



Neutral Citation Number: [2023] EWHC 505 (Fam)

Case No: FD22P00704

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 March 2023

Before:

Paul Bowen KC (sitting as a Deputy Judge of the High Court)

Between:

AB
- and -
CD

Applicant

Respondent

Re. EF (Abduction: Hague Convention (Slovakia))

Graham Crosthwaite (instructed by **Stephensons Solicitors LLP**) for the Applicant
James Yearsley (instructed by **Petherbridge Bassra Solicitors**) for the Respondent

Hearing dates: 2-3 March 2023

APPROVED JUDGMENT

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.

Paul Bowen KC (sitting as a Deputy Judge of the High Court)

Introduction

1. This is an application under the Child Abduction and Custody Act 1985 by the father, AB (hereafter ‘**F**’) for a summary return order under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (‘**Hague Convention**’). The application concerns a child, EF, born in the United Kingdom in October 2019 and who is now 4. The respondent is the mother, CD (hereafter ‘**M**’). The parties have been anonymised for reasons of privacy and confidentiality. F and M are Slovakian nationals but M has lived for significant periods in the UK. F seeks EF’s return to Slovakia. M opposes the application on the grounds that: (1) EF was habitually resident in the UK, not Slovakia, on the date she and F returned to the UK from Slovakia on 17 December 2021, so the application is out of the scope of the Hague Convention. Alternatively, (2) F consented to EF’s removal for the purposes of Article 13(a) of the Hague Convention; (3) further or alternatively, there is a grave risk that EF’s return would expose her to physical or psychological harm or otherwise place her in an intolerable situation under 13(b). In either event, the court is not bound to order EF’s summary return and should not do so in its discretion.
2. I conducted a final hearing of the application by MS teams over two days on 2-3 March 2023. The parties had been directed to attend to give oral evidence on the issue of ‘consent’. M attended, assisted by an interpreter and represented by Counsel, Mr. Yearsley. F did not attend but was represented by Counsel, Mr. Crosthwaite, who explained that F had been notified of the date but had emailed his solicitor the previous day to say he would not be attending because he was ‘at work’. No further explanation was forthcoming. M gave evidence and was cross-examined on the consent issue. I heard oral submissions and directed further short written submissions by 4 pm on 3 March. I am grateful to both Counsel for their assistance.
3. These are summary proceedings that should be determined swiftly. They nevertheless raise a number of issues of law and fact requiring careful consideration, the consequences of which may be significant for the child, EF. I therefore reserved judgment. In this judgment I will set out the facts; explain the relevant legal framework; make relevant findings of fact; then apply the facts and the law to the issues I must decide.

Facts

4. M and F are both aged 22 and are the parents of EF, who was born on 1 October 2019. They were both born in Slovakia and are Slovakian citizens. F lives in Slovakia. M lives in the UK with EF and has limited leave to remain (‘pre-settlement status’) obtained under the EU Settlement Scheme on 23 July 2020. M’s parents, her brothers and her aunt also live in the United Kingdom. In 2017, M, then aged 17, moved from Slovakia to live with her mother, brothers and her aunt in the UK.

July 2017 to December 2018

5. While she was in the UK, M met F on Facebook. They struck up an online relationship and in July 2017 M agreed to visit F in Slovakia. During this time, she stayed at her maternal grandfather's house, who lives about an hour from F. A few weeks later she returned to UK, but her relationship with F continued and in December 2018, aged 18, she moved to Slovakia to live with F. F says she stayed in Slovakia and lived with him throughout the period from July 2017 to March 2019, but it is not necessary to resolve this difference of evidence.

December 2018 to March 2019

6. M's evidence is that from December 2018 to March 2019 she lived with F at his home in Slovakia, together with F's mother and four brothers (aged 17 to 21), including one brother's wife and their two children. M reports that there was a 'toxic atmosphere' at F's home and that each of F's family members were regularly abusive towards each other and towards her. F and his brothers would regularly argue and fight; violence and abuse was the norm. She also describes an abusive relationship with F that included (but was not limited to) controlling and coercive behaviour, as understood and explained by the Court of Appeal in *H-N, Re. (Allegations of domestic abuse)* [2022] 1 W.L.R. 2681, [29-32] and to which I will return, below. She says: 'When I went to reside with the Applicant he took my mobile phone off me and would not let me contact any of my family members. I was regularly physically and emotionally abused by the Applicant. The Applicant would slap me and hit me if I did not do what he asked. If he was unhappy with the way I had undertaken any of the house chores he would beat me up. On one occasion his mother physically abused me as well. The Applicant's mother would regularly threaten to hit me and I lived in fear of her and the rest of the family members'. M says she was a 'virtual prisoner' in F's home from around December 2018 to March 2019. This account of events and of their relationship is disputed by F, and I will need to resolve this difference of evidence. M also describes how she became pregnant soon after moving in with F. M says the pregnancy was 'unplanned'; F disputes this, saying that the pregnancy was planned.
7. Sometime in February 2019, M managed to get hold of F's mother's phone and texted her own mother in the UK to tell her that she was suffering domestic abuse, she was very frightened and needed help. She also texted her brother who at that time was living in Slovakia and asked him for help. On or about 3 March 2019, her brothers came to F's house (who was not there at the time) and escorted her to a brother's house. Shortly thereafter, F arrived at M's brother's house with his brothers, mother and father and physically forced M into their car and took her back to F's home. In the process they threatened M's brothers and grandfather that they would hurt them if they followed. M's mother then contacted Slovakian police who came to F's house and escorted her back to her grandfather's house. This incident led to M lodging a complaint against F for the offence of 'restriction of personal liberty'. She gave a statement to Slovakian police on 19 March 2023, a copy of which was obtained on 8 February 2023 following an order made by Sir Jonathan Cohen on 10 December 2023 and after M had prepared her statements for these proceedings. The police statement has been translated into English and begins with a number of printed legal notices to the witness. These

include a notice that under section 131(1) of the Code of Criminal Procedure a witness is obliged to testify truthfully and that it is a criminal offence to give false evidence. M says this was explained to her at the time she signed the statement and that she understood its implications. I set out the key passages from her statement (as translated and redacted for anonymity) which is of particular relevance when resolving the disputed factual issues in the case (with emphasis added).

‘Since I joined him in [address in Slovakia], AB has changed in his behaviour. I couldn’t go anywhere without him, he didn’t want to leave me alone, he got angry when I was on the phone with someone, especially when I called or talked to my mom in Hungarian. I couldn’t even go on Facebook, he even took my phone, which I had bought in my name, and left me only an English card. He wanted to cut me away from my family. When I was chatting or calling my family, I had to speak or write in Slovak. On March 3, 2019, it was a Sunday when my brother [name] messaged me on Facebook and AB allowed me to write to him. I wrote to him in Hungarian, then I managed to fool AB and I wrote to [brother] to come and get me. My brother [name] came for me by car the next morning, when AB was not at home but at work and drove me to my other brother [name] and his wife [name], who lived at [address in Slovakia]. Then it dawned on me that I no longer had to stay with AB in [address in Slovakia]. On that day, in the afternoon around 5 p.m., my boyfriend AB came to see me in [address in Slovakia]. As my brother [name] knew him, he let him in and AB began to ask my brother where I was. In the meantime, I hid in the bath with my sister-in-law [name]’s mother. But when I heard AB talking to my brother [name] and my sister-in-law [name], I got scared that he would hurt them, so I went outside, where he asked me why I had left and begged me to come back to [F’s home] with him. I replied AB that I don’t trust him and that I won’t go back, I’m not going anywhere. After I told him this, he grabbed me by the wrists, pulled me by them, and his mother, who came with him, started to put my shoes on. Then, when I resisted, he took me in his arms and carried me out of the flat. I shouted at my sister-in-law to help me. My brother [name] couldn’t do anything, because AB came for me with his parents and two brothers, these two brothers were standing outside the apartment building. AB’s parents were with him in the apartment. When AB took me in his arms, he took me outside the apartment and put me in the car. Even then in the car, he told me to look forward to coming to [his home]. He went on to tell me to start praying that when we got to [his home] he would beat me up. I was so scared in the car. When we arrived in [his home], right in the house, AB grabbed me by the left shoulder in the hallway and shook me so hard that I almost fell down. Then he hit me four times on the head with his open hand and spit on me while he was doing it. But he didn’t hurt me, I only had a bruise on my shoulder. I had

the feeling that he would beat me again, but his parents told him to stop, that I was pregnant. Then he sent me to a room where he came in behind me and kept yelling and spitting at me. Then he talked to me all night and told me to look forward to him coming home from work on Tuesday, and that he would beat me up again, but he didn't. In all the time from Monday, when he took me to his house in [address in Slovakia], until Tuesday, when the police came for me, I was once in the grocery store with his brother. I was in this house during the day, where someone from AB's family was always there, I couldn't go anywhere by myself, but the house wasn't locked. Then when he came home, he didn't move from me. He took my phone and wouldn't let me call anyone. He's terribly violent. He also told me that if I left him he would hurt me so badly that an ambulance would come for me. AB hasn't contacted me in any way since I've been staying with my grandfather and now on Saturday, I'm going to England with my mother to sleep, where my parents have been living for a long time. ... I have nothing more to say. What I have said is based on the truth.'

8. F denies that he abducted M in the way she suggests or at all. He accepts that M 'did involve the police' when she left in March 2019 but says he does not know what she said to them and he was never spoken to by the police about this incident. He denies that he or his family ever abused M, so clearly denies the veracity of M's account given in her police statement although he makes no mention of it in his witness statement. I will need to determine this dispute of evidence.

March 2019 to May 2020

9. In March 2019, shortly after giving her statement, M returned to the UK with her mother, where she remained until May 2020. M reports that F soon made contact with her after her return, apologising for his behaviour and trying to persuade her to return to Slovakia, but M refused to do so. On 1 October 2019, their daughter, EF, was born. It is instructive that M did not include F's name as the father on EF's birth certificate when she was born; at this stage, in any event, it appears she considered the relationship to be over.

May 2020 to December 2021

10. In May 2020, however, M returned to the Slovak Republic with the child. There is a dispute between the parties as to whether M intended only to visit for a few weeks so that F could meet his daughter (M's case) or whether she had returned with intention that she and EF live with F (F's case). M describes how, as before, she became a virtual prisoner in F's home throughout the period from May 2020 until 2 December 2021. As soon as she arrived at F's house he took her passport, ID card, EF's birth certificate and red health visitors' book and mobile phone. F's mother and brothers and other family members were still living there. Thereafter, as before, he prohibited her from contacting family members and regularly beat, slapped and controlled her on a daily basis. The abuse intensified: according to F, M also regularly forced her to have sex in front of F's brothers without her consent. She also describes how F was physically abusive to EF. If

the child cried or would not go to sleep, F would throw her in the push chair with force. If she continued to cry he would hit and slap her. EF has been affected by this treatment; if anyone talks loudly to her now ‘she is so scared that she flinches and starts to cry’.

11. M produced a document at the hearing which she says corroborates her account that she was kept incommunicado. This is a Facebook message dated 1 October 2021 which M explained was sent by M’s mother to F’s brother, and reads (as translated): ‘Hi be nice tell [M] to call her father we don’t know anything about her for months you haven’t even picked up the phone’. F’s counsel objected to its admission given the late service and the absence of his client. I admitted the document *de bene esse* and indicated I would rule on its admission when giving judgment. I give permission to admit the document for the reasons at paragraph 55, below.
12. M says she was only able to escape after she got hold of F’s mother’s phone and texted her mother for help. Her mother contacted the grandfather who alerted the police, who came to F’s home and escorted M and her child to the maternal grandfather’s house on 2 December 2021.
13. By email dated 8 February 2023 the Slovakian police confirmed that on 17 December 2021 a criminal complaint was transferred between police jurisdictions and states ‘domestic violence was not the subject of the above-mentioned criminal complaint’. I was told that the criminal complaint was made by M against F, but there is no explanation of what the complaint involved or what its outcome was. M says she did not make a full statement to the police on this occasion as she knew she was able to travel to the UK for her safety.
14. F again flatly denies M’s account. In his witness statement he states that from May 2020 to December 2021 he, M and EF were living happily together as a family. EF’s birth was registered with the Slovakian authorities with both M and F named as parents, and a copy of this was produced in evidence. F worked full-time as a foreman on a building site while M lived at home caring for EF while on maternity leave, for which she was paid maternity leave payments. They were receiving child benefit; EF was registered with a doctor and dentist; they were making plans for EF’s school; and all of them were registered as living at F’s address. F relied on a document from a paediatrician which confirmed that EF had medical appointments between 22 September 2020 and 11 November 2021. F says M regularly went out with friends and regularly visited her family, including her grandfather, brother and sister-in-law. As for the Facebook message, F’s Counsel submitted that it can be explained by the fact that M and her mother had fallen out because her mother had been unfaithful to her father, a matter attested to in F’s witness statement. F does not respond at all to the evidence that the police came to escort M and EF from the house on 2 December 2021 after they had been alerted by M’s grandfather. I will need to resolve this dispute of evidence.

2-17 December 2021

15. Following (on M’s account) her rescue by the police from F’s house on 2 December 2021, the parties agree that F visited M at the grandfather’s house when

he tried to persuade her to return, and F refused. There is also no dispute that, on 17 December 2021, she returned with EF to the UK, where she has remained ever since. There is, however, a stark difference of evidence about whether M told F that she planned to return to the UK with EF, and that F consented (M's case); or M took EF to the UK without notifying F (F's case). This is of particular relevance to M's 'consent' defence under Article 13(a) of the Hague Convention. On 9 December 2022 the parties sought, and were granted, permission by Sir Jonathan Cohen to give oral evidence on this issue. The judge directed that both parties attend the full hearing for that purpose. In the event, F did not attend so his evidence on this issue has not been tested. M did attend and was cross-examined by F's Counsel.

16. In her witness statement, M states that F came to her grandfather's house asking her to come back to his family home. He again said that he had changed and regretted his actions. M told him she did not wish to return to live with him and that she was going to the UK with EF to live with her family. She asked F for her passport, Slovakian ID card and EF's birth certificate so that they she could get a passport for EF. F 'willingly provided' the documents and she then applied for a passport. F brought their belongings from his home and even took her and EF to the airport on the day of departure. Her brother also accompanied her as she feared for her safety. She arrived in the UK on 17 December 2021. Under cross-examination she said F had visited her grandfather's house on 3 or 4 occasions between 2 December 2021 and 17 December 2021. It was on the first occasion that she said she wanted to take EF home; F said 'Go, I'll come and visit her'. They agreed that he would be able to come and visit her and EF in the UK and would keep in contact by video call. F subsequently returned with the travel documents and on another occasion with M's belongings. M said she wasn't happy when F came to the house as she was concerned he would act aggressively. She was surprised by the fact he agreed to her returning to the UK with EF given his previous behaviour. F's evidence was put to her and she was accused of lying; she maintained her evidence.
17. F's evidence is contained in his statement but was not tested by cross-examination. He denies that M asked him for her travel documents as she already had them. She did ask for EF's birth certificate and threatened to call the police if he didn't give it to her. She said she wanted this 'because EF would be with her and to prove her identity'. She did not say that she was taking EF to England; he did not drive them to the airport. Had she told him she was planning to go to the UK he would have told the police immediately. In the event he only found out she had gone to the UK with EF from her grandfather. As soon as he found out he contacted the police and applied to the court in Slovakia.
18. I will need to determine this dispute of evidence.

December 2021 to date

19. Since M's return to the UK F has notified the Slovakian police, begun proceedings in the Slovakian family courts for F's return, complained to M's local Social Services that M is not providing proper care for EF and initiated these Hague proceedings. It is submitted on his behalf that this evidences his lack of consent to EF's removal. M, on the other hand, believes F is using these

proceedings to get revenge for her leaving him; put another way, it is an extension of his coercive and controlling behaviour. She notes that his complaint to her local Social Services in July 2022 to complain that EF was living in poor home conditions came to nothing; they investigated and then closed the case. His complaint to the Slovakian police also came to nothing; she was in due course then visited by UK police who took no further action. On 19 January 2022 M made her own application to the Kosice District Court seeking sole custody of EF. In evidence she said this was in response to F's application to the Slovakian family courts and was not an acknowledgment that EF was habitually resident in Slovakia or that she accepted F had not consented to EF's removal to the UK. The current proceedings were notified to the UK International Child Abduction and Contact Unit (ICACU) by the Slovakian Centre for the International Legal Protection of Children and Youth (the requesting authority) on 16 August 2022. F gave authority to the requesting authority on 12 April 2022. There was no explanation for the delay by the requesting authority in notifying ICACU. F instructed solicitors on 30 August 2022 who wrote to M on 18 October 2022 seeking her agreement to EF's voluntary return. M replied on 4 November 2022, alleging that she had been a victim of domestic abuse by F and did not intend to return EF voluntarily. These proceedings were issued on 1 November 2022, nearly eleven months after M and EF's arrival in the UK on 17 December 2021. Directions were given on 15 November (including that no CAFCASS report should be obtained as the child was too young for her views to be ascertained) and 9 December 2022 setting a timetable for the final hearing which took place before me on 2-3 March 2023.

Legal framework

20. In this section I set out the relevant legal principles.

Overview

21. The underlying purpose of the 1980 Hague Convention, which is given effect domestically by the Child Abduction and Custody Act 1985, is to enable the 'prompt return of children wrongfully removed to or retained in any Contracting state' (Article 1). It is intended to provide a swift, summary procedure for a left-behind parent to secure the return of a child wrongfully removed to or retained in another country by the removing parent. Where the procedure is triggered the courts of the requested state are required to 'act expeditiously' (Article 11), if possible within six weeks of the request being made.¹ Once a request is made, the courts of the requested state 'shall not decide on the merits of rights of custody until a determination has been made that the child is not to be returned' (Article 16).
22. The Courts of the requested state must be satisfied that: the request falls within the scope of the Convention, namely that the child was under 16 and was

¹ Under the terms of EU Council Regulation 2201/2003 (the 'Brussels IIa Convention') the process was expected to be completed within six weeks of the application being made. Although, since the UK's departure from the EU on 31 January 2020, Brussels IIa no longer applies so there is no longer a legal deadline, Hague Convention proceedings are still expected to be completed within a six week window: para 1.2 of the Practice Guidance 'Case Management and Mediation of International Child Abduction Proceedings' (2018) (the Practice Guidance).

‘habitually resident’ in the requesting state at the date of their removal or retention (Article 4); and that the removal or retention was ‘wrongful’, namely that it was in breach of the custody rights of the left-behind parent and that those rights were actually exercised or would have been exercised but for the removal or retention (Article 3). Where these criteria are satisfied, there is a prima facie duty to return the child if less than a year has elapsed since the wrongful removal or retention or more than a year has passed and it is not demonstrated that the child has now settled in their new environment (Article 12).

23. The Courts of the requested state are not obliged to return the child if one of the defences in Article 12 or 13 are made out. Return under the Hague Convention may otherwise be a breach of Article 3(1)² of the UN Convention on the Rights of the Child (UNCRC) and Article 8 of the European Convention on Human Rights (ECHR) in circumstances such as those considered by the Grand Chamber of the European Court of Human Rights (ECtHR) in *Neulinger v Switzerland* (2012) 54 E.H.R.R. 31. Following *Neulinger*, the Supreme Court clarified the interrelationship of the Hague Convention with the UNCRC and ECHR in *E (Children), Re (Abduction - Custody Appeal)* [2012] 1 A.C. 144. At [13-17] of their speech on behalf of the Court, Baroness Hale and Lord Wilson observed that ‘the fact that the Hague Convention does not expressly make the best interests of the child a primary consideration does not mean that they are not at the forefront of the whole exercise’. The Hague Convention is premised on the assumption that ‘if there is a dispute about any aspect of the future upbringing of the child the interests of the child should be of paramount importance in resolving that dispute’. It is also based on a second assumption, namely that ‘the best interests of the child will be served by a prompt return to the country where he is habitually resident’. This latter assumption may, however, be rebutted, ‘albeit in a limited range of circumstances, but all of them inspired by the best interests of the child’, namely:
 - 23.1. if proceedings were begun more than a year after her removal and she is now settled in her new environment (Article 12);
 - 23.2. if the person left-behind has consented to or acquiesced in the removal or retention or was not exercising his rights at the time (article 13(a));
 - 23.3. if the child objects to being returned and has attained an age and maturity at which it is appropriate to take account of her views (article 13);
 - 23.4. if ‘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’: article 13(b).
24. Where one of these defences is established, the assumption that it is in the best interests of the child to be returned to the requesting state ‘may not be valid’: *Re. E*, [16]. Accordingly, the Courts of the requested state will then have a discretion

² 3(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

whether to accede to or refuse the request to return the child, to be exercised in accordance with the principles at paragraph 38, below.

25. However, ‘these limitations on the duty to return must be restrictively applied if the object of the Convention is not to be defeated’. Moreover, ‘there is a particular risk that an expansive application of Article 13(b), which focuses on the situation of the child, could lead to this result’: *Re. E*, [30], citing the explanatory report to the Hague Convention, para 34. This has implications for the procedure that the Court is to undertake when determining Hague Convention proceedings, including the following.
 - 25.1. The burden of proof lies on the person opposing the child’s return (usually the removing parent) to adduce evidence to substantiate one of the Article 13 defences to the civil standard: *Re. E*, [32].
 - 25.2. The Courts of the requested state are not expected to carry out a ‘full-blown examination of the child’s future ... which it was the very object of the Hague Convention to avoid’: *E*, [22].
 - 25.3. There is, moreover, no right to call oral evidence which should only be allowed ‘sparingly’, with the threshold for the court giving permission a ‘high one’: *Re. B (CA)* [2022] 3 WLR, [57-65]. While that threshold is more likely to be crossed where binary issues of fact are involved, such as whether consent has been given for the purposes of Article 13(a), the judge must decide whether it is necessary to hear oral evidence in order to be able fairly to determine central issues of fact in the context of what is a summary process and in the context of the available documentary and written evidence: *Re. B*, *ibid*, [64].
 - 25.4. There are particular restrictions that apply when the Court is concerned with the defence under Article 13(b), to which I will come shortly.

Habitual residence

26. I have already observed that the Hague Convention only applies to a child under the age of 16 who is ‘habitually resident’ in the requesting Contracting state (Article 4). Where ‘habitual residence’ is in dispute the courts of the requesting will need to determine this as a preliminary issue. In many, if not most, cases the issue will not be in dispute, because the child was born in the requesting state and has never lived anywhere else. The issue arises where a child has been born or has lived in – and so was ‘habitually resident’ – in another state before moving to the requesting State. The question then arises as to whether they have become habitually resident in the requesting State. In the present case, it is not in dispute that the child, EF, was ‘habitually resident’ in the UK from the date of her birth until May 2020, when M took her to meet F in Slovakia. The issue is whether, if F thereafter coerced M into remaining with EF in Slovakia rather than returning to the UK, EF nevertheless became ‘habitually resident’ in Slovakia before she eventually returned to the UK with M on 17 December 2021.
27. The legal principles for the determination of ‘habitual residence’ are summarised by Hayden J in *Re. B (A Child)* [2016] 4 WLR 156, [17], as approved by the

Supreme Court in *Re. C (Children) (International Centre for Family Law, Policy and Practice intervening)* [2019] AC 1 at [56], which are derived in material part from a series of Supreme Court judgments including *A v A* [2014] AC 1, *Re. LC* [2016] AC 1038 and *Re R* [2016] AC 76. These principles were recently restated and applied by McDonald J in *E v D* [2022] EWHC 1216 (Fam), [21]. I extract what I consider to be the relevant principles for the purposes of this case from those judgments, unless otherwise indicated, as follows:

- 27.1. As Counsel for F accepted, where habitual residence is established in one country, the burden of proof lies on the party claiming that it has changed: *Re. R (Wardship: Child Abduction)* [1992] 2 FLR 481. Here, that is F.
- 27.2. The relevant date by which habitual residence in the requesting state is to be established is the date ‘immediately before the removal or retention’ (Article 3) or ‘immediately before any breach of custody or access rights’ (Article 4). These are the same dates: the ‘right to determine the place of the child’s residence’ is a ‘custody right’ for the purposes of Article 5, so any wrongful removal or retention is also a breach of the left-behind parent’s custody rights.
- 27.3. The test for ‘habitual residence’ of a child is the same under the Hague Convention as under EU law and ‘corresponds to the place which reflects some degree of integration by the child in a social and family environment in the country concerned’, with relevant factors including the duration, regularity, conditions and reasons for the family’s move to and stay in that state, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state: *Re. A* [2010] Fam 42, per the ECJ, [38-40], cited and approved by the Supreme Court in *A v A*, [48, 54(iii)], *Re. LC*, [30], *Re. B (A Child)*, [2016] AC 606, *Re. B*, [17(i)].
- 27.4. The relevant question is whether the child has ‘some degree’ of integration; they do not need to be ‘fully integrated’: *Re. B*, [17(x)].
- 27.5. It is the *stability* as opposed to the *permanence* of residence which is important (*A v A*, [51]; *Re. R*, [16]), though this is qualitative and not quantitative in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there: *Re. B*, [17(ix)].
- 27.6. The test is essentially a factual one which should not be overlaid with sub-rules or glosses: *Re. B*, [17(i)].
- 27.7. A child will usually have the same habitual residence as the parent(s) upon whom they are dependent and who care for them. The younger the child the more likely the proposition is to be true: *A v A*, [54(iv)], *LC*, [35-36], *Re. B*, [17(v)].
- 27.8. There is no longer a rule of law that one parent cannot unilaterally cause a child to change habitual residence by removing or retaining the child in another jurisdiction without the consent of the other parent: *Re. H*

(*Children*) (CA) [2015] 1 WLR 863, [34], approved by the Supreme Court in *Re R* [2016] AC 76; *Re. B*, [17(iv)]. However, as Black LJ acknowledged in *Re. H*, [33], ‘the ability of one party to unilaterally change their child’s habitual residence without the consent of the other is limited by the inclusion of the *purposes and intentions* of the parents as one of the relevant factors in the factual determination of where a child is habitually resident’ by the Supreme Court in *A v A*, [54(iv)]. Furthermore, ‘the fact that the child’s residence is *precarious* (as it may well be where one parent has acted unilaterally) may prevent it from acquiring the necessary quality of stability for habitual residence’: *Re. H*, *ibid*.

27.9. The court’s focus should be on whether habitual residence has been established in the new state, rather than whether it has been lost in relation to the child’s residence in the previous state, although the second question may still be relevant to the first: *Re. M (Children)* (CA) [2020] 4 WLR 137, [61-63].

Article 13(a): consent

28. The parent opposing return may establish a defence under Article 13(a) if they prove, to the civil standard, that the left-behind parent gave their ‘clear and unequivocal’ consent to the child’s removal from the jurisdiction, although ‘consent (or lack of it) must be viewed in the context of the realities of the disintegration of family life’, not ‘the law of contract’: *Re. PJ (Children) (Abduction: Consent)* (CA) [2010] 1 WLR 1236, [48]. Consent may be withdrawn at any time before actual removal or retention, but not thereafter: *PJ*, *ibid*, [48].
29. The question of consent is a binary issue of fact for the court to resolve, which may require the hearing of oral evidence: *Re. B*, *ibid*, [57-65], above, paragraph 25.2.

Article 13(b): grave risk of harm

30. The parent opposing return may also establish a defence under Article 13(b) if they prove that ‘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 Supreme Court in *E* held at [31-34] that Article 13(b), by its very terms, is of restricted application. In addition to the burden being on the parent opposing return to establish the defence:
- 30.1. The risk of harm to the child must be ‘grave’. It is not enough that the risk be ‘real’. The risk must reach a certain level of seriousness as to be characterized as ‘grave’. Although ‘grave’ characterizes the risk rather than the harm, there is in ordinary language a link between the two. Thus, a relatively low risk of death or really serious injury might properly be qualified as ‘grave’ while a higher level of risk might be required for other less serious forms of harm: *Re. E*, [33].
- 30.2. The child must be put at risk of ‘physical or psychological harm’ or otherwise placed in an ‘intolerable situation’. ‘Intolerable’ gives colour to

the term ‘physical or psychological harm’. It 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’. Every child must put up with a certain level of ‘rough and tumble, discomfort and distress’, but there are ‘some things it is not reasonable for a child to tolerate’. Among these are physical or psychological abuse or neglect of the child, as well as ‘exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent’: *Re. E*, [34]. I return to this, below, under the heading ‘controlling and coercive behaviour’.

- 30.3. Article 13(b) looks to the future: the situation as it would be if the child were to be returned forthwith to her home country, having regard to any protective measures that may be put in place to safeguard the child from such harm: *Re. E*, *ibid*, [35]. There may, objectively, be a ‘grave risk’ that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation if they are returned (whether with or without the removing parent) to live with the left-behind parent without any protective measures. But if, for example, the child can be returned to a different setting, with effective restrictions on the left-behind parent having any contact with them and the removing parent, then the threshold required for Article 13(b) purposes will not be crossed. The gravity of the risk of harm, including both its likelihood and the potential seriousness of the harm, needs to be evaluated in the light of the availability and efficacy of any protective measures. ‘The clearer the need for protection, the more effective the protective measures must be’: *Re. E*, [52], cited in *Re. S (Abduction: Article 13(b)) (Mental Health)* [2023] EWCA Civ 208, [92].
 - 30.4. Relevant protective measures may include anything which might reduce the risk, including general features of the home State such as access to the courts and other state services: *Re. C* [2019] 1 FLR 1045, [41]. The measures may also include orders made by the court in the requested state or undertakings given by the left-behind parent requiring them, for example, not to contact the removing parent pending the resolution of children’s proceedings in the requesting state. In assessing the efficacy of any such orders or undertakings, the fact that they are enforceable in the requesting state under the terms of the 1996 Hague Convention³ is a relevant consideration: *Re. Y (Abduction: Undertakings)* [2013] 2 FLR 649. If there is any doubt as to the availability or efficacy of protective measures, enquiries may be made through the international liaison judges and a short adjournment may be necessary for that purpose: *E v D* [2022] EWHC 1216 Fam, [32].
31. In determining the Article 13(b) issue the court should adopt the following approach.
 - 31.1. The burden of establishing the Article 13(b) defence remains throughout on the party opposing return. However, given the nature of allegations of

³ Full name the ‘Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children Protection of Children 1996’

domestic abuse upon which the risk of harm is likely to be founded and the limited evidence available given the summary nature of the proceedings, the court may be unable to determine the truth of the allegations. The courts have therefore adopted a pragmatic solution. Unless the available evidence enables them ‘confidently to discount the possibility that the allegations give rise to an article 13(b) risk’, the judge ‘should assume the risk of harm at its highest and then, if that risk meets the threshold in Article 13(b), go on to consider whether protective measures sufficient to mitigate the harm can be identified’: *Uhd v Mckay* [2019] 2 FLR 1159, per MacDonald J, [68-70], applying *Re. E*, [36] (as endorsed by the Supreme Court in *Re. S (A Child)* [2012] 2 AC 257, [22]) and the Court of Appeal decisions in *Re. C (Children) (Abduction: Article 13(b))* [2019] 1 FLR 1045, [39], and *Re. K (1980 Hague Convention: Lithuania)* [2015] EWCA Civ 720, [52-53].

31.2. Although the caselaw does not expressly say so, in my judgment it follows from the reasoning in *Re. E*, *Uhd*, *Re. C* and *Re. K* that if the judge is able to find, on the limited evidence available, that the allegations made by the removing parent are made out then they may make such a finding, rather than assume the allegations to be true. That is particularly so if (as here) those findings of fact are also relevant to other issues that do turn on binary issues of fact, such as the question of ‘habitual residence’.

31.3. Although it is not necessary, it is preferable for the judge to adopt a two stage process under Article 13(b): *Re. B*, [2022] 3 WLR 1315, [70-71].

(1) At stage one, the judge should evaluate the nature and level of the risk *in future* on the basis of their finding (if made) or assumption that the allegations made by the removing parent of the left-behind parent’s *past* behaviour are true: *ibid*, see also *Re. C*, [2019] 1 FLR 1045, [48-50]. If a number of different allegations are made, the judge should consider the cumulative effect of those allegations as a whole before evaluating the nature and level of risk: *Re. B*, [70]. If the court assesses the necessary threshold has been reached then they will proceed to stage two; if not, the defence fails.

(2) At stage two, the judge should evaluate the sufficiency and efficacy of any protective measures in reducing or removing that risk to a level below the threshold of ‘grave risk’ provided for by Article 13(b).

31.4. I asked counsel whether, at the second stage, there is an evidential burden (if not a legal burden) on the left-behind parent to establish the availability and efficacy of protective measures. Counsel for F pointed out that Article 11(4)⁴ of the Brussels IIa Convention had imposed a legal burden of that nature, but this was no longer law due to the UK’s exit from the EU. He also pointed to observations of Lewison LJ in *Re. C* [2019] 1 FLR 1045, [69] that to impose such a burden would reverse the burden of proof imposed by Article 13(b) on the party opposing return. I will not treat F as

⁴ ‘A court cannot refuse to return a child on the basis of Article 13(b) of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.’

being under any such burden. I will approach the task at each stage by considering all the available evidence and conducting an evaluative judgment: first, as to the nature and level of risk in future if the child is returned; second, as to the sufficiency and efficacy of any protective measures in that event; and then to ask whether the removing parent, M, has discharged the burden on her under Article 13(b).

Controlling and coercive behaviour and Article 13(b)

32. Baroness Hale in *E* acknowledged that a child may suffer ‘harm’ for the purposes of Article 13(b) when they witness domestic abuse of a parent or caregiver: [35], above, paragraph 30.2. In recent years there has been an increasing awareness, as a matter of domestic law, that ‘domestic abuse’ may occur when a person subjects another to a pattern of behaviour amounting to ‘controlling or coercive behaviour’. This awareness should also inform the exercise under Article 13(b): *Re. A-M (A Child: 1980 Hague Convention)* [2021] EWCA Civ 998, [49, 56], where the Court of Appeal held that when considering Article 13(b) ‘the court must be astute to recognise’ conduct which forms part of a pattern of controlling or coercive behaviour’, referring to the judgment of the Court of Appeal in *Re. H-N (Allegations of domestic abuse)* [2022] 1 W.L.R. 2681, [29-32]. In *F v M* [2021] EWFC 4, Hayden J undertook the first detailed analysis of a case involving controlling and coercive behaviour ([100]) and took the opportunity ‘to highlight the insidious reach of this facet of domestic abuse’: [4]. In *H-N* the Court of Appeal approved Hayden J’s ‘comprehensive and lucid analysis’ and endorsed his plea ‘urging greater prominence to be given to coercive and controlling behaviour in Family Court proceedings’: [29]. The Court of Appeal also endorsed the definition of controlling or coercive behaviour in PD12J, paragraph 3, which in turn derives from statutory guidance issued by the Home Office under s 77 of the Serious Crime Act 2015 following the introduction of the new offence of controlling or coercive behaviour under s 76, which is also relevant to the evaluation of evidence in the Family Court (*H-N*, [30]):

‘domestic abuse’ includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. ...;

‘Coercive behaviour’ means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim;

‘Controlling behaviour’ means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

33. These definitions are based on those in the Statutory Guidance (p. 3 and 22), which also gives examples of coercive and controlling behaviour (at p. 4, and cited in *F v M*, [2021] EWFC 4, [60]), including: isolating a person from their friends and family; monitoring their time; taking control over aspects of their everyday life, such as where they can go, who they can see, what to wear and when they can sleep; repeatedly putting them down such as telling them they are worthless; enforcing rules and activity which humiliate, degrade or dehumanise the victim; assault; rape; preventing a person from having access to transport or from working. Further examples include, on page 11 under the heading ‘Offender tactics’:

causing or creating vexation - using the system against the victim by making false or vexatious allegations to agencies. The Police should examine whether this has been a feature in previous relationships. The Authorised Professional Practice on Investigating Domestic Abuse issued by the College of Policing states: ‘A manipulative perpetrator may be trying to draw the police into colluding with their coercive control of the victim. Police officers must avoid playing into the primary perpetrator’s hands and take account of all available evidence when making the decision to arrest’

...

using threats of manipulation against the victim. For example, by telling the victim that they will make a counter-allegation against them, that the victim will not be believed by the police or other agencies, that they will inform social services, or that they will inform immigration officials where the victim does not have a right to remain;

34. A person’s controlling behaviour may even express itself in an abuser’s willingness to, and the manner in which they, conduct court proceedings against the abused party, as Hayden J recognised in *F v M* [2023] EWFC 5, [17-23].
35. In assessing whether controlling or coercive behaviour has occurred, it is important to focus on the pattern of behaviour rather than to focus too intently on specific incidents, which may be ‘counterproductive’ as it ‘carries the risk of obscuring the serious nature of harm perpetrated in a pattern of behaviour’: *F v M* [2021] EWFC 4, [113]. Such a pattern of behaviour may cause serious emotional and psychological harm to victims, and their children, even in the absence of specific incidents of violence. As the President went on to explain in *H-N* at [31],

... coercive and/or controlling behaviour by one party may cause serious emotional and psychological harm to the other members of the family unit, whether or not there has been any actual episode of violence or sexual abuse. In short, a pattern of coercive and/or controlling behaviour can be as abusive as or more abusive than any particular factual incident that might be written down and included in a schedule in court proceedings ...
. It follows that the harm to a child in an abusive household is

not limited to cases of actual violence to the child or to the parent. A pattern of abusive behaviour is as relevant to the child as to the adult victim. The child can be harmed in any one or a combination of ways for example where the abusive behaviour: (i) is directed against, or witnessed by, the child; (ii) causes the victim of the abuse to be so frightened of provoking an outburst or reaction from the perpetrator that she/he is unable to give priority to the needs of her/his child; (iii) creates an atmosphere of fear and anxiety in the home which is inimical to the welfare of the child; (iv) risks inculcating, particularly in boys, a set of values which involve treating women as being inferior to men.

36. This conclusion is consistent with the Domestic Abuse Act 2021 which gives a statutory definition of ‘domestic abuse’ that includes ‘controlling or coercive behaviour’ (s 2) and provides that a child who ‘sees or hears, or experiences the effects of’ of such abuse by or towards a person to whom they are related is considered to be a victim of ‘domestic abuse’ (s 3).
37. As *A-M* makes clear, this developing understanding of controlling and coercive behaviour as a matter of domestic law should inform the approach of the Courts when determining the Article 13(b) defence.

Discretion

38. Where the court is satisfied one of the defences in Article 13 is made out it is no longer under a duty to order the return of the child to the requesting state under Article 12. However, the court retains a discretion to return the child. This discretion is ‘at large’, that is to say it is not exercised within limits set down by the Hague Convention: per Baroness Hale in *Re. M (Abduction: Zimbabwe)* [2008] 1 FLR 251, giving a speech with which the rest of the House of Lords agreed: [43]. The underlying purposes of the Hague Convention are relevant to the exercise of the discretion, but should not always be given more weight than other considerations, which may include wider considerations of the child’s rights and welfare: [43]. The exercise of discretion will be determined by the court’s findings as to why there is no obligation to return the child. For example, where the decision has been taken under Article 13(b) that there is a ‘grave risk’ of harm to the child if they are returned it will be ‘inconceivable’ that the court will nevertheless in its discretion order their return: [45]. Different considerations may apply in consent cases, although as a general principle ‘the further one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be’: [44].

Relevant principles in making findings on the evidence

39. The relevant principles I will apply in making findings on the evidence are these:
 - 39.1. The approach to fact-finding by a judge when conducting Hague Convention proceedings is conditioned by their underlying purpose, namely the ‘prompt return of children wrongfully removed to or retained in any Contracting state’ (Article 1). The proceedings must be determined swiftly and, if possible, within six weeks of their commencement. The

judge does not conduct a fact-finding exercise such as that under PD12J. Oral evidence is the exception, not the norm.

- 39.2. The judge must nevertheless make findings of fact necessary to resolve the issues before them. In doing so, it is not open to a judge to say: 'I don't know where the truth lies'. A fact in issue must be determined one way or the other: the law is binary and does not allow for any value other than zero and one: per Lord Hoffman in *B (Children) (Sexual Abuse - Standard of Proof)*, *Re* [2009] 1 A.C. 11, [2]; see also per Baroness Hale at [31-32]. The judge must make findings of fact only on the admissible evidence and appropriate inferences but cannot speculate about the existence of other evidence. Where there is little evidence on a particular issue, the fact-finding exercise may be not so much about establishing the truth as a forensic exercise in determining whether the party upon whom the burden of proof rests has discharged that burden: *Air Canada v Secretary of State* [1983] 2 A.C. 394, 411F-G, per Denning LJ.
- 39.3. This principle is qualified in proceedings under Article 13(b), as I have explained at paragraph 31 above. Rather than make findings of fact, the judge may instead assume the truth of allegations that support the existence of a 'grave risk' of harm if the child is returned, although these must be 'reasoned and reasonable assumptions based on an evaluation that includes consideration of the relevant admissible evidence that is before the court': *Uhd v Mckay*, *ibid*, [70]. If the judge has sufficient evidence 'confidently to discount the possibility that the allegations give rise to an article 13(b) risk' they should do so. By the same token, if the judge has sufficient evidence they may make positive findings of fact.
- 39.4. In making findings of fact or Article 13(b) assumptions, contemporaneous documents carry a particular weight in the forensic exercise. The advantages of such contemporaneous documents compared to witness testimony have been repeatedly stressed in the caselaw, helpfully summarized by Warby J in *R (Dutta) v GMC* [2020] Med. L.R. 426 at [39].
- 39.5. Witness testimony that has been tested by cross-examination and has not been discredited in the process will carry more weight than evidence contained only in a witness statement, particularly that of a witness who has been directed to attend court to give evidence and has failed to do so without good reason.
- 39.6. A finding or admission that the witness has lied on one issue may undermine their credibility in relation to another, related issue unless the witness had an innocent reason for lying such as shame, misplaced loyalty, panic, fear or distress: *R v Lucas* [1981] Q.B. 720; *Re. A (A Child) (Fact-Finding Speculation)* [2011] EWCA Civ 12, [21].
- 39.7. The judge may consider the inherent probability or improbability of an event when deciding whether, on balance, the event occurred or its truth should be assumed for Article 13(b) purposes. 'The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established': Lord Hoffman in

Re. B, [11], citing Lord Nicholls in *H (Minors) (Sexual Abuse: Standard of Proof)*, *Re.* [1996] AC563, 586. However, the fact that an event is a very common one does not lower the standard of probability to which it must be proved. Nor does the fact that an event is very uncommon raise the standard of proof that must be satisfied before it can be said to have occurred: *BR (Proof of Facts)*, *Re* [2015] EWFC 41, [7(3)], Jackson J.

39.8. Similarly, the fact that allegations are particularly serious, or have serious consequences, does not change the standard of proof to which they must be established. ‘The court will consider grave allegations with proper care, but evidence is evidence and the approach to analysing it remains the same in every case’: *BR (Proof of Facts)*, *Re* [2015] EWFC 41, [7(1-2)].

39.9. ‘When approaching decisions on issues of fact judges should deploy the kind of rational, objective and fair-minded rigour that all reasonable people would deploy when deciding questions of fact on really important matters’: *F v M* [2021] EWFC 4, [4], Hayden J.

Resolution of disputed factual issues

40. I will first resolve the disputed factual issues (or Article 13(b) assumptions) necessary to the determination of the issues in the case, namely:

40.1. Whether, between December 2018 and 3 March 2019, M was the victim of domestic abuse by F. F denies this.

40.2. Whether M intended to visit Slovakia with EF in May 2020 only for a short period before returning to the UK (M’s case); or whether she came with the intention that she and EF live with F and make Slovakia their home (F’s case).

40.3. Whether, between May 2020 and 2 December 2021, M and F were the victims of domestic abuse, first by preventing M from returning to the UK and thereafter by subjecting M, in particular, to violent, controlling and coercive behaviour until the intervention by police in December 2021. F denies this.

40.4. Whether F consented to M taking EF to the United Kingdom between 2 and 17 December 2021 (M’s case). F disputes M’s evidence.

41. The first three are relevant to the issue of ‘habitual residence’ and to M’s Article 13(b) defence based on an asserted ‘grave risk of harm’ to EF if she were returned to Slovakia. The fourth is relevant to M’s Article 13(a) defence.

Application of the relevant principles: general

42. The evidence available to me for determination of these issues included two witness statements from F and two from M, together with a number of other documents. Unsurprisingly, given the summary nature of these proceedings, the evidence could have been more extensive. For example, as pointed out by Counsel for F, M did not produce any witness statement from other witnesses to

the events she described, namely her mother, father, brothers or grandfather. I would observe that the same criticism may be made of F; no statement was forthcoming from his mother, brothers or other family members. But this is nothing to the point. Of course more and better evidence could have been obtained, on both sides, but neither party sought to persuade me to adjourn for that purpose. I must decide the issue on the basis of the evidence before me without speculating about other evidence and having regard to the summary nature of these proceedings. Indeed, even if I am unable to make findings of fact as to the allegations of domestic abuse upon which the Article 13(b) defence is based, the caselaw requires me to assume the truth of those allegations unless I can confidently discount them on the available evidence.

43. As already noted, F failed to attend the hearing to give oral evidence as directed by Sir Jonathan Cohen, whereas M attended and was cross-examined. I did not consider her evidence to be discredited in the process and I will give greater weight to her evidence than to F's. However, as the direction for cross-examination was limited to the issue of consent, and M was not cross-examined about the other evidential issues in dispute, I will only apply that forensic approach to the consent issue.

Was M the victim of domestic abuse between December 2018 and March 2019?

44. I am satisfied, to the civil standard, that M was the victim of domestic abuse in the period between December 2018 and March 2019. In particular, I am satisfied that M was the victim of violent, coercive and controlling behaviour by F and that she was only able to escape after contacting her family with F's mother's phone in February/ March 2019 in the way she describes in her evidence. I am also satisfied that, following M's rescue by her brothers, on 3 March 2019 F, his mother and brothers came to M's brother's house and abducted M and took her back to his own home, and that the police were then called to rescue her. M says she was a 'virtual prisoner' in F's house. It is not M's case that she was literally a prisoner, kept under lock and key. The influence that F wielded over her was more insidious and contains many of the features of controlling and coercive behaviour identified in the caselaw and the Statutory Guidance referred to at paragraphs 32-37 above. F made M a 'virtual prisoner' by cutting her off from friends and family, depriving her of the means of contacting anyone who might help her, monitoring her whereabouts himself or through the family members who shared the house, ensuring F's compliance by threats of violence, including future threats of violence ('he ... told me to look forward to him coming home from work on Tuesday, and that he would beat me up again'), and thereby systematically undermining M's confidence and sense of self. As Hayden J noted in *F v M* [2021] EWFC 4, [83, 113], there may be no need for an abuser to lock a victim of controlling and coercive behaviour in their home; eventually, the victim may effectively 'lock themselves in'. Their mind may become so overborne by the other's behaviour that their own autonomous decision making becomes compromised. While M did not reach that stage of helplessness, the key point is that coercive and controlling behaviour erodes the abused person's ability to help themselves. It is likely that is what happened here.
45. In making these findings, the police statement carries a particular weight in the forensic exercise. It was made before these proceedings were envisaged, indeed

before EF was even born, so cannot possibly have been created with a view to influencing these proceedings. M signed the statement having been warned that, if it was untrue, she could face imprisonment. It is consistent in all material particulars with the account she gave in her witness statement to the Court, although with significantly more detail, as might be expected of a contemporaneous account of the events of 3 March 2019 given by M in a language she speaks fluently.

46. F submits that the police statement cannot be relied upon, for two reasons. First, F's evidence is that he was never interviewed by the police. Second, the criminal prosecution was discontinued. The inference I am asked to draw is that the Slovakian police must have considered M's allegation to be unfounded. An email from the Slovakian police to M's solicitors dated 2 February 2023 does not mention whether F was spoken to in connection with the criminal investigation, but confirms that on 30 April 2019 the criminal prosecution was discontinued by the investigator of the Regional Police Office in Kosice under Article 215(1)(b)(4) of the Criminal Procedure Code. Neither party was able to assist me with what that provision says so it is not possible to determine the grounds upon which that decision was taken. Counsel for F drew my attention to a statement in M's witness statement to the police which reads: 'Having been informed of the possibility of terminating the criminal proceedings by entering into a settlement agreement, I hereby state that I agree with this procedure', inviting me to draw the inference that M had voluntarily withdrawn her complaint. However, I reject that suggestion. First, it is clear from the original Slovakian document that this is another standard form of wording. Second, it is also evident that any agreement to terminate the criminal proceedings was conditional upon there being some form of 'settlement agreement', which clearly cannot have happened if F was not even spoken to. In my judgment M was simply agreeing to engage in some process of restorative justice as an alternative to a criminal prosecution, but there is nothing to suggest any such process took place. I do not need to decide the issue, but I suspect the reason why the prosecution was discontinued is that M left the country. In any event, criminal proceedings may be discontinued for many reasons which do not undermine the veracity of the underlying account, including where a victim of domestic abuse withdraws or does not pursue an allegation. I am satisfied that the events described in the police statement have the ring of truth. I therefore accept the evidence of M on this issue and reject that of F as untrue.

Did M intend to visit Slovakia in May 2020 for a short trip or to live?

47. I accept M's evidence, applying the civil standard, that when she returned to Slovakia with EF in May 2020 she intended to do so only for a short visit before returning to the UK. M's evidence is that she only agreed to come on condition that F paid for return flights for her and EF. F denies this, saying that '[F] bought the flights to return herself'. In my judgment, by this statement F inadvertently reveals the fact that – regardless of who paid for them – M had return flights for her and EF, which supports M's evidence that she intended to return to the UK and that F knew that to be the case. F and M had not seen each other for over a year, and the relationship had ended with the dramatic and violent events of March 2019. M had not put F's name on EF's birth certificate. I do not discount

F's persuasiveness or the insidious and controlling nature of F's hold over M, which clearly survived in some form. M was not cross-examined about this issue, but she may well have had mixed feelings about the visit and may have considered the possibility that she and F would resume their relationship. But I am satisfied that on this occasion her intention was to only visit for a few weeks to allow F to meet and develop a relationship with EF. I reject F's evidence that they agreed M was coming with EF to live with him and to settle in Slovakia. I am supported in this conclusion by the fact that I have already found F to have lied in his evidence that no abuse took place between December 2018 to March 2019 and do not consider there to be an innocent explanation for this lie.

Were M and F forced to remain in Slovakia and were they victims of domestic abuse between May 2020 and 2 December 2021?

48. With two exceptions, I accept M's evidence on this question. I find, on the balance of probabilities, that immediately upon arriving at F's home, F removed M's travel documents and telephone so that she was unable to contact her friends and family and that thereafter she was 'virtually a prisoner' until her rescue by the police on 2 December 2021. That is consistent with my finding of F's controlling and coercive behaviour towards M between December 2018 and March 2019, aided and abetted by F's family members. M's evidence that the police were involved in her escape on 2 December 2021 is also corroborated by the email of 8 February 2023 from the Slovakian police that a criminal complaint had been made, although I attach little weight to that given the lack of detail it contains. I also consider the Facebook message from M's mother to F's brother dated 1 October 2021 is capable of corroborating M's account that F had cut her off from all contact with her family, although I attach relatively little weight to that as it is also capable of an alternative – albeit less likely – interpretation put forward by F's Counsel, namely that M had fallen out with her mother.
49. I reject F's evidence that M and EF were happy and settled living in his home during this period. F does not respond at all to M's evidence that the police had to rescue her from his home on 2 December 2021 and took her to her grandfather's. All that F says is that 'when [M] left my home with [EF] in December 2021, I went to see her at her grandfather's and asked her to come back'. If F disputed that evidence, I would have expected him to say so in his witness statement. F relies upon the fact that M was receiving maternity leave payments and child benefit and that she and EF were registered as living at F's address, but there is no documentary evidence to support that. He also relies upon EF's Slovakian birth certificate, which records both M and F as parents, but that does not help me with deciding whether M freely consented to adding F as the father. The fact that she had not included F on EF's UK birth certificate suggests not. I have also seen a document from a Slovakian paediatrician recording that EF was living at F's address and received treatment between 22 September 2020 and 11 November 2021. That does not rebut M's evidence that she was the victim of controlling and coercive behaviour during that period. I have already found that F lied about events in the period from December 2018 and March 2019 and there was no innocent explanation for those lies; his intention was to refute M's claims of domestic abuse in their entirety. I find his credibility is therefore

undermined when it comes to his evidence concerning the allegations of domestic abuse in the period from May 2020 to December 2021.

50. The two exceptions for which I do not make positive findings of fact are, first, M's evidence that F was abusive to EF directly; and, second, that F forced her to have sex in front of his brothers against her will: above, paragraph 10. These allegations go beyond the findings I have already made of controlling and coercive behaviour and are not directly corroborated by M's police statement of 19 March 2019. The allegation of rape, in particular, is a very serious one. I have only M and F's written statements containing the allegations, which (in the case of the rapes) are lacking in specificity, and F's bare denial; no oral evidence was directed to be heard on this issue so M's allegations were not tested in cross-examination; and there is no other evidence to corroborate M's evidence on these issues. I do not feel able to conclude that these events are established on the balance of probabilities. The evidence is, however, consistent with F's evidence that M subjected her to violent, coercive and controlling behaviour, which I have already accepted to be made out. Accordingly, I cannot discount these allegations and I am satisfied it is appropriate for me to assume these allegations to be true for the purposes of the exercise in Article 13(b).

Did F consent to M taking EF to the United Kingdom between 2 and 17 December 2021?

51. I find that F probably did give his consent to M removing EF to the UK at some point between 2 and 17 December 2021 and that consent was not withdrawn before M had left, although it has since been withdrawn. There is a straight conflict of evidence on this issue between M and F. I have already explained why I give greater weight to M's evidence than F's on this issue given hers was tested in cross-examination and his was not. I have also already found F's credibility to have been undermined in relation to the issue of coercive and controlling behaviour, on which I have concluded he was not truthful and without an innocent reason.
52. F's Counsel argued that it was inherently unlikely that F was both (a) a violent and controlling individual who had effectively imprisoned M for the last 18 months and (b) gave M his blessing to return to the UK with EF, including providing EF's birth certificate, collecting M's belongings from the house and even driving her to the airport on 17 December 2021. On that analysis, my finding on the former must necessarily preclude my finding the latter; the converse would also be true. Furthermore, it is said, a finding of consent is inconsistent with F's uncontested evidence that shortly after M's departure he reported EF as missing to the police and thereafter brought proceedings in the Slovakian family courts and invoked these proceedings under the Hague Convention.
53. I do not accept Counsel's premise. I have found that F was coercive and controlling and had been so throughout his relationship with M. But that does not preclude a finding that F consented to M and EF's return to the UK. I accept that, had M still been living with F, it is unlikely that he would have acceded to such a request. But the context is crucial: at the time he is said to have given consent M had just been rescued from F's house by the police on 2 December 2017. F may have agreed to her leaving because he feared she would pursue

criminal proceedings against him if she remained in Slovakia. After all, the last time she had made a criminal allegation against him, in March 2019, it was not proceeded with after M returned to the UK. It may also be that F saw this as a necessary concession to make in the short term, knowing that he had persuaded M to return in the past and believing he would be able to do so again. It may even be, as M said in evidence, that this was simply evidence of his erratic and unpredictable behaviour. It certainly cannot be said that it is so unlikely that F would have given his consent that I should reject M's evidence on that basis. Nor does the fact that F subsequently went to the police and the courts support the conclusion that M must be lying about his having given consent. F may have regretted giving his consent and withdrawn it, after M had left. I find F consented to M and EF leaving Slovakia and this was not withdrawn before their departure on 17 December 2021.

Decision

54. Against that backdrop I can articulate my decision on the issues in relatively short compass.

Admission of the Facebook message of 1 October 2021

55. I give permission for M to rely upon this document. First, it has some probative value, as I have explained at paragraph 48, above. Second, these are summary proceedings with short timescales. Third, F filed his own evidence late; he was directed to file a witness statement by 16 January 2023 but this was only served on 1 March 2023, the day before the hearing. Fairness demands that M be able to respond. Fourth, F would have had an opportunity to give instructions on the Facebook message had he attended as directed.

Habitual residence

56. The critical issue for me to decide is whether EF's habitual residence in the UK changed following her and M's trip in May 2020 and subsequent stay in Slovakia so that, as at the date of EF's removal on 17 December 2021 (the relevant date, see paragraph 27.2 above), she had acquired habitual residence in Slovakia. If the answer is yes, it is accepted by M that her removal was 'wrongful' and the court must order EF's return unless M can establish one of the defences under Article 13(b). If the answer is no, the case falls outside the scope of the Hague Convention and the application must be dismissed.
57. F accepts that the burden is on him to prove, on the balance of probabilities, that EF had acquired habitual residence in Slovakia by 17 December 2021. In my judgment, F has failed to discharge that burden. Indeed, I find that, on the relevant date, EF was habitually resident in the United Kingdom. My reasons are these.
- 57.1. In May 2020, prior to the visit to Slovakia, EF was habitually resident in the UK; F accepts as much. She was born in the UK on 1 October 2019 to a mother who was a citizen of an EU country, although she is a Slovak national and has a Slovakian passport. Her maternal grandparents and uncles live and are settled in the UK.

- 57.2. As a very young child, EF has and retains the habitual residence of her caregiver, namely her mother, with whom she lived without her father from her birth until May 2020; thereafter her mother was her primary caregiver. Her mother, M, although a Slovak national, was also habitually resident in the UK, at least between December 2019 and May 2020, but also having lived in the UK from July 2017 to December 2018 and her parents and brothers are also settled there. M has had pre-settled status in the UK (limited leave to remain) under the EU Settlement Scheme since 23 July 2020. She will be entitled to settled status (indefinite leave to remain) once she has lived in the UK for five years.
- 57.3. I have already found that M went to Slovakia in May 2020 with the intention of only spending a few weeks in the country to enable F to get to know his daughter EF: above, paragraph 47. Thereafter, I have found M only remained in Slovakia because F removed her travel documents and telephone and prevented her contacting friends and family and exercised coercive control over M, helped by his family, so that she remained a ‘virtual prisoner’ until 2 December 2021: above, paragraphs 48-50. In those circumstances, M did not acquire habitual residence in Slovakia but retained her habitual residence in the UK. As a very young child, M retained the habitual residence of her mother unless there is good reason to conclude otherwise.
- 57.4. Given the circumstances in which M was forced to remain in Slovakia, EF cannot be said to have become ‘integrated in a social and family environment’ so as to acquire habitual residence in Slovakia. On the one hand, I accept she will have developed relationships with her father, paternal grandmother, grandfather, uncles and cousins. On the other hand, she was a very young child whose primary relationship was with her mother. EF had existing ties in the UK, namely her birthplace and existing family relationships (above, paragraph 57.1). Her father had coerced her mother into remaining in Slovakia, abetted by her paternal grandmother, grandfather and uncles. Her mother had not consented to EF residing in Slovakia any more than she had consented herself. The lack of consent and F’s coercive control of M means that EF’s residence was precarious and lacked the necessary quality of stability to develop ‘habitual residence’. Had M had the ability and the opportunity at any time between May 2020 and 2 December 2021 to escape with EF, she would have done so, as evidenced by the fact she did so in December 2021.
58. I have reached that conclusion by applying the principles that I have outlined at paragraph 27, above, and having regard to the fact that there is no longer any ‘rule’ that one parent cannot unilaterally change the habitual residence of a child without the consent of the other. I have not applied such a rule. Rather, as Black LJ envisaged in *Re. H* [2015] 1 WLR 863, [33] (above, paragraph 27.8), I have taken account as a relevant factor that where one parent has removed or retained a child without the other’s consent the child’s residence may be *precarious*, and lack the necessary quality of *stability* to integrate into their environment. That is the situation in the present case.

59. It follows that the Hague Convention does not apply and this application should be dismissed.

Article 13(a): consent

60. If I had reached a different conclusion, and found M to be ‘habitually resident’ in Slovakia, then M would need to establish one of the defences under Article 13. For the reasons I have given at paragraphs 51-53, above, I have concluded it is likely that F consented to M removing EF to the UK between 2 December 2023 and their arrival on 17 December 2023, although it is clear he has since withdrawn that consent. M has established the defence under Article 13(a). The court is not under a duty to order EF’s return to Slovakia under Article 12, although I have a discretion to do so which I will consider, below.

Article 13(b): grave risk of harm to EF

61. In addition, I also find, on the balance of probabilities, that there is a grave risk that EF’s return would expose her to physical or psychological harm or otherwise place her in an intolerable situation for the purposes of Article 13(b). My reasons are these (and applying the two-stage approach advised in *Re. B*, [2022] 3 WLR 1315, [70-71], above paragraph 31.3).
62. Stage one: is there a grave risk of harm? I have concluded that M was the victim of violent, coercive and controlling behaviour by F both before EF’s birth between December 2018 and March 2019 and after her birth between May 2020 and December 2021: above, paragraphs 44-50. I am satisfied that EF probably suffered psychological harm indirectly as a result of F’s abuse of her mother during that later period, applying the understanding and guidance relating to abusive, controlling and coercive relationships outlined at paragraphs 32-37, above. I have also made assumptions for the purposes of Article 13(b), but not findings, that (a) F was physically abusive towards EF herself; and (b) F raped M in front of his brothers on a number of occasions: above, paragraphs 10, 50. I assume that this would have caused EF further direct and indirect physical and psychological harm.
63. I am also satisfied, on the balance of probabilities, that there is a significant risk F’s violent, coercive and controlling behaviour will resume if EF (and, it follows, her mother M who has vowed to remain with her daughter) is returned to Slovakia. One risk is that F will physically abduct M, which he has done before (March 2019). A second risk is that F will influence M into resuming their relationship. It is in the nature of controlling relationships that the abused person is vulnerable to the abuser’s influence, even at a distance. F has demonstrated his ability to influence M in the past; he has persuaded her to travel to Slovakia on three occasions (July 2017, December 2018, May 2020), the last time despite the fact he had previously subjected her to domestic abuse and M had to escape twice, first with the assistance of her brothers and then of the police (March 2019). If F were to abduct M, or influence M into resuming their relationship, a third risk is that he would then remove M’s means of travel and of contacting others and resume his violent (including sexually violent), controlling and coercive behaviour, as he has done before (from December 2018 to March 2019 and May 2020 to December 2021). There would then be a very high risk that EF will be

exposed to further abuse, both indirectly and directly, which will worsen the longer she is so exposed. In my judgment, looking at these risks both individually and globally, EF will be at grave risk of psychological harm that it is not reasonable for her to tolerate if she is returned to Slovakia without any protective measures in place.

64. Stage two: are there adequate and effective protective measures that will avoid that risk? A number of protective measures have been proposed by F that, he submits, will be adequate and effective to protect against that risk. First, M and EF can live with her grandfather, with whom she has previously lived in Slovakia, so will not be living with F. Second, the court can make orders or accept undertakings from F not to harass M or to attend or go within 100 metres of any property in which M is residing. Third, these orders or undertakings will be enforceable against F by virtue of Article 23 of the 1996 Hague Convention. Fourth, other protective measures are available in Slovakia including the intervention of the police (if F commits a criminal offence) and the equivalent of a non-molestation order is available in the civil courts. Counsel for F stresses that these protective measures will only be required for as long as it takes for the Slovakian family court to determine child custody proceedings. I will consider these in turn.

64.1. M's evidence is that her grandfather's house is inappropriate for her and EF; it has only two bedrooms, her grandfather already shares the house with M's aunt. F disputes this; he says the house has three bedrooms and is quite big enough. If I had to resolve this dispute I would find in favour of M; I have already concluded F's credibility is undermined by the lies he has told. In any event, F knows where M's grandfather's house is and he has previously abducted M from her brother's house.

64.2. For present purposes I accept that any order or undertaking I make may be enforceable in the Slovakian courts, which may also make the equivalent of non-molestation orders. However, F has shown that he lacks respect for court orders by his failure, without good excuse, to attend these proceedings as directed by Sir Jonathan Cohen on 2-3 March.

64.3. As for the protection of the police, F has also shown he is quite willing to continue to abuse M even after the police have been involved.

65. Stepping back and looking at these protective measures in the round, my real difficulty is that none of them, whether individually or collectively, can *effectively* ensure that M does not fall back under F's influence. The insidious nature of coercive and controlling relationships is such that the victim remains vulnerable to the abuser's influence and will often return to the abusive relationship. In the UK, M has a number of protective factors that reduce the likelihood of her returning to F, chief among which are the physical distance from F and the support she has with her parents, family and friends in the UK. Both of those will be lost if she returns to Slovakia. Nothing this court can do can guarantee that M will not return to F. But I am quite satisfied that by returning EF and, by extension, M to Slovakia the court would unacceptably increase the risk of M falling once again under F's malign influence. Accordingly, having evaluated the available

protective measures I remain satisfied a return to Slovakia would give rise to a grave risk of harm within the meaning of Article 13(b).

Discretion

66. I can deal with this shortly. In view of my conclusions on ‘grave risk’ under Article 13(b), it would be inconceivable for the court to nevertheless order EF’s return to Slovakia: *Re. M (Abduction: Zimbabwe)* [2008] 1 FLR 251, [45], above, paragraph 38. Even if I had reached a different conclusion on Article 13(b), for example because I had found there were adequate and effective protective measures to guard against the identified risk of harm, but I had reached the same conclusion on parental consent under Article 13(a), I would not order EF’s return in my discretion. The baleful and insidious risk of harm to both M and EF given my factual findings of F’s controlling and coercive behaviour is such that I would not expose them to that risk. It is also relevant that a period of nearly 11 months elapsed between the date of removal (17 December 2021) and the date these proceedings were commenced (1 November 2022). Had a year passed the automatic duty to return in Article 12 would have been qualified by considerations of whether EF had settled in the UK. The period of time that has elapsed, during which time EF has undoubtedly become more settled in the UK, is relevant to the exercise of the court’s discretion: the longer the period, the less weighty the Convention considerations and the more weight is to be given to other welfare considerations. In any event, F’s failure to attend these proceedings leaves me with little confidence that he is pursuing them because of his concern for his daughter’s best interests rather than as a further means of controlling M.

Conclusion

67. For the above reasons, in my judgment:

67.1. M has permission to admit the Facebook message of 1 October 2021.

67.2. EF was habitually resident in the UK, not Slovakia, on the relevant date, namely 17 December 2021. The Hague Convention does not apply and the application is dismissed.

67.3. In any event, I am satisfied, on the balance of probabilities, that F consented to EF’s removal to the UK on or before 17 December 2021 for the purposes of Article 13(a).

67.4. I am also satisfied that there is a grave risk that EF’s return would expose her to physical or psychological harm or otherwise place her in an intolerable situation for the purposes of Article 13(b).

67.5. It is not appropriate to return EF to Slovakia as a matter of discretion.

68. The application is accordingly dismissed.