contact will take place in the future. His track record speaks for itself. It is the best way to judge this. He simply did not promote contact for months. No arrangements for contact with the Portuguese family were made until March 2022 when the UK was seized and made directions. Ms Gwynne found that the lack of goodbyes before leaving Portugal and the lack of contact with the Portuguese family would have caused, as she put it, “emotional upheaval” in the children and also a “substantial emotional impact”. That harm has exclusively been Mr F’s doing. The court has not bound by Ms Gwynne’s conclusion. But I weigh it, while recognising that it is not determinative. She said, in terms, that it was “finely balanced”. I find that Mr F has not proved that the risk of psychological harm comes anywhere near to the requisite threshold in the Convention. I thus find that the Art.13(1)(b) test is not proved on this basis. Nevertheless, I go on to consider the question of discretion and explain what I would have found should the discretionary gateway have been opened. It has not been.

137. In considering discretion, there is a second aspect to Mr F’s stance that I must deal with. That is the issue of principle and where it fits into the Convention scheme. What should be the approach of the court when an abducting and

wrongfully retaining parent refuses to return with the children and thus argues they will be caused psychological harm as a result of *that* parental refusal? It is a problem that has arisen in many previous cases. The courts in this jurisdiction have grappled with the problem, but I begin by referring back to the Hague Guide to Good Practice. This document has been approved by the Court of Appeal (*Re C (A Child) (Abduction: Article 13(b))* [2021] EWCA Civ 1354, per Moylan LJ, quoting Guide with approval).

138. In respect of a refusal to return, the Guide says at para.72, headed “Unequivocal refusal to return”:

“In some situations, the taking parent unequivocally asserts that they will not go back to the State of the habitual residence, and that the child’s separation from the taking parent, if returned, is inevitable. In such cases, even though the taking parent’s return with the child would in most cases protect the child from the grave risk, any efforts to introduce measures of protection or arrangements to facilitate the return of the parent may prove to be ineffectual since the court cannot, in general, force the parent to go back. It needs to be emphasised that, as a rule, the parent should not - through the wrongful removal or retention of the child - be allowed to create a situation that is potentially harmful to the child, and then rely on it to establish the existence of a grave risk to the child.”

139. In support of that commentary, the Guide cites a case from the court in Australia, *Director General, Department of Community Services Central Authority v JC*

*and JC and TC*, 11 July 1996 [INCADAT Reference: HC/E/AU 68]. The Guide also quotes an Argentinian case which is *G, PCcH, SM*, heard on 22 August 2012 by the Corte Suprema de Justicia de la Nación (Argentina) [INCADAT Reference: HC/E/AR 1315]. In that case, the court held that allowing for the return mechanism to be deactivated automatically on the sole account of the refusal of the taking parent to return would subject the system designed by the international community to the unilateral will of the defendant.

140. The point made in Australia and Argentina arises with sharp focus in this case. Mr F has wrongly removed the children. Can he then, having engineered that situation, rely on his stubborn refusal to return to his home country as a ground of grave risk of psychological harm to the children? A moment's thought indicates the perils and pitfalls condoning this. Of course, one must always look forward to the reality of what would happen when the children are returned, but there is a vital point of principle as well. This nettle has been grasped by the courts in this jurisdiction as well as intercontinentally.
141. The Court of Appeal gave a judgment in *C v C* [1989] 1 WLR 654 where Butler-Sloss LJ (as she then was) said:

“The grave risk of harm arises not from the return of the child but the refusal of the mother to accompany him. The Convention does not require the court in this country to consider the welfare of the child as paramount but only to be satisfied as to the grave risk of harm. Is a parent to create a psychological situation and then rely upon it? If the grave risk of psychological harm to a child is to be inflicted by conduct of the parent that abducted

him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and horses through the Convention at least in respect of applications relating to young children. I, for my part, cannot believe that this is in the interests of international relations, nor should the mother, by her own actions, succeed in preventing the return of a child who should be living in his own country and denying contact with his other parent.”

142. In *S v B & Y (Abduction: Human Rights)* [2005] EWHC 733 (Fam), Potter J ordered the return of a child to New Zealand, stating at [49]:

“49. The principle that it would be wrong to allow the abducting parent to rely upon adverse conditions brought about by a situation which she has herself created by her own conduct is born of the proposition that it would drive a coach and horses through the 1985 Act if that were not accepted as the broad and instinctive approach to a defence raised under Article 13(b) of the Convention. However, it is not a principle articulated in the Convention or the Act and should not be applied to the effective exclusion of the very defence itself, which is in terms directed to the question of risk of harm to the child and not the wrongful conduct of the abducting parent...

50. No doubt, the reasoning underlying the provision of an Art.13(b) defence within the Convention is the desire of the Signatory States expressed in the preamble to the Convention...”

143. He then stated at [51]:

“51. That said however, Art.13(b) sets a high threshold, as the authorities have repeatedly made clear... Only where a case of grave risk is established on the basis of cogent evidence should it do otherwise...”

144. Finally, in the case of *AT v SS* [2015] EWHC 2703 (Fam), MacDonald J said at [64]:

“It would also in my judgment be wrong in this case to allow the mother to frustrate the aims of the Convention by relying on a situation which she herself has brought about. However, whilst it is vitally important that the court maintains fidelity to the principles and aims of the 1980 Convention, I make clear that the driving factor in my decision that in this case the defence under Art.13(b) is not made out is my conclusion that the level of distress and upset that will be caused to S by separation from his mother and placement in foster care in Holland does not meet the criteria for establishing that defence.”

145. I conclude from all this that if there were a grave risk of psychological harm to the children, notwithstanding the fact of a manufactured or engineered situation

of either the removing or retaining parent, the gateway to discretion is open. The source of risk cannot prevent the gateway from opening. That must be the case. However, during the discretionary evaluation, the court can and should take into account the conduct of the parent as one of the criteria in the balance. It can be rationally connected, I judge, to two more classical Convention principles. That is because if such flagrant and deliberate wrongful acts were completely ignored, the aforementioned “coach and horses”, would be driven through this international treaty. One simply has to ask: what would stop any removing and retaining parent from refusing to return? This is where the discretion and common sense of the court must surge to the fore. The court must look forward.

146. I take the concerns expressed by the Guide to Good Practice to mean not that the discretionary gateway cannot be opened in the case of a stubborn refusal to return. If there is a grave risk, the first limb of the test is met but it does not end there. Instead, I understand the Guide to mean that a powerful consideration in the discretionary evaluation must be how this situation has come about. It is not determinative. It does not automatically defeat the harm even if the conduct is wanton. However, it must be considered.

147. Mr Perkins, in his helpful and comprehensive closing submissions, stated:

“It would be wrong in the circumstances of this case to allow the father to rely upon a situation which he himself has brought about to frustrate the aims of the Hague Convention.”

148. The court cannot go as far as that. The father’s manoeuvrings in themselves are not an impediment to the gateway opening. But I do weigh in the discretionary

balance the conduct of Mr F and his obvious attempts to frustrate the policy and object of the Hague Convention 1980.

149. Looking at factors in the balancing exercise against return, the court must weigh the fact that Claudio, whose views the court must take into account as I will come to, has stated that he wants to stay in the United Kingdom. I find that return would have an adverse psychological impact on the children. There would be an impact on the children from being uprooted in England and their school here. Claudio is about to start a new school. There would be the impact of separation from their father if he refuses to return with them. But I do not consider it as creating a grave risk in Convention terms, as I have previously indicated. Yet even if it was, there are other factors that weigh against it. Therefore, in favour of return are the facts that the children would be returning to live to a home they know well and where they have lived for an extended period. They would live with a grandmother who loved them and has looked after them for that extended period and who had fought very hard to have them back in Portugal, where their mother wished for them to live and grow up. The children would be going back to friends they have in Portugal and although the court expressly told the children during the meeting with the judge that they should not provide evidence, almost immediately, Claudio could not help himself and stated that he missed his friends in Portugal - his "little friends" as he called them. It was a genuine and heartfelt comment. I have no doubt whatsoever that it is true and reflects his genuine wishes and feelings. But I keep it in proportion. It is simply one part of the picture. It does reassure the court that the situation on return to Portugal would not be as dire as Mr F would have the court believe.

150. For now, this court only has to contemplate the staying of the boys in Portugal until the Portuguese court has made its decisions. That this was the wish of their mother who issued proceedings in Portugal is something the court does take into account along with the fact that all parties agree it is for the Portuguese court to decide living and other arrangements for these children. I take into account also the fact that Mr F did not speak to his wife in the months before her death and the fact that, effectively, the relationship was over, as he accepted in the end.
151. I also take into account the policy objectives of the Convention in deterring child abduction and wrongful retentions. The assumption the Convention is based upon is that an abduction and wrongful retention is psychologically harmful if it is away from the country of habitual residence as it is here.
152. I conclude that these factors cumulatively significantly outweigh the psychological harm to the children and the factors in favour of their return. In coming to that conclusion, I have in mind what Mostyn J said in *B v B* [2014] EWHC 1804 (Fam) at [3]:

“...It is important to understand what the Convention does not do. The Convention does not order a child who has been removed in the circumstances I have described to live with anybody. The Convention does not provide that the parent who is left behind should, on the return of the child, have contact or access in any particular way. The Convention does not provide that, when an order for return to the child's homeland is made, the child should stay there indefinitely. All the Convention provides is that the child should be returned for the specific



purpose and limited period to enable the court of her homeland to decide on her long-term future. That is all it decides.”

153. He continues at [4]:

“...It must be a sound, reasoned and mature objection to being returned to her homeland for the sole limited purpose of enabling the court of that country to determine her long-term future...”

154. I proceed on the basis of comity. This court has no reason to doubt the competence of the Portuguese court to make the appropriate interim and final safeguarding decisions whatever they may be. That is a matter that I am certain can best be assessed in Portugal when these two children are in Portugal and their welfare can be properly assessed. Thus, I find that the psychological harm would be very limited. Therefore, I would, if a discretionary gateway were triggered, exercise by discretion to order return. But common sense and reality must also play a part. In *Re Y (Children)* [2018] EWCA Civ 1208, McFarlane LJ (as he then was) gave the judgment of the court. The court directed the child’s return but gave the mother “a further window”, as it put it, to choose whether to go back to Canada with the children after summary return was ordered.

155. Here, if a summary return were ordered, the other exceptions having failed, Mr F should be given a window to choose whether to return with his sons. The same applies if any exception or exceptions succeed and the factors favouring return outweigh those remaining. The dimensions of that window are clear. Given the fact that children are still at school, they should finish the English school term. There should not be a return until after the end of the English

school year. I will provide precise details should they become relevant, if all other exceptions fail. That period will be over a month; it should be the time for Mr F to reflect hard on whether he wishes to do his best for his sons and ensure they have a soft landing in their home country.

### **(7) Intolerability**

156. I can take this shortly. Both counsel dealt with psychological harm and intolerability together. Sometimes, these are distinct grounds of resistance as where, for example, there is alleged psychological impact on the retaining parent. That is not the case here. Thus, the above analysis of harm applies to intolerability. I would add one thing. As Lady Hale stated in *Re E (Children) (Child Abduction: Custody Appeal)* [2011] UKSC 27, the word “intolerable” is a strong word, but in the context of a child means:

“...a situation which this particular child in these particular circumstances should not be expected to tolerate...” (see [34])

Her Ladyship said:

“Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up.” (see [34])

157. I would add the word “disappointment”. The children will be disappointed to some extent if they have to return to Portugal, but there will be compensations too. They will be able to see old friends and be educated in their first language and live in their old home. None of this comes close to the level of intolerability required by the Convention. This exception is not proved by Mr F.

## **(8) Child objections**

158. It is common ground that Bruno is too young for his wishes and feelings to be taken into account. Therefore, I focus on Claudio. Having said that, the jurisprudence indicates that if the court makes a decision about one child, the court must look at the situation of all the children in the round (*WF v RJ* [2010] EWHC 2909 (Fam), per Baker J (as he then was)). I will adopt this course if necessary. I structured my analysis by having at the forefront of my mind the judgment of Black LJ (as then was) in *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26, where she provided an authoritative exposition of the principles that could be drawn from the developing law around child objections (see especially [18]-[77]).
159. Whether a child objects is a question of fact. It is for the court to decide and involves a “straightforward and fairly robust examination” where “technicality of all sorts should be avoided” (*Re M* [69]). The court takes all the evidence into account, and I have invoked the axiom of Dame Elizabeth Butler-Sloss P (as then was) in *Re T* [2004] EWCA (Civ) 558 at [33], that evidence should not be “evaluated and assessed in separate compartments”. Ms Gwynne stated in her evidence, having spoken to Claudio in some detail, that she did not consider that he did “object” to a return to Portugal. Instead, it was a preference. I emphasise that it is for this court to decide whether objectively, and as a question of fact, there is an objection from Claudio. But Ms Gwynne’s assessment is a relevant factor. She was there; she spoke to him specifically about this question and could judge his strength of feeling. Her oral evidence accords with what she recorded in her report at para.33 that Claudio “prefers to live in England

with his father”. He would only “want” to return to Portugal if his father was to live there. She noted that Claudio does not object and that Claudio’s preference would be to live in England. The last observation of hers was in oral evidence.

160. I have no doubt that Claudio is conflicted about all of this. I find that his true preference is to be with Mr F - to be wherever his father is. This makes evident sense. Mr F has been the children’s primary caregiver for almost a year now and is their sole surviving parent. Claudio is bound to be strongly influenced by that. The court has found that if push came to shove, Mr F would most likely return to Portugal with his sons, although he cannot be compelled to do so by the court. However, I consider this exception on the basis that Mr F does not return. If so, Claudio’s preference would be to remain in the United Kingdom with his father.

161. Does that amount to an objection? The main intention of Art.13(2) was to draw a clear distinction between a child’s objections, as defined in the Article, and a child’s wishes as commonly expressed in a custody case. This is logical given that the Convention is not intended to be an instrument to resolve custody or welfare disputes. It follows, therefore, that the notion of objections under Art.13(2) is something more than a preference and is not coterminous with “wishes and feelings in a custody case”.

162. Following the judgment of Black LJ in *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26, the court must conduct a straightforward and robust examination of whether Claudio does actually object as a question of fact. It must also consider what

the objection is to. It must be to being returned to Portugal, not an objection to being returned to the care of a particular person. That also comes from *Re M*.

163. Claudio would prefer to be cared for by his father until the Portuguese court decides the case. He would prefer not to be returned to Portugal, but I do not find, to use the Convention language in Art.13(2), that Claudio does object to a return to Portugal. I do not accept the submission on behalf of Mr F that:

“If Claudio were to be sent to Portugal without his father, then he would object.”

Claudio’s position on the evidence, rather than speculation, is clear. He prefers to be with his father but he does not, as a question of fact, object to a return to Portugal itself.

164. Nevertheless, once more, I have gone on to consider carefully what the outcome would have been if I had found that his wishes and feelings did amount to an objection in Convention terms. A child’s objection is not a veto. A court can disregard it. In this case, I would. I would not regard it as sufficient in discretionary terms in the evidential balance, along with everything else, to require his stay in this country. The court should consider the other factors listed and identified by Black LJ in *Re M*.
165. Claudio is sufficiently mature for the court to take his views into consideration, but is still young. He is 11. This is not a 14 or 15-year-old child. That affects weight the court can reliably place on his views. However, I do not find that his views are particularly strong on this point, even if they did amount to an objection, which I have found that they do not. That is because Claudio can see

advantages to returning to Portugal and seeing his friends he has been missing. He explicitly brought that to the court's attention. Also, he gave his school in England a high 9 out of 10 but he still rated his school in Portugal highly at 7 out of 10. Indeed, he told Ms Gwynne that he wanted to spend time with his maternal family if everybody was happy and they treated his father well. Therefore, I do not have concerns about his welfare if his views are not followed by the court.

166. I find that both Ms C and the Portuguese court will well be able to ensure a safe landing and general welfare of the children. As Ms Gwynne noted, Claudio said Ms C played a role in his life and Ms Gwynne's judgment was that Ms C was important to the lives of the children.

167. If there is no return to Portugal, I have serious concerns about the limited level of contact the children would have with Ms C and the Portuguese family. This is what the intervening year has unmistakably taught us. There has been a delay in the decision as time has remorselessly advanced. The children have become accustomed to living in England and are doing well at school. It is difficult to gauge the extent that Claudio has been influenced by his father and I emphasise that I heard no evidence that Mr F has coached him or anybody else. But Claudio cannot but know that Mr F wants them to stay in England. He brought the children here very soon after their mother's tragic death. He has set up a life for them here. Claudio can be in no doubt what Mr F wants for them. I am certain that Portugal will be far better able to make decisions about the children's welfare and the optimum arrangements for their future, and that is

going to be more easily, effectively and efficiently done if these children are back in the country of their habitual residence.

168. All parties are nationals of the requesting State and speak Portuguese as their first language. Indeed, two interpreters were needed for the court hearing. The children do have an established relationship with their grandmother and with her home, which was their home, and a school they attended in Portugal when they were living with her. There are advanced proceedings in Portugal. There was prompt action by Ms C, the person with rights of custody, when there was removal. Her daughter had issued proceedings in Portugal before her death. For all these reasons, the countervailing factors significantly outweigh Claudio's stated views and desires to remain in England. This exception fails.

**(9) Discretion**

169. No exception has been proved. Thus, there is no discretion to exercise. But I have indicated that I would have exercised my discretion to return the boys if the Art.13(1)(b) and Art.13(2) exceptions had been proved. They have not been. The countervailing factors in this case strongly outweigh the arguments for refusing return.

**(10) Inherent jurisdiction**

170. There is now no need to decide this. Nevertheless, I have carefully considered the structure of the discretion as set out by the United Kingdom Supreme Court in *Re NY (A Child)* [2019] UKSC 49 and, in particular, the range of factors identified by Lady Hale in *Re J (A Child)* [2005] UKHL 40. These include the Portuguese nationality of the children; the fact that they had lived in Portugal for a very significant part of their lives; the fact they had lived with Ms C for

almost a year before they were wrongfully removed from Portugal; their strong degree of connection with Portugal; the fact that they were going to school in Portugal; their degree of isolation from the rest of their family while they have been living in England; the fact that Portuguese is their first language; and the fact that Claudio is about to move to a new school and this would be an opportune moment to resume his education in Portugal - a natural break.

171. I have considered the welfare checklist. Thus, I would, by some margin, have concluded that the children's welfare best interests would be served by a return to Portugal. As *Re J* made clear, it is the welfare of the child that is the deciding factor under the inherent jurisdiction.

## **§IX. CONCLUSION**

172. Therefore, I now provide a concise summation of the findings of the court in one place. The specific answers to the questions posed by the issues section are provided for convenience in the Appendix. But here I put together the totality of the findings in this case, fleshing out the answers to the issues as necessary.

- (1) Ms C had rights of custody at the point of the children's removal from Portugal on 21 July 2021 and was exercising those rights;
- (2) The children were habitually resident in Portugal immediately before that date;
- (3) Removal on or around 21 July 2021 was wrongful;
- (4) Therefore, that wrongful removal engages Art. 3 of the Convention and was in breach of Ms C's rights of custody;
- (5) In any event, by 28 July 2021, both Ms C and the Portuguese court had accrued rights of custody;



- (6) Immediately before that accrual, the habitual residence of the children was Portugal;
- (7) The retention by Mr F from 28 July 2021 was wrongful and engaged Art. 3;
- (8) It was in breach of the rights of custody of both Ms C and the Portuguese court;
- (9) Mr F has not proved that the children would be exposed to the grave risk of psychological harm on return. The Art.13(1)(b) exception fails on the harm basis;
- (10) Mr F has not proved that the return would place the children in an intolerable situation. The Art.13(1)(b) exception fails on the intolerability basis;
- (11) Even if harm or intolerability were proved, I would exercise my discretion to return the children;
- (12) The factors in favour of a return significantly outweigh the factors in favour of refusal;
- (13) The Portuguese court is plainly the right jurisdictional forum to determine matters in respect of the welfare and the immediate and longer-term arrangements for the children;
- (14) As to Art.13(2), I find that Bruno is too young and lacking in maturity for the court to take into consideration his views;
- (15) I find that Claudio has attained sufficient age and maturity for the court to take into consideration his views;
- (16) I find that he does not object as a question of fact to return to Portugal. Instead, he has a preference to remain in the United Kingdom and a preference not to be separated from his father;
- (17) The Art.13(2) exception has not been established in this case;
- (18) But even if the Art.13(2) discretionary gateway were open, I would exercise my discretion to return the children to Portugal pending the determination by the Portuguese court for the reasons previously given;
- (19) The court does not have to make a decision on inherent jurisdiction as, first, Art. 3 of the 1980 Convention is engaged and, second, no exception has been proved. However, if it did have to decide, by a clear and

unmistakable margin, the court would exercise its discretion to order the summary return of both children in their best interests;

(20) Therefore, the Art.12 presumption of summary return has not been displaced;

(21) Therefore, the children must return to Portugal forthwith.

## **§X. DISPOSAL**

173. I turn finally to the disposal of the case. The court orders the summary return of Claudio and Bruno to the jurisdiction of the Portuguese Republic. Lady Hale in *Re D (a child)* [2006] UKHL 51 at [68] said:

“The United Kingdom may be justifiably proud of its record in speedily returning abducted children to their home countries.”

174. This return, deeply regrettably, is anything but speedy. But a return to Portugal it must be. It must happen expeditiously from this point. There must be sharp focus on ending the wrongful retention in England. As Mostyn J pointed out in *FE v YE* [2017] EWHC 2165 (Fam) at [16]:

“Obviously, justice delayed is a bad thing whatever the subject matter of the dispute, but it is especially bad if the dispute is about a child.”

However, I accept Ms Gwynne’s advice that it would be better in the welfare interests of the children that any return was delayed until after the end of the current school year in England. That is the end of July. Mr F must begin to make the arrangements now. There is ample time.

175. I direct that the two children be returned forthwith after the end of the school term in July. Forthwith means forthwith. “Speed is of the essence” (*Re M (Minors) (Abductions: Undertakings)* [1995] 1 WLR 1021, per Butler-Sloss LJ). The court directs that they leave the United Kingdom within 48 hours of the last day of their summer term. This period of a month will give Mr F the opportunity to make the necessary arrangements, but also the chance for mature reflection on his position. It would be better for the children if he did return to Portugal until the Portuguese court decides arrangements for his sons. This court cannot force him to do so. It can, however, invite him to do precisely that. It does.

176. I direct that counsel agree an order to reflect the terms of the court’s decision.

177. That is my judgment.

-----

## APPENDIX

### Answers to questions posed by issues

- (1) Has the grandmother proved that at the time of removal from Portugal on 21 July 2021 she had rights of custody? **YES.**
- (2) Has she proved that the removal on 21 July 2021 was in breach of her rights and wrongful under Art. 3 of the Hague Convention 1980 purposes? **YES.**
- (3) If (1) and (2) are proved, where was the children's habitual residence immediately before removal? **PORTUGAL.**
- (4) Has the grandmother proved that the children were retained in the United Kingdom on or after 28 July in breach of the rights of custody of:
  - (c) Ms C herself; **YES.**
  - (d) The Portuguese court; **YES.**
- (5) If (4), where was the habitual residence of the children immediately before the date of wrongful retention? **PORTUGAL.**
- (6) Has Mr F proved the psychological exception? **NO.**
- (7) Has Mr F proved the intolerable situation exception? **NO.**
- (8) Is the child objection exception established in this case? **NO.**
- (9) If an exception or exceptions have been proved, how should the court exercise its discretion? **NO EXCEPTION PROVED.**
- (10) If the Hague Convention 1980 is not engaged, should the court order return under the inherent jurisdiction? **HAGUE CONVENTION 1980 ENGAGED.**

