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Case No: FD23P00198

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2023

Before :

MR DAVID LOCK KC
SITTING AS A DEPUTY HIGH COURT JUDGE

Between :

AB

Applicant

- and -

CD

Respondent

Mark Jarman KC (instructed by **AL Law**) for the **Applicant**
Simon Miller (instructed by **Waldrons Solicitors**) for the **Respondent**

Hearing dates: 21 and 23 June 2023

Approved Judgment

This judgment was handed down remotely by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR DAVID LOCK KC

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

MR DAVID LOCK KC :

1. This is an application by AB (“the Father”) for the summary return of his daughter (“EF”) to Portugal pursuant to the The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (“the 1980 Hague Convention”) which was incorporated into UK domestic law by the Child Abduction and Custody Act 1985 (“the 1985 Act”): see section 1(2) of the 1985 Act. The Respondent to this application is EF’s mother, CD (“the Mother”). As is usual in such applications, EF is not a party to the proceedings, but her voice is heard through the report of the CAFCASS officer, Ms Cull-Fitzpatrick.
2. The Father was represented by Mr. Mark Jarman KC and the Mother was represented by Mr. Simon Miller. I am grateful to both counsel and their instructing solicitors for the informed, sensible and efficient way that that this case has been conducted.

The facts

3. These are summary proceedings and neither the Mother nor the Father has given live evidence or been cross-examined. There are substantial aspects of their joint history about which they agree but there are some important aspects where there are disputes of fact. I will attempt to set out my understanding of the key facts in this case. The events described below are taken from the written evidence of the parties and the relevant documents. Most of the matters set out below are accepted by both parties as being accurate. Where I consider that a dispute of fact is material, I will refer to it. There may be disputes regarding other matters, but I do not regard those disputes as material to the decision in this case.
4. EF was born on 10 April 2016 and is now aged 7 years 2 months. Both the Mother and the Father are Portuguese nationals. The Mother and the Father have never married but they commenced a relationship and decided to move to the UK so the Mother could work as a nurse in about February 2015. EF was born in the UK in April 2016 and the Father is named on the UK birth certificate. Her birth was also registered in Portugal and EF has Portuguese nationality. It follows that, for the purposes of UK law, both the Mother and the Father have parental responsibility. I have not been provided with any expert evidence concerning parental rights of unmarried fathers under Portuguese law but it is accepted by both parties that, for the purposes of this case, there is no material difference in UK and Portuguese law in relation to the acquisition of parental rights by unmarried fathers. It is also common ground that, under Portuguese law, it is a breach of the rights of one parent for the other parent to move a child to live in another country without the consent of the left behind parent.
5. The Mother and the Father split shortly after EF’s birth, although it is clear that the Father remained substantially involved in the life of his daughter after the split. In about June 2016, the Mother, EF and the Father all moved back to Portugal. After arriving back in Portugal, EF lived with her Mother but the Father had regular contact with her.
6. The Mother moved back to Portsmouth with EF in about June 2017. She explained in evidence that she did so to return to work because her maternity leave came to an end. During the time the Mother and EF were living in England, the Father commenced

proceedings seeking an order from the Portuguese court to enable him to have a greater level of contact with EF. I have been provided with a translation of the order made at the end of those proceedings which provided for them to be dismissed on the grounds that, at that point, EF was habitually resident in the UK. Notwithstanding the outcome of his Portuguese court action, the Father travelled to Portsmouth regularly to see EF and at times stayed in the Mother's house and provided support to her in caring for EF whilst the Mother was working.

7. In December 2019 the Mother decided to move back to Portugal, but she continued to work as an agency nurse substantially in the UK. She explained that she went to the UK for periods of time of a few weeks, leaving EF in the care of a combination of her mother, the maternal grandmother, with care for EF also being provided by the Father. During this time, the Father came to stay in the Mother's house in Portugal from time to time and took EF to her regular nursery. My impression from the evidence is that the bulk of the care for EF appears to have been provided by the maternal grandmother but I do not need to make any findings about the exact division of time EF was cared for by her Father and by her maternal grandmother during this time. The Mother gives examples of her working pattern during this period including the period between 11 September 2020 and 23 October 2020 when, during those weeks, the Mother was working in the United Kingdom and EF was being cared for in Portugal by a combination of the Father and the maternal grandmother.
8. Free movement to the UK ended for EU citizens when the UK left the European Union and, to protect her ability to work in the UK, the Mother applied for settled status in the UK. She was granted residence rights under the EU Settlement Scheme in January 2022. The Mother also applied for settled status for EF. In October 2022, whilst that application was being considered and the Mother was in the United Kingdom as explained above, the Mother emailed the Father to ask him to take photographs of EF which were needed for EF's UK settled status application.
9. It thus seems to me that the Father must have known by October 2022 at the latest that the Mother was working to ensure that she had the legal right to live with EF in the UK. However, neither the Mother nor the Father suggest that there was ever a clear plan agreed between them for the Mother and EF to leave Portugal and move on a permanent basis to the UK. Thus, the most that I can read into these documents was that both the Mother and the Father knew in October 2022 that the Mother was laying the ground for a possible move to the UK, albeit nothing had been agreed.
10. The next significant event occurred on 6 April 2022. The Father's account of this event is as follows:

“On 6 April 2022, we went to a restaurant with some friends. During the meal I needed to use the bathroom. EF was adamant she was going to show me where the bathroom was. I asked the respondent to keep EF at the table with her, however she refused and therefore EF came with me. I instructed EF not to touch anything in the stall, but to my surprise she touched my “penis”. I tried to defuse the situation and explain to EF that that was not allowed and encouraged her to go tell the respondent. EF informed the respondent of the incident, and nothing further occurred”
11. The Mother's account of the event is slightly different. It is:

“On the 6th of April 2022, me EF and AB were together in [Portugal] and were having dinner with a friend in a restaurant. When we were about to leave, EF grabbed my hand and told me that she held her father’s penis when he was peeing in the toilet.

Earlier AB went to the toilet and he didn’t know where it was and EF went to show him. I had stayed at the table.

I paid the dinner, called an Uber taxi at 1:04 and on our way home, I asked EF if what she had told me was true and she told me that it was. When we got home I asked EF to go to the bedroom and I confronted AB with what she told me. He denied that it happened. I then called EF and ask her to repeat what she just told me before and she did it. AB’s face went red and I asked him for an explanation of what happened and the only thing he said to me was “...what do you want me to say to you?!” He got up and went to the kitchen to get food. He then came back to the living room and sat on the sofa eating. At this point I was extremely nervous and I demanded that he give me an explanation of exactly what happened. He didn’t so I told him I was going to call the police. I did that at 1:50h.

The police arrived at the house and I explained to them why I was calling. One officer spoke with EF and the other spoke with AB alone. I was not present while EF spoke with the officer. AB denied to the officer that anything happen, which is as stated in the police report. I believe that he has changed his story and it makes me really worried, particularly with how clear EF has been with me about what her father has done”

12. The police report about this case has been disclosed. It states:

“On questioning AB, who was at the scene, he said that, when he had gone to the bathroom to urinate, his daughter had gone with him and that she had not touched his genitals as described above. AB also said that there was never any type of incentive on his part that would lead to sexual behaviour or behaviour harmful to the rights or to the physical or moral integrity of his daughter, on that date or at any other time.

When the police spoke to the minor and in view of the fact that she was only 5 years old, the child said that, on her own initiative, when her father was urinating, she had touched his genitals and that he had quickly removed her hand as a sign of disapproval. The child also said that she had done that and I quote “Because I wanted to”.

When I questioned CD, the child’s mother, she said that her daughter’s version was exactly what she had told her, but she had found the behaviour strange, on which account she asked for it to be recorded.

When asked about any history that might indicate a sexual reprimand by AB, CD immediately said that there had been nothing to record, no history and no previous sign that might indicate abusive or harmful acts regarding the minor.

This document, entitled Participation, has been drawn up for all relevant purposes. It has been read and reviewed in full and is duly signed by the reporting officer”

13. The Mother makes a considerable amount in these proceedings about the fact that the Father lied to the police about what happened when he gave his first account. The Father does not dispute that, when first confronted about this event, he was not truthful to the police. However, I am not satisfied that this lie is particularly relevant for the purposes of this case albeit the lie may have affected relations between the Mother and the Father. The fact that a person lies about one matter does not mean that I should assume he or she is generally lacking credibility or is lying about other matters: see *Uddin v Secretary of State for the Home Department* [2020] 1 WLR 1562 per Ryder LJ at paragraph 11. Nonetheless what happened on that evening appears to have caused a rift between the Mother and the Father.
14. The Mother has also disclosed a report by MGS, a qualified Counsellor and a Certified Play Therapist and a member of the British Association of Counselling and Psychotherapy dated 5 April 2023 which suggests that EF is now giving a somewhat different account of this incident and suggests that sexual abuse by the Father was more widespread. It states:

“EF - “I like my Dad, but not when she (he) make me do that much, I don’t like him. In Portugal, not where I have my home - after I have ice cream of the day and after it’s night time I go to somewhere where they cook”

MGS - “A restaurant?”

EF - “Yes, my Dad she (he) go to the toilet and he don’t have babies, the boys don’t have babies and after you know boys don’t have like girls, (pointed to her genital area)”

MGS- “What do you mean EF?”

EF then drew a shape of a penis in the air with her hands.

EF - “He made me touch it, I wanted to touch it because I never do that before. Daddy.

she (he) let me touch it for a while and then he stay stop. My Mother call the police, Mum tried.....”

MGS - “EF you are very brave for telling me this, is there anything else you would like to tell me?”

EF - “She (he) always touching me and I don’t like it - I told my mother.

MGS - “Where did he touch you EF?”

EF - “Here (pointed to her vagina) and I don’t like it”

MGS - “When did this happen EF”

EF - “Always at night in his bed, he was touching me down there inside (pointing to her vagina”

15. I have set this evidence out in detail because I am mindful that it raises an issue to be investigated as to whether the incident on 6 April 2022 was a single incident with a plausibly innocent explanation, as the police report could be considered to support, or whether the Father has been responsible for repeated sexual abuse of EF. It also suggests that there may be further matters to be investigated. I should also record that the Father has strongly denied that he has abused his daughter and asserts that what happened in the toilet of the restaurant was not at his instigation, as EF said at the time, and denies any other allegations of abuse.
16. These are summary proceedings and I am not in a position to determine the truth about these allegations but they are sufficiently grounded in the evidence that I consider that they should be investigated and, if the investigation finds that there is a dispute of fact based on credible evidence (including crucially the account that EF gives), apart from any consideration of criminal proceedings, there may well have to be a fact finding hearing to determine the truth of the allegations so that EF is protected going forward.
17. The Mother has also disclosed a translation of a report from SM, a Portuguese psychologist, dated April 2023 which refers to EF saying that she had “suckled on my [paternal] grandmother’s breasts”. That evidence understandably caused the Mother to be concerned that EF may not be safe in the care of the Father’s wider family.
18. Whilst these matters raise safeguarding issues and should be investigated, I approach the matter on the basis that there is no evidence that they cannot be properly investigated by the authorities and adjudicated upon in the courts in Portugal: see McDonald J in AT v SS [2015] EWHC 2703 (Fam) at paragraph 62. Indeed, given that all these incidents occurred (if they occurred at all) in Portugal and all witnesses are Portuguese speaking, it may deliver a more reliable outcome for EF if the investigation about the truth or otherwise of these incidents is undertaken in Portugal.
19. There is no dispute that the Mother moved to England with EF on about 8 July 2022 without the Father’s knowledge or consent. The evidence about her making applications for UK settled status suggests that she had been planning to move for some time but it may well be that the allegations of sexual abuse against the Father and his lie when confronted by the police about this incident played some part in her decision to relocate to England.
20. However, in making this decision the Mother acted unilaterally. She did not seek the Father’s consent to this move and did not seek an order from the Portuguese Courts to override his parental rights by moving EF to live in outside Portugal. Further, she admits that the Father only learned that she and EF were in the UK when she sent him a text on 12 July 2022. In that text she informed him that they were only intending to stay in the UK for a month. She admits that was a lie because she intended to relocate to England on a permanent basis. I do not know precisely when she told the Father that she intended to stay with EF in the UK on a permanent basis. However, just as I need to treat the Father’s initial lie about what happened in the restaurant with caution, I do not draw any particular inferences from the Mother’s lie about her intentions.
21. By the time the Mother made her decision to relocate to the UK, the Father had made an application for a child arrangements order to the Family Court in Portugal. He

made that application on 7 July 2022 because he was concerned that the Mother would attempt to relocate to the UK with EF and wished to secure an order preventing this happening. The Father is understandably suspicious that the Mother left Portugal on 8 July because she was aware of the application and sought to leave before an order was made. She says that she was not informed about the proceedings until later in July and thus left before she knew that there were court proceedings. Whilst I understand the Father's suspicions, it is not necessary for me to make any finding on this issue.

22. The Father and the Mother have both instructed lawyers in the Portuguese proceedings and a hearing was held on 7 September 2022. No order was made for EF to be returned to Portugal at that stage because it appears that the Judge was concerned to find out more about the sexual abuse allegations before making a return order. The possibility of the Father making an application in England for a return order was raised and it appears the Father agreed to make this application. The Portuguese proceedings have effectively been stayed whilst the Portuguese court waits for this court to decide whether to make a summary return order.
23. The Father then made an application to the Portuguese authorities for a request to be made for these proceedings to be commenced. There appears to have been some delay on the part of the Central Authority in Portugal but these proceedings were commenced in April 2023 and interim orders were made Mrs Justice Morgan on 5 April 2023 and by Mr Trowell KC on 28 April 2023.
24. The Mother has moved within England and has been working as a nurse in a nursing home since July 2022. EF has been enrolled in a local state school and is progressing well. She appears to be mastering English, has settled in her new life in England and has made friends. The Father has been having contact with EF via a video link but this does not appear to be going terribly well. It is not necessary for me to express any view on whether the difficulties are because contact is being sabotaged by the Mother or whether EF genuinely does not want to have contact with her father in this way. I should also mention that there was an unfortunate incident on 24 December 2022 when the Father travelled to England with his mother in order to attempt to see EF. He turned up at a local Catholic Church and there was a scene when he attempted to see EF. Whilst I can understand the Father's frustration at not seeing his daughter in person, I consider that this unilateral attempt by the Father so have contact with EF at Christmas was ill judged as it was only ever going to result in distress for EF and further conflict between the Mother and the Father.
25. Those are the material facts and I now turn to the legal framework.

The Law

26. There was no dispute between counsel as to the law I have to apply and I can therefore state the legal framework succinctly. Portugal is a contracting state under the 1980 Hague Convention and the convention has direct effect in UK domestic law. The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children signed in The Hague on 19 October 1996 ("the 1996 Hague Convention") also has direct effect under UK domestic law because it was designed as an EU Treaty by the European Communities (Definition of Treaties) (1996 Hague Convention on

Protection of Children etc.) Order 2010. It thus continues to have effect as part of EU retained law: see *In re J (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 1291.

27. Article 4 of the 1980 Hague Convention provides:

“The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of sixteen years”

28. It is accepted on behalf of the Mother than EF was habitually resident in Portugal prior to moving to the UK and that, in moving EF to live in the UK without the Father’s consent or an order from the Court in Portugal, the Mother breached the Father’s custody or access rights under Portuguese law. Thus, it was common ground that article 4 of the 1980 Hague Convention was engaged on the facts of this case.

29. The Mother originally sought to contend that EF was habitually resident in the UK at the material time, which was agreed to be 8 July 2022 when she was moved to the UK in breach of the Father’s rights under Portuguese law. However, that contention was abandoned, and it was common ground before me that EF was habitually resident in Portugal before her removal to the UK.

30. Article 7 of the 1996 Hague Convention provides:

“In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and

a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or

b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment”

31. It follows that, as the Father has made this application within 12 month of EF’s wrongful removal from Portugal, EF remains habitually resident in Portugal for both the purposes of this court and the Portuguese courts.

32. Article 12 of the 1980 Hague Convention provides:

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

33. That article expresses the primary purpose of the Convention, as explained by Butler Sloss LJ in on *C v C (Minor: Abduction: Rights of Custody)* [1989] 1 WLR 654:

“...the whole purpose of the Convention is...to ensure that parties do not gain adventitious advantage by either removing a child wrongfully from the country of its usual residence, or having taken the child, with the agreement of the other party who has custodial rights, to another jurisdiction, then wrongfully retain the child.”

It follows that, unless any of the defences under the Convention are made out, I have a duty to order EF’s return to Portugal.

34. The Mother raises two defences to the Father’s application based on Article 13 of the 1980 Hague Convention which provides:

“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 —

(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.

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.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child’s habitual residence”

The Mother’s position on her own return to Portugal

35. Before turning to the particulars of the defences raised by the Mother under Article 13 it is necessary to examine the Mother’s position concerning what she would do if this Court were to make a return order. The Mother made a statement in these proceedings on 10 May 2023. In doing so she was assisted by her solicitors and set out her position in detail. At paragraph 49 she said:

“I have asked EF whether she wants to go back to Portugal and she has said clearly to me that she does not. Her counsellor believes that she is really traumatised by what has happened to her and gets very angry about it. She will be dealing with this for some time. She still have nightmares about what has happened to her and, as said, the calls that she has with her father, despite my encouragement, do not go well. It would completely break her heart to go back”

36. I note that this paragraph is solely about EF’s likely reactions to an order that EF should be made to return to Portugal, but there is nothing in that paragraph to suggest that, if EF were to be required by this court to return to Portugal, a consequence of her return to Portugal is that EF would be separated from her Mother. Given that the Mother is and always has been EF’s primary carer, any separation from her Mother would clearly be challenging for EF and, if a return order were to have that effect, it seems to me inconceivable that the Mother would not have referred to it as the primary consequence for her daughter of this court making a return order. Further, as

this case was about the Father's request for a return order, if the Mother had not made her mind up whether she would return with EF or not, I think she would have referred to this as one possible consequence of this court making a return order. The fact that the Mother is silent about the potential separation of EF from her mother means that this paragraph can only be read as implying that, if a return order was to be made, the Mother was intending to return to Portugal with her daughter and was looking at the consequences for her daughter of that happening.

37. On 12 May 2023 the Mother's solicitors filed a formal Notice setting out their defence. It included the following in relation to a defence under article 13(b):

"Article 13(b)

The respondent submits that if the child is ordered to be returned there will be a grave risk that such return would expose [her] .. to physical or psychological harm or place [her] .. in an intolerable situation. The respondent submits this is evidenced as a result of:

(i) the applicant is subject to an ongoing investigation by the Police in Portugal further to allegations made by the child that the applicant sexually abused her

(ii) the child herself does not wish to engage in contact with her father

(iii) there remains no suitable plan for the child if it was Ordered that they be returned to Portugal"

38. Once again, no mention was made of the possibility that EF would have to return to Portugal without her Mother and no case was advanced that the "grave risk" to EF was her having to live apart from her mother. I also note that no article 13(b) case was advanced that EF would be at any risk of harm because, if a return order was made, she may find herself living with her Father and thus being exposed to the risk of further abuse or that she would find a return to Portugal intolerable because she would be separated from her Mother or would be living with her Father.

39. Mr Miller points to the evidence from the Mother at paragraph 4 of her second witness statement where she says:

"I cannot see how a return to Portugal would work as the Court is aware that I work here in the UK"

40. That is, at best, equivocal because she could have resumed her former pattern of taking periods of time away to work in the UK whilst EF was care for by her maternal grandmother. The other answer to that point was, as raised by the Father, that the Mother has a property in Portugal and has a professional qualification as a nurse and could work as a nurse in Portugal.

41. I thus consider that there was nothing clear in the evidence to suggest that Mother and daughter would not return to Portugal if a return order was made. Thus, I cannot accept the submission from Mr Miller that, throughout this case, the Mother had not made her position clear because the Mother had not made up her mind whether she would return or not. Whilst I accept that the Mother has not expressly said that she

would return with her daughter, it seems to me that the only way to read the evidence in the case is that everything is presented on the assumption that, if a return order was made, the Mother would be returning to Portugal with her daughter.

42. However all that changed when the Mother's counsel served his Position Statement on the morning of the hearing which made it clear that his instructions were that, in the event that the Court made a return order, the Mother's position was that she would stay living in England and would not return to Portugal, even for the period of time needed to make an application to the court in Portugal for her to resume her residence in the UK with EF.
43. Both counsel accepted that I do not have to take this stated position at face value but have to make an assessment as to whether on the balance of probabilities, I consider that the Mother will return to Portugal with EF if I make a return order. The issue is not whether I believe the Mother when she says that her present intention is not to return to Portugal with EF. I do not have to make a finding about that issue. The real question is different namely whether, if a return order is made, I consider that it is more likely than not that she will in fact return with EF either because she changes her mind about returning in the face of a return order being made or because her position that she will not return is not a threat that she ever intended to carry through.
44. The Mother's case is that she has the gravest concerns about her daughter's safety if she were to return to spend any time unsupervised with the Father. Further, she does not accept that supervision by member of the Father's family would protect EF but she is advancing no proposals as to how or where EF should live in Portugal if she were to return. Her mother is now living with her in England and is providing childcare for EF but the Mother's case is, for reasons that she has not explained, that her Mother would not return to Portugal or be able to look after EF if I made a return order.
45. I accept that the mother considers that EF would be at risk if she were to return to live unsupervised with the Father although, I am wholly unable, in these summary proceedings, to make any findings about whether EF would face any real risks from unsupervised contact with her Father. A decision about that could only be made after a court had decided whether there was any truth to the concerns about past sexual abuse by the Father and then made a full welfare assessment.
46. I also accept that the Mother's employment prospects may well be better in the UK than in Portugal, but she has a professional qualification and is able to work as a nurse in Portugal. Given she holds these fears about the safety of her daughter, I regard it as inexplicable as to why, on her case, she has decided to prioritise her career interests above EF's safety by refusing to return to Portugal or put forward any arrangements in Portugal which will promote EF's safety.
47. There is, in particular, no evidence to explain why the Mother and EF could not return to Portugal and for the Mother travel to the UK to work as she did before, with EF living with her mother whilst she was away in the UK. There is no proper explanation as to why EF's grandmother could not resume providing childcare support in Portugal. In her recent witness statement she says she "*cannot leave her [EF] with my mother*" but does not explain why that is said to be the case.

48. In my judgment, looking at the material before me as a whole and bearing in mind these are summary proceedings with all the evidential limitations inherent in such proceedings, I consider that it is more likely than not that the Mother will return to Portugal with EF if I make a return order. It follows that, in accordance with the issues as set out in the Mother's pleaded case, it is not strictly necessary for me to consider either of the cases advanced by the Mother on the assumed factual basis that the Mother will not return to Portugal with EF if I make a return order.
49. However, I am mindful to avoid future controversy or a rehearing and accordingly make it clear that, even if I was satisfied that the Mother will not return to Portugal with EF if I make a return order, that would not have persuaded me not to make such an order. I will deal with the reasons for that decision below.

Child Objections

50. It is the Mother's case that EF objects to returning to Portugal and I note that this case is supported in her witness statement. The Mother sought a CAFCASS report to support this case. That application was opposed by the Father's solicitors but was granted by Mrs Justice Knowles. A report was prepared by Ms Cull-Fitzpatrick, an experienced CAFCASS officer, dated 19 June 2023. She prepared that report after meeting with EF and her mother on 6 June 2023. Ms Cull-Fitzpatrick said at paragraph 17:

"When we talked about the possibility of returning to Portugal, the prospect was not inconceivable but rather her preference was to remain living in England, with her mother"

51. That approach was supported at paragraph 24 of the Report where Ms Cull-Fitzpatrick said:

"EF spoke fondly of Portugal and she did not voice any objections of returning, but rather her preference was to remain in England with her mother. EF's main attachment to England is her relationship with her mother"

52. It follows that Ms Cull-Fitzpatrick concluded that EF had expressed a preference for staying with her Mother in the UK but did not object to returning to Portugal. The parties agreed that Ms Cull-Fitzpatrick did not need to attend to give evidence. It was common ground between the parties that there was a difference between a child expressing a preference for one country over another and the child positively objecting to a return to the country where the child was previously habitually resident. That common ground is supported by the Court of Appeal decision in *Re M (Children) (Republic of Ireland) (Child's Objections) (Joinder of Children as parties to appeal)* [2015] EWCA Civ 26 where Black LJ (as she then was) said at paragraph 39 *"The word 'objects' imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute"*. I accept that, as EF is an intelligent 7 year old, she is of an age where some weight should be given to her views. The weight I should give to her objections is considerably less than the weight that should, by way of example, be accorded to the objections of a much older child who has a far more settled view about where she wants to live.

53. Mr Miller argued that, notwithstanding the conclusions in Ms Cull-Fitzpatrick's report, I should still find that EF objects to a return to Portugal. He submitted that, despite there being no direct evidence to contradict Ms Cull-Fitzpatrick's evidence other than the Mother's general statement, I could infer that EF did have objections to returning to Portugal. I do not accept that submission. It seems to me that Ms Cull-Fitzpatrick's evidence is the best evidence on the issue and she has the advantage of both being entirely neutral and having substantial relevant experience in drawing out the real feelings of a child about a possible return. I thus conclude, looking at the evidence as a whole, that the Mother has failed to establish that EF is objecting.
54. No case was advanced to me that EF was objecting to a return because she had been told that, if she had to return, it would result in her being separated from her mother. I do not know whether EF has been told about the change in her mother's position or asked to consider its consequences. As no case was advanced to me on that basis, I do not consider it would be right for me to speculate on whether EF might or might not raise objections to a return if the consequence was that she would be living apart from her mother.
55. However, if I had concluded that the evidence supported a case of child objections I would not have been prepared to exercise my discretion to refuse a return order on that basis because (a) any "objections" would have been only weakly supported in the evidence, (b) given EF's age and maturity, it seems to me they should have less weight because of the policy of the Convention in support of a return order even if that meant a return in circumstances where her Mother was not returning with her. I therefore reject the Mother's case based on child objections.

Article 13(b)

56. There is extensive jurisprudence on the approach to be taken where an article 13(b) defence is raised. This has recently been summarised by Mr Justice Macdonald in *MB v TB* [2019] EWHC 1019 (Fam). The Judge said at paragraph 31:

"The applicable principles may be summarised as follows:

i) There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.

ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.

iii) The risk to the child must be 'grave'. It is not enough for the risk to be 'real'. It must have reached such a level of seriousness that it can be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two.

iv) The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'. 'Intolerable' is

a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'.

v) Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child's immediate future because the need for protection may persist.

vi) Where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation would become intolerable the court will look very critically at such an assertion and will, among other things, ask if it can be dispelled. However, in principle, such anxieties can found the defence under Art 13(b).

32. The Supreme Court made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as ground the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest on the evidence available to the court and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm are identified. It follows that if, having considered the risk of harm at its highest on the available evidence, the court considers that it does not meet the imperatives of Art 13(b), the court is not obliged to go on to consider the question of protective measures.

57. If EF returns with her Mother to Portugal, she will continue to live with the Mother, possibly supported by her maternal grandmother as she is at the moment. There are three elements which are said to amount individually or cumulatively to a relevant “risk” for the purposes of article 13(b). First, the Mother relies on the extant investigation by the Portuguese police into the allegations of sexual abuse by the Father. In my judgment the fact that there is an investigation without more cannot, of itself, amount to a risk to EF. On the contrary, she would be far more exposed to risks if there was no investigation and thus no impediment to the Father having unsupervised contact with her. The investigation exists, and its potential outcome is a feature which makes it safer for EF to return to Portugal.
58. The second element relied upon by the Mother is the fact that EF does not wish to have contact with her Father. Ms Cull-Fitzpatrick noted in her report that EF said “*I hate my dad*”. However, if EF returns to Portugal, the question as to whether EF has any level of supervised or unsupervised contact with her Father is a matter for the family court in Portugal.
59. The Father has offered the following protective measures:
- i) If the respondent wishes to return to her home in Portugal, she is to live there with EF, and I shall continue to live in my home;

- ii) If the respondent is unable to start working straight away, I shall assist the respondent in taking care of EF financially, by way of maintenance, until she is able to commence work;
 - iii) I would further promise not to harass, intimidate or pester the respondent upon her return on take any steps to remove EF from the respondents care;
 - iv) I agree to provide notification of any family proceedings that may be commenced in Portugal.
60. It seems to me that the practical effect of these measures is that, as long as EF is living with her Mother in Portugal, the Father is promising that he will not have any contact with EF unless it is either agreed with the Mother in advance or set by the court because otherwise he would be acting in breach of undertakings (ii) and (iii). I have to assume that no contact will be permitted by the court in Portugal unless the court is satisfied that such contact is in EF's best interests and takes place under conditions which provide that she will be safe. I accept that EF's present state of mind is that she does not want to spend time with her father but I do not accept that the possibility that, having conducted a welfare assessment, the Portuguese court might come to the conclusion that some level of contact is in EF's best interests. I cannot accept that this future contact would expose EF to a grave risk of harm or would be intolerable for her. On the contrary, it seems to me that a combination of the undertakings offered by the Father and the involvement by the court in Portugal means that any contact will only happen if either the Mother or the court are satisfied that contact is in EF's best interests.
61. The third element relied upon by the Mother is that there is no plan for EF if she returns to Portugal. I reject that as a basis for an article 13(b) defence because I consider that, on the balance of probabilities, the Mother will return to Portugal to live there with EF, even if she spends time working away. The Mother has a property at which she can live in Portugal, will have the support of her mother and has the ability to work there and thus generate an income. Further the Father has promised financial support until the Mother is able to find work.
62. I accept that it is possible that a return order may result in EF returning without her Mother. As Mr Jarman KC rightly said, it is possible that EF will return with her maternal grandmother and live with her. EF is very familiar with her maternal grandmother as she already lives with her in England and the maternal grandmother provides a significant level of childcare to EF at the moment, and did so whilst the Mother was dividing her time between Portugal and The UK after December 2019.
63. There, of course, is a remote possibility that neither the Mother nor the maternal grandmother would be available to provide care to EF in Portugal on a return. In that unlikely circumstance I accept that a decision will have to be made concerning the child arrangements for EF in Portugal. At the resumed hearing Mr Jarman KC proposed that he file details of EF's great paternal aunt, who knows EF and against whom no allegations have been made to date, as a potential carer for EF. I do not criticise the Father for not filing this evidence to date because, as mentioned above, the change of position by the Mother only occurred just before the trial of this matter.

64. In approaching that, albeit unlikely scenario, I have been referred to the helpful observations of McDonald J in *AT v SS* [2015] EWHC 2703 (Fam). The Judge said:

“46. However, it is also important to note that a conscious refusal by a parent to return, which refusal itself creates the situation on which the parent seeks to rely to establish a defence under Art 13(b), will not inevitably lead to the conclusion that the defence cannot be made out. To so conclude would be to place on the words of Art 13(b) a gloss which they cannot not bear. Within this context, in S v B and Y [2005] EWHC 733 (Fam) at [49] Sir Mark Potter, P held as follows having considered C v C (Minor: Abduction: Rights of Custody):

“The principle that it would be wrong to allow the abducting parent to rely upon adverse conditions brought about by a situation which she herself has 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 Art 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 the risk of harm to the child and not the wrongful conduct of the abducting parent. By reason of the provisions of Arts 3 and 12, such wrongful conduct is a 'given' in the context of which the defence is nonetheless made available if its constituents can be established.”

47. Thus, accepting the imperative need to maintain fidelity to the aims of the Convention, it is important in cases where a parent refuses to return that, in determining whether a defence under Art 13(b) is made out, the primary focus of the court remains on the question of the risk of harm or intolerability to the child rather than the conduct of the abducting parent. Within this context, it is important again to bear in mind that Art 13(b) looks to the situation as it would be if the child were returned forthwith to his or her home country and that the situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. The significance for the situation the child will face upon return of a parent's refusal to return must in each case be evaluated in the context of the protective measures that can be put in place to mitigate the impact of the same”

65. The final default position is that EF should go into foster care on her return to Portugal. It seems to me highly unlikely that this will occur but, if it does, I consider that a welfare assessment should be made by the Courts in Portugal to determine where EF should live and whether, pending any final decision, she should continue to live with her Mother in England or should go into foster care in Portugal. I accept that this is a less than ideal solution for a 7 year old but I do not accept that it will result in the situation becoming intolerable for EF.
66. I therefore reject the defences raised by the Mother and come under a duty to make a “forthwith” return order. However, in the context of this case, all parties accept that “forthwith” does not mean “immediate” and that EF should finish her school year in England before returning to Portugal. I am told that school term will finish on 25 July and thus I anticipate that a return should happen immediately thereafter.

67. That leaves open the question as to what practical arrangements should be made for EF's return on 26 or 27 July and whether I can or should make any directions for protective measures to take effect on EF's return to Portugal prior to decisions being made by the Portuguese Court concerning child arrangements for EF. I would hope that is a relatively short period. Prior to the resumed hearing of this case on 20 July, I raised a number of possible scenarios with the parties. I made it clear that I was not prepared to make a return order if the consequence was that EF were to return to live with her father for that interim period. It seems to me that there is evidence which suggests that the Father may have been responsible for sexual abuse and, whilst that evidence may well not be proven if the matter were to be examined at a fact finding hearing, EF may be exposed to unacceptable risks if she were to resume living with her Father at this point.
68. Having heard submissions, it seems to me that there are the following possible options:
- i) The Mother may change her position and agree to return and to live with EF to Portugal. In such a case, I would not need to make any ancillary orders because any issues around where EF should live and any contact with the Father can properly be decided by the Court in Portugal;
 - ii) The Mother may not be prepared to return to live in Portugal but she places Ines in her mother's custody and the child travels back to Portugal with her grandmother and lives with the grandmother, or the Mother proposes other acceptable living arrangements for the child. If that were to occur, I would not need to make any ancillary orders because any issues around Ines having contact with the Father can properly be decided by the Court in Portugal;
 - iii) The Mother or the Father could obtain an order from the court in Portugal prior to her return which sets out where and with whom EF should live on her return to Portugal. Whilst the Court in Portugal must make its own decisions, it seems to me that it would be perfectly proper for the court to make such an order because, whilst EF is physically living in the UK, she has to be treated as being habitually resident in Portugal because article 7 of the 1996 Hague Convention. If such an order were to be made, it seems to me that I have a duty to respect that order, whatever it may provide; or
 - iv) The Father could propose residence arrangements for EF which do not expose her to the risk I have identified and do not give rise to any other form of grave risk to EF. If such arrangements were to be proposed, subject to any contrary interim order being made by the Portuguese court, those arrangements could be put into effect until EF's future arrangements can be determined by the Portuguese court.
69. Mr Jarman KC has reminded me that I have the ability to make urgent protective orders under Article 11 of the 1996 Hague Convention. As Lady Hale observed at paragraph 31 of her judgment in *In re J (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 1291 "where there has been a wrongful removal or retention, article 11 has proved very helpful in securing a "soft landing" for children whose return to their home country is ordered".

70. I have decided that I will make a return order but will adjourn to a further hearing to consider the question about the practicalities of that return and whether to make any orders under Article 11 until a further hearing on 20 July 2023. The parties should file their positions well in advance of that hearing, supported by any evidence upon which they rely to support their proposed arrangements for EF's return and, if no order has been made by the Portuguese Court, for arrangements to apply in the period before the Portuguese Court makes child arrangements orders. If the parties cannot agree on arrangements for EF's return and her living arrangements until an order can be secured from the court in Portugal, it seems to me that I may be called on to make orders under article 11, including an order to require the Mother to take EF back to Portugal and to live with her there until a child arrangements order is obtained from the court in Portugal or EF is taken into foster care. Mr Miller has accepted that I have that power, albeit that I would be reluctant to exercise the power given its coercive nature.
71. I also accept that, despite having made this decision, I retain a measure of control over the return of the child until the implementation of the order: see *Re C (A Child) unreported 1 November 1999* (as noted at footnote 270 of Lowe, Everall and Nicholls: *The International Movement of Children* (Second Edition)). Hence although I have made a return order, if there is no way of returning EF which is consistent with her reasonable safety whether supported by Article 11 orders or not, I would have the power to re-open the question as to whether to make a return order. It seems to me that this is a power to be used very sparingly and that the hearing on 20 July must be used to focus on how EF is to be returned not whether EF should be returned.
72. I invite both the Mother and the Father to discharge their duties as parents by working as constructively together as is possible in these circumstances to put forward arrangements to support EF's return to Portugal.