



Neutral Citation Number: [2024] EWHC 1149 (Fam)

Case No: FD22P00512

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 May 2024

Before :

MR JUSTICE CUSWORTH

Between :

A Father

Applicant

- and -

A Mother

Respondent

Ms Emily Rayner (instructed by Wilson Solicitors LLP) for the Applicant
Professor Rob George and Mr Henry Pritchard (instructed by The International Family
Law Group LLP) for the Respondent

Hearing dates: 30 April to 1 May 2024

JUDGMENT

This judgment was handed down remotely at 10.30am on 16 May 2024 by circulation to the parties or their representatives by e-mail and by release to The National Archives.

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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 and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mr Justice Cusworth :

1. This is an application for a summary return order under the Hague Convention 1980.
2. The parents and K are all Lithuanian nationals. The applicant father is aged 39. He resides in Lithuania and was in attendance via a video link at today's hearing, albeit for part of the time at the outset of the hearing he attended while also driving a car. He is represented by Wilson LLP and Ms Rayner of counsel. The respondent mother is aged 37. She resides in a town on the East Coast of England, and was also in attendance remotely, albeit more conventionally than the father. She is represented by The International Family Law Group LLP and Professor George and Mr Pritchard of counsel.
3. I have heard this application over 2 days, with the first day being used for live evidence from the CAFCASS reporter Ms Callaghan, who was cross-examined by counsel for both parties, and for submissions. I have then written this judgment on day two of the hearing, at the conclusion of which I will meet K by video-link and communicate my decision to her, as she has requested.
4. **Background.** The parties were in a relationship from 2011 until 2019. K was born on 24 May 2011, so will be turning 13 this month. Following the parties' separation in 2019, and until September 2021, K had had regular contact with her father, although precisely how much is in dispute. Until September 2021 it is the case that K had always lived in Lithuania. In September 2021 the mother sent K to stay with her own mother in England, without the father's knowledge. In January 2022 the father discovered the mother had also moved to England, in November 2021. On 21 December 2021 the mother applied in the Lithuanian courts for an order for K to live with her, to regulate the father's contact and for child maintenance.
5. In June 2022 the father made a counter-claim in Lithuanian asking for K to live with him. He also contacted the Central Authority who instructed Wilson LLP to make an application in the UK pursuant to the Hague Convention 1980. On 13 July 2022 the mother made an application to amend her application in the Lithuanian proceedings for permission to relocate with K to England. The father's Hague Convention 1980

proceedings in England and Wales were then issued on 18 July 2022, already over 9 months after K's arrival here. The matter progressed with statements, a Cafcass report and was listed initially for a final hearing in October 2022.

6. In the meantime in the Lithuanian proceedings, by a decision of 4 October 2022 the Lithuanian courts determined that K should live with her mother, and permitted her relocation to the UK. They also set the father's contact, and awarded child maintenance. Given this determination the parties agreed to adjourn the final hearing in the Hague proceedings listed here on 10 October 2022. Since then, the proceedings in England have remained stayed while domestic court proceedings continued before the family courts of Lithuania. The father appealed the Lithuanian decision twice, first unsuccessfully to their Court of Appeal, and then finally to the Lithuanian Supreme Court. On 27 November 2023, now more than 2 years after K's arrival in England, that court did partly overturn the decision, determining that whilst K's place of residence should stay with the mother, they should nevertheless leave the request to allow the mother to take K to the UK to live there permanently without the consent of the father, as 'unexamined.'
7. The Supreme Court of Lithuania said this in their judgment:

55. ... if the change of the child's permanent place of residence is not resolved by agreement of the parents before his removal, if he is wrongfully removed and the process for his return begins, the court can no longer decide on the issue of changing the child's permanent place of residence, therefore such an application must be left unexamined (Paragraph 12, Part 1, Article 296 of the CCP).

8. The Supreme Court has therefore concluded that it has no power to make orders or even to comment on this issue, contrary to the earlier orders of the first instance and appeal courts (both of which granted the mother after the event permission to relocate with K). Those proceedings have, inevitably, taken time; these Hague proceedings have been stayed by consent for nearly 18 months, having themselves as explained only been initiated 9 months after K's arrival in the UK. A further 2½ months after the decision of the Supreme Court, the father on 12 February 2024 restored his application under the Hague Convention to court which came before me on 29

February 2024 for directions. The application proceeded to a PTR on 19 April 2024 and to this final hearing.

9. K has therefore been living in this country since as long ago as September 2021, initially for a short period with the maternal grandmother who was already resident here, and then with her mother. Rather than this being a ‘hot pursuit’ case of the type that the 1980 Convention is primarily intended to address, it has now been 2½ years since K arrived here. As Professor George for the mother points out, the Hague Convention 1980 is expressly designed to secure ‘*the prompt return of children*’ (Art 1(a)), meeting the objective in the Preamble of ‘*ensuring their prompt return to the State of their habitual residence*’ so that long-term decisions can be made in the context of their home environment, i.e. their place of habitual residence.
10. This is apparent from Lady Hale’s judgment in *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619, where she said at para 3:

‘The assumption on which the remedy of prompt return proceeds is that the state to which the child will be returned is the state of his habitual residence. Through no fault of his own, the child whose return is being sought in this case has now been settled for so long in this country that this assumption is scarcely tenable.’

11. And later at para. 48:

‘The whole object of the Hague Convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their “home”, but also so that any dispute about where they should live in the future can be decided in the courts of their home country ... and in accordance to the evidence which will mostly be there rather than in the country to which they have been removed.’

12. There is no doubt that K’s place of habitual residence is now in England and Wales. It is also clear from what K told the CAFCASS reporter Ms Callaghan, discussed below, that she would no longer regard Lithuania as her ‘home’. In those circumstances, there is a strong argument that the entire purpose of the Hague Convention has been overtaken by the course of events described above.

13. The expert report by Advocate Vaiciunas has confirmed that, whether K is returned to Lithuania or not pursuant to these 1980 Convention proceedings, the Lithuanian courts will then have jurisdiction to consider a relocation application. Such an application would take between 6 and 18 months, or more, to be resolved. The expert suggests that it may be possible that, if no return order is made, the Lithuanian court may transfer jurisdiction to this court under the provisions of the 1996 Hague Convention. Professor George suggests that it is by no means certain that the 1996 Convention would actually permit this. He points out that K is, presumptively, habitually resident in England and Wales now, which would suggest that there is no Art.5 habitual residence jurisdiction in Lithuania. However, Lithuania retains primary jurisdiction as the state of former habitual residence under Art.7.

14. In this regard, I note that Art.7 jurisdiction would appear to last only so long as the return request lodged is still pending, provided K is habitually resident here, has resided here for at least a year and is settled in her new environment (Art.7(1)(b)). It may therefore come to an end at the conclusion of these proceedings. If this is not right, the only answer to this jurisdictional issue may be for the mother to obtain a further relocation order from the Lithuanian court, which it could now consider in the absence of extant Hague proceedings. These proceedings therefore fall to be determined before there can be any further progress made to regularise K's position.

15. **The Child's Objections.** The mother raises 2 defences to the father's application for a summary return, both under Art 13; K's objection to a return, and a situation of intolerability under Art.13(b). I will deal first with the objection. Articles 12 and 13 of the Hague Convention 1980 state:

Article 12

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

...."

Article 13

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

- a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

- 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 the age and degree of maturity at which it is appropriate to take account of its views.

16. In *H v K (Return Order)* [2017] EWHC 1141 (Fam), MacDonald J summarised the law in this area as follows:

46. The law on the 'child's objection' defence under Art 13 of the Convention is comprehensively set out in the judgment of Black LJ in Re M (Republic of Ireland)(Child's Objections)(Joinder of Children as Parties to Appeal) [2015] EWCA Civ 26 (and endorsed by the Court of Appeal in Re F (Child's Objections) [2015] EWCA Civ 1022) and I have regard to the clear guidance given in that case. In summary, the position is as follows:

- i) The gateway stage should be confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in 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 his or her views.*

- ii) Whether a child objects is a question of fact. The child's views have to amount to an objection before Art 13 will be satisfied. An objection in this context is to be contrasted with a preference or wish.*

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iii) The objections of the child are not determinative of the outcome but rather give rise to a discretion. Once that discretion arises, the discretion is at large. The child's views are one factor to take into account at the discretion stage.

iv) There is a relatively low threshold requirement in relation to the objections defence, the obligation on the court is to 'take account' of the child's views, nothing more.

v) At the discretion stage there is no exhaustive list of factors to be considered. The court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available. The court must give weight to Convention considerations and at all times bear in mind that the Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly.

47. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are authentically the child's own or the product of the influence of the abducting parent, the extent to which they coincide or at odds with other considerations which are relevant to the child's welfare, as well as the general Convention considerations (Re M [2007] 1 AC 619)."

48. Finally on the subject of the law applicable in this case, it is always useful to recall that, as pointed out by Mostyn J in B v B [2014] EWHC 1804, the objective of the Convention is to ensure that a child who has been removed unilaterally from the country of his or her habitual residence in breach of rights of custody is returned forthwith in order that the courts in that country can decide his or her long term future. It is likewise important to recall that a decision by the court to return a child under the terms of the Convention is, no more and no less, a decision to return the child for a specific purpose and for a limited period of time pending the court of his or her habitual residence deciding the long-term position.

17. Specifically on the question of what it is that the child's objection must go to, Black LJ had said this in *M (Republic of Ireland) (Child's Objections) (Joinder of Children As Parties To Appeal)* [2015] EWCA Civ 26:

42. It is said that the child has to object to returning to the country of habitual residence rather than to returning to particular circumstances in that country, although it has been clear from early on that there may be difficulty in separating out the two sorts of objection.

43. The ground for this acknowledgment of the potential difficulty was laid in what Balcombe LJ said Re S [1993] at 782D. However, it may be convenient to rely

upon what he said a little later in Re R (Child Abduction: Acquiescence) [1995] 1 FLR 716. Commencing at 729, he set out the principles which he considered were to be deduced from the authorities dealing with child's objections. He described the second of these as follows:

"The second principle to be deduced from the words of the Convention itself, and particularly the preamble, as well as the English cases, is that the objection must be to being returned to the country of the child's habitual residence, not to living with a particular parent. Nevertheless, there may be cases....where the two factors are so inevitably and inextricably linked that they cannot be separated. Support for that proposition will be found in the judgment of Butler-Sloss LJ in Re M (A Minor)(Child Abduction) [1994] 1 FLR 390 at p 395...."

18. She then concluded her remarks on the law in this area with the following examples:

77. I discourage an over-prescriptive or over-intellectualised approach to what, if it is to work with proper despatch, has got to be a straightforward and robust process. I risk the following few examples of how things may play out at the gateway stage, trusting that they will be taken as just that, examples offered to illustrate possible practical applications of the principles. So, one can envisage a situation, for example, where it is apparent that the child is merely parroting the views of a parent and does not personally object at all; in such a case, a relevant objection will not be established. Sometimes, for instance because of age or stage of development, the child will have nowhere near the sort of understanding that would be looked for before reaching a conclusion that the child has a degree of maturity at which it is appropriate to take account of his or her views. Sometimes, the objection may not be an objection to the right thing. Sometimes, it may not be an objection at all, but rather a wish or a preference.

19. In terms of the gateway stage, the mother says that this is the plainest case of a child who, as a matter of fact, objects to a return. Professor George is right to say that K's views about this have been clear and consistent:

- a. In her discussion with the Lithuanian social worker from 20/7/2022, who reported for example that the father '*threatens her that she will have to go back to Lithuania, which is something she does not want at all*';
- b. In her discussion with Ms Dunlop for the first Cafcass report, her '*clear*' view

was that she wanted to remain in England, with a return to Lithuania representing ‘*a huge scary worry*’ for her;

c. In her discussion with Ms Callaghan for the second Cafcass report in April 2024, ‘*K told me that she does not want to return to live in Lithuania*’; ‘*K talked positively of her life in England, her friends and her school and her opposition to returning to Lithuania appeared to stem from her not wishing to leave the life that she currently has*’;

d. And to the father himself, she has said in a text message: ‘*I wouldn’t go back to Lithuania for anything, I like it HERE very much*’.

20. Ms Rayner’s case for the father is that K’s views as expressed to the Cafcass officer are not authentically her own. The Cafcass officer highlights that K “*has a sense of loyalty to her mother and maternal family, and she is aware of their wish for her to remain living in England*”, and that “*her description of the relationship she had with her father differs considerably from the account [the father] has given of them having spent regular time together, however I suspect that this may be reflective of K’s exposure to parental conflict between her parents and of her loyalty to her mother.*”

21. During this hearing Ms Rayner for the father has argued K’s views amounted to no more than a wish or preference, as opposed to an actual objection to return to Lithuania. However, in resolutely and attractively presenting his case, she was also constrained to acknowledge that K’s expressions to Ms Callaghan amounted to ‘*stridently expressed views*’. Ms Rayner also suggested that K thinks that she will be returned to her father’s care, but Ms Callaghan was clear in her oral evidence to me that that was not the case. I am satisfied that K entirely understands that what is proposed is that she and her mother would return to Lithuania together, and I accept that her expressions of her position are in light of that understanding. As K explained to Ms Callaghan, ‘*My mum tried to reassure me, saying that even if we have to go back, we will be together*’.

22. Ms Callaghan’s oral evidence to me was clear and unequivocal. She said that she felt

very much that K's views were her own. She said that the objections to a return expressed related not just to her mother's concerns but also to her own life. Whilst Ms Callaghan was clear that her parents' poor relationship has had an emotional impact for her, she spoke of K growing and developing important relationships with friends here which she does not want to interrupt. Asked by Ms Rayner whether she would easily adapt to a return she replied that she couldn't say. But she was clear that K would be angry with her father if he forced her to return to Lithuania against her will. Ms Callaghan was clear that K has very strong views on the subject, having been in the UK for 2 ½ years. She doesn't keep in contact with her Lithuanian friends any more.

23. In her report she had said:

- a. [20] ...K is at the developmental stage of adolescence, where it may be considered usual for a teenager to approach family relationships from a self-centred perspective. In middle adolescence, a child's way of thinking about themselves and others shift to a more adult level. K is developing independence and her friends and social networks are very important to her. K talked positively of her life in England, her friends and her school and her opposition to returning to Lithuania appeared to stem from her not wishing to leave the life that she currently has.
- b. [21] Whilst undoubtedly K has a sense of loyalty toward her mother and maternal family, and she is aware of their wish for her to remain living in England, she talked of her own experiences of forming friendships and enjoying school and what she considers to be a more positive life in the UK. K has feelings of resentment toward her father for pursuing her return to Lithuania and she does not believe that he is taking into account her wishes. K told me that she finds it difficult to believe that her father wants what is best for her as he is going against what she wants. She said, 'if the court made me go back, I am not saying that it would make me hate my dad, but it would certainly make me less likely to want to have a relationship with him'.
- c. [22]... Given her age, level of maturity and the strength of her views, it is possible that any decision made which is against her wishes could have a detrimental impact on her future relationship with her father and paternal family.

24. I am entirely satisfied from the above that K does object to return within the terms of the Convention. In circumstances where K's age and maturity are assessed by Ms Callaghan as being broadly in line with her chronological age, they are such that I

should take them into account, and make a discretionary determination. I will address the discretionary considerations below.

25. **Article 13(b)**. The issue of K's objection is in fact intertwined with, but is distinct from, the second aspect of the mother's defence, under Art.13(b), which would give rise to a discretion 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*'.
26. The relevant test under Art. 13(b) has been summarised by the Court of Appeal in *Re IG* [2021] EWCA Civ 1123, where Jonathan Baker LJ said:

47. The relevant principles are, in summary, as follows.

- (1) The terms of Article 13(b) are by their very nature restricted in their scope. The defence has a high threshold, demonstrated by the use of the words "grave" and "intolerable".
- (2) The focus is on the child. The issue is the risk to the child in the event of his or her return.
- (3) The separation of the child from the abducting parent can establish the required grave risk.
- (4) When the allegations on which the abducting parent relies to establish grave risk are disputed, the court should first establish whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then establish how the child can be protected from the risk.
- (5) In assessing these matters, the court must be mindful of the limitations involved in the summary nature of the Hague process. It will rarely be appropriate to hear oral evidence of the allegations made under Article 13(b) and so neither the allegations nor their rebuttal are usually tested in cross-examination.
- (6) That does not mean, however, that no evaluative assessment of the allegations should be undertaken by the court. The court must examine in concrete terms the situation in which the child would be on return. In analysing whether the allegations are of sufficient detail and substance to

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give rise to the grave risk, the judge will have to consider whether the evidence enables him or her confidently to discount the possibility that they do.

...

27. The issue here raised by the mother is whether by reason of the delay in determining this application, a return to Lithuania would place K in an intolerable situation. That such delay could create a situation whereby a return of the child became ‘intolerable’ was acknowledged by Baroness Hale in *Re D (Abduction: Rights of Custody)* [2006] UKHL 51 – although *obiter*, as Professor George for the mother accepts. She said at [52]:

‘In this context, a delay of this magnitude in securing the return of the child must be one of the factors in deciding whether his summary return, without any investigation of the facts, will place him in a situation which he should not be expected to have to tolerate. He is not responsible for the passage of time. But the passage of time has contributed to a situation in which he is adamantly opposed to returning’.

28. Subsequently, Macur J (as she then was) in *RS v KS (Abduction: Wrongful Retention)* [2009] EWHC 1494 (Fam), and Peel J in *T v G* [2024] EWHC 246 (Fam), have both considered and adopted the argument, although in the former case the intolerability was said to be a product in large part of the child’s young age, and in the latter case (where the child was also young) the prospective intolerability was augmented by the prospect that the returned child would be left without their primary carer. Macur J in *RS v KS* also stressed the stringency of the test which must be met when she said at [45]:

*That undue delay and settlement may, in appropriate cases, constitute the basis of an argument that a child would be exposed to an intolerable situation if summarily returned to their country of habitual residence prior to removal is recognised by Baroness Hale in *In re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51; [2007] 1 AC 619 at 639 at paragraphs 51 - 53. In particular I note that the word "intolerable" in this context should be taken to mean "a situation which this particular child in these particular circumstances should not be expected to tolerate". Such an approach is fact specific and, in my opinion, does not detract from nor undermine the well established statement of principle found in *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145, that there is:*

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"...an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence."

29. I am not presently satisfied, in all of the circumstances, that K's situation is one which would easily amount to one of sufficient intolerability for her to justify an exercise of the discretion under Art.13(b). As a child about to turn 13, who would not on return be separated from her mother, the situation created for her would be difficult, and certainly unwelcome, but it would be something of a stretch to find that it was properly *intolerable*. Perhaps the closest element to achieve that test would be the detrimental impact of any return on her relationship with her father, who she would blame for its imposition (as she told Ms Callaghan). However, in circumstances where her very clear objections to return anyway justify the operation of the discretion as explained above, and is the safest route to that outcome, this question need not be further considered.
30. Before turning to the exercise of the discretion I will just deal briefly with one aspect of the father's case which I apprehend from Ms Rayner is of significant importance to him. He raises a concern that the mother has a problem with alcohol, and cites one concerning incident when in 2023 she was picked up the police evidently heavily intoxicated, from the streets of her home town. That incident has been considered by the local authority, who have accepted that it is an isolated incident, and are not investigating further. The father relies on other pieces of evidence to suggest that there may be more to the mother's drinking problem than this, and that it may be chronic, including remarks made by the maternal grandmother. However, as I indicated to Ms Rayner, after 2 appeals, the latest in November last year, the order of the Lithuanian Court remains very clearly that K should live with her mother, about whom that court has no concerns as a carer. Further, there are no welfare concerns expressed about K at present from any other source. In this summary process, and without compelling evidence that the previous welfare determination was wrong, it is not open to me to consider what is an underlying welfare issue. That must await what will almost inevitably be the next round of proceedings after the conclusion of this application.
31. **Discretion.** Notwithstanding the above, the operation of the discretion inevitably

requires consideration of the delay which has occurred in this case, and K's established life in England, alongside what I have found to be her strong objections now to being removed from it. I agree with Macur J's analysis in *RS v KS* that even though the proceedings may in fact have begun within 12 months of removal, de facto settlement may be an important factual element in any consideration, and especially in the operation of the discretion. Even though these may be proceedings which were commenced less than 12 months after K's arrival in England, the fact of the much longer time that has now elapsed and her assimilation into a settled life in this country are highly relevant factors to consider. The reasons for that delay are less important as the child and her interests have always to be the centre of the exercise.

32. How that discretion should be properly operated has been the matter of a significant amount of consideration before the courts. I have set out MacDonal J's observations in *H v K (Return Order)* [2017] EWHC 1141 (Fam) above. The leading case is *Re M (Children)* [2007] UKHL 55, where Baroness Hale said:

43. *My Lords, in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare...*

44. *That, it seems to me, is the furthest one should go in seeking to put a gloss on the simple terms of the Convention. As is clear from the earlier discussion, the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will vary enormously. The extent to which it will be appropriate to investigate those welfare considerations will also vary. But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be...*

47. *In settlement cases, it must be borne in mind that the major objective of the Convention cannot be achieved. These are no longer "hot pursuit" cases. By definition, for whatever reason, the pursuit did not begin until long after the trail had gone cold. The object of securing a swift return to the country of origin cannot be met. It cannot any longer be assumed that that country is the better forum for the resolution of the parental dispute. So the policy of the Convention would not necessarily point towards a return in such cases, quite*

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apart from the comparative strength of the countervailing factors, which may well, as here, include the child's objections as well as her integration in her new community.

48. *All this is merely to illustrate that the policy of the Convention does not yield identical results in all cases, and has to be weighed together with the circumstances which produced the exception and such pointers as there are towards the welfare of the particular child. The Convention itself contains a simple, sensible and carefully thought out balance between various considerations, all aimed at serving the interests of children by deterring and where appropriate remedying international child abduction.*

33. I also remind myself that the exercise of discretion in every case will be at least coloured by the factual matrix which has ignited that exercise. What a judge says will always be said in a context, and that context may lead to an expression which can later be misinterpreted or misapplied in arguments where the underlying facts are very different. I must therefore keep a balance of the full basket of considerations well in mind when exercising my discretion. As Peter Jackson LJ made clear in *Re G (Abduction: Consent/discretion)* [2021] EWCA Civ 139 at [41]

To sum up, the exercise of the discretion under the Convention is acutely case-specific within a framework of policy and welfare considerations. In reaching a decision, the court will consider the weight to be attached to all relevant factors, including: the desirability of a swift restorative return of abducted children; the benefits of decisions about children being made in their home country; comity between member states; deterrence of abduction generally; the reasons why the court has a discretion in the individual case; and considerations relating to the child's welfare.

34. In considering the discretion, the mother points to the following elements:
- a. The reason that the discretion arises is the fact of K's objections — in those circumstances, her views form a significant part of the discretionary exercise;
 - b. The rationale that K has for coming to her views is also important, and the extent to which those views are settled and maturely expressed. These include her being happy with her life in her present home, where she has her mother, wider family, the beach and sea, a school that she likes, settled friendships, and activities like piano, swimming and gym, against what she perceives as her historically difficult

relationship with her father, whom she considers to be uninterested in her life;

- c. There is also a broader welfare perspective. Both parties acknowledge that, following the Lithuanian Supreme Court decision, there will have to be a fresh determination of the mother's application to relocate once these proceedings are concluded. It is difficult to see why any different determination would be arrived at from that already reached and initially confirmed on appeal in 2022/3, unless circumstances changed. The father may hope that a summary return order made now would create such a change. Whilst it would probably create a further difficulty in his relationship with K, as explained above, it is right the fact of such a difficult relationship may serve to complicate the court's decision. It is very hard however to see how creating that dilemma for a child still aged 12 could be in her best interests. Effectively, she would be brought back against her firmly expressed and long held objections to a country in which she does not want to live and where she has no recent friendships, to rebuild a relationship with a parent which relationship has been made worse by the very fact of that return;
- d. It is of course in her interests to have a positive and rewarding relationship with both of her parents; that will be most likely and soonest fostered by the ending of these proceedings, which would enable her to be free to visit him there. At present, she is prevented from doing so by the port alert that the father has maintained since July 2022, preventing her or the mother leaving this country for nearly 2 years. As Ms Callaghan records in her report:

19. K explained that she had messaged her father to say that she would visit him in Lithuania and that he should speak to her mother to arrange it. K added, 'He is my dad, and I was prepared to give him a chance, to see if he had changed but then he was saying that the court had decided that I should live with him'... K explained, 'I am worried about these court proceedings, I want to stay in England. I have talked to my mum about how I feel, we have a close bond, and I can talk to her. My mum tried to reassure me, saying that even if we have to go back, we will be together. I would like to visit Lithuania, but not live there';

- e. I agree with Professor George that 'the father is seeking to up-end K's life and require her (and her mother) to be pulled out of a life that she has had here for over

2½ years’ even though K has clearly said to Ms Callaghan that ‘ *I don’t see my life as being in Lithuania*’. It is a concern he is seeking to do that in circumstances where K has not seen him or any of her paternal family members since she left Lithuania, and where he has not visited her here in that time;

- f. Significantly, in this case a return order would upset what K undoubtedly regards as the settled status quo. The objectives of the Convention focus on the desirability of such a change happening only after a full and careful welfare consideration by the country in which the child has been settled. The summary process is designed to enable that to happen. In this case, a return order would do the opposite. It would create a new and unwelcome disruption in K’s life, and propel her into a limbo which would disrupt her currently settled life for a perhaps temporary but potentially lengthy period. It would not, in all probability, serve the purpose of improving relations with her father, as I am sure that he intends it to.

35. The court will of course always look to see whether protective measures can be taken to facilitate a return, but in this case, and despite the fact of historic allegations of domestic abuse, the usually discussed measures, which the father offers, are of little practical assistance. The objection is to a return from a settled life in England to Lithuania, where K has not lived since she was 10. The move would leave her less likely to want to see her father, although not at any immediate risk from him. If a return order is made, her mother intends to return with her to Vilnius. I should nevertheless record that K told Ms Callaghan that:

‘If the Judge said that I had to return I would be really sad and I would feel scared. I had always wanted to live in England and my dad knows that. When we lived in Lithuania he would turn up, knocking on the window at 3 am, which was scary. I enjoy living here and being at school and with my friends, I don’t want to go back to Lithuania’.

36. In the context of Art.13(b) Jonathan Baker LJ in *Re IG* (above) discussed the availability of protective measures thus at [47]:

...(7) If the judge concludes that the allegations would potentially establish the

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existence of an Article 13(b) risk, he or she must then carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to the risk.

(8) In many cases, sufficient protection will be afforded by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting State to protect him once he is there.

37. Here, there is no ‘protection’ which might meet or lessen the bulk of the objections which K has to a return. She would object to a return to Lithuania just as much with non-molestation undertakings in place as without them. And the disruption which such a return would cause would not be ameliorated in any way by any such measures.
38. In all of the above circumstances I am satisfied that I should take careful account of the objections which K is expressing to a return order being made, and in circumstances where the considerations around the purpose of the Convention have been much reduced in significance by the passing of time while the Lithuanian proceedings played out, I am clear that in this case, welfare considerations should prevail. I therefore decline to make a return order as asked, and so determine these Hague Convention proceedings.
39. I will ask counsel to draw up the necessary order.