



Neutral Citation Number: [2024] EWHC 352 (Fam)

Case No: FD23P00514

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 February 2024

Before :

MR JUSTICE CUSWORTH

Between :

A father

Applicant

- and -

A mother

Respondent

Mehvish Chaudhry (instructed by **Freemans Solicitors**) for the **Applicant**
Mark Twomey KC and Alice Scanlan (instructed by **Landmark Legal LLP**) for the
Respondent

Hearing dates: 31 January 2024 and 1 February 2024

JUDGMENT

This judgment was handed down 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 commenced by the father for the summary return to the jurisdiction of Italy under the auspices of the Hague Convention 1980 of his two children, XR born in December 2017 and aged 6, and XZ born in May 2020, and aged 3. Their mother is the respondent to the application.

2. This matter came before me with a time estimate of 2 days, conducted as a fully remote hearing, but on the basis that there may need to be limited oral evidence from the parties to deal with issues of consent and acquiescence, which included, it emerged, some exploration of the actual circumstances of the removal itself, which took place now nearly 14 months ago on 19 December 2022. I have heard oral evidence from both parties, the father's through an Italian interpreter; I have also read 2 statements by the father, 2 by the mother in addition to her answer in the proceedings, and one by the maternal grandfather, along with police and CAFCASS evidence. I have then reserved this judgment for a matter of days. I should say that the father's application under the provisions of the 1980 Hague Convention was made only on 12 October 2023, so that this cannot be classed as a 'hot pursuit' case.

3. As for the reception of oral evidence, I acknowledge that this will happen only very exceptionally in summary hearings such as these. In this regard, in *Re K (Abduction: Case Management)* [2011] 1 FLR 1268, Thorpe LJ confirmed at [13] that:

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

4. I was satisfied that in the case exceptionally it was necessary for me to hear the parties' evidence on this issue, albeit virtually. I am quite satisfied that notwithstanding these circumstances, I have been able to fairly hear from each of them, and been able to assess their respective evidence. During that evidence, the actual circumstances of the removal have become much clearer than had

been the case from the parties' respective written submissions. This has also enabled a more confident date to be taken as that upon which the children's habitual residence needs to be determined, as I will explain below.

5. I have been greatly indebted to the helpful and skilful submissions of Mr Twomey KC for the mother, and Ms Chaudhry for the father, in disentangling and then determining the interwoven issues in this multi-layered case.
6. I should add that I have not heard substantial evidence either about the issue of habitual residence itself, nor about the mother's article 13(b) defence, which I have therefore considered on the basis of submissions and written evidence in the usual way. In this regard, I have had in mind what the Supreme Court confirmed in *Re E (Children)* [2011] UKSC 27 at [32], to the effect that:

'... it is clear that the burden of proof lies with the "person... [who] opposes the child's return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13b and so neither those allegations nor their rebuttal are usually tested in cross-examination."

7. I should also add that, having considered evidence and listened to submissions in relation to each of the successively pleaded aspects of this application, I will set out my determination in relation to each of them, although as not all are required to arrive at the decision which I have made in this case, some have been attenuated. I am well aware that these summary determinations under the 1980 Convention are very often the subject of further appellate consideration, and it is therefore important for the totality of the findings that I am able to make to be set out both for the parties and for any further court hearings.
8. As I have explained, the first issue between the parties has been whether XR and XZ were actually habitually resident in Italy on the relevant date for the purposes of the Convention, and it was suggested by counsel that the answer to

that question might have been affected by whether the Court's analysis was that the children had been removed from Italy in breach of the father's custody rights on 19 December 2022, as he maintains, or whether the relevant date might be a later point of retention, as the mother argued, if indeed the children were habitually resident in Italy at any time.

9. I first then had to determine what were the circumstances of the children's removal on 19 December 2022, and whether the father's handing over to the mother at an Italian Police Station of the children's passports might have connoted some form of acceptance by him of their departure with her for England, which might amount to, as Mr Twomey put it, an act of parental responsibility which made the subsequent removal later that day not unlawful. Ms Chaudhry quite rightly pointed out that, insofar as this might amount to an assertion of consent, that this would become relevant not to the Art.3 question of whether there has been a wrongful removal, but rather as a potential defence under Art.13; as a path to an exercise of discretion, rather than as a complete defence under Art.3.

10. She reminded me that, for the purposes of Art.3, the court is looking only a *prima facie* breach, and questions of consent are not relevant at this stage. In *Re P (A Child)* [2004] EWCA Civ 971, Ward LJ made clear:

33. ... If the giving of consent prior to the removal had the effect that the removal could never be classified as wrongful or in breach of the right of custody, then there would be no need for Article 13 at all. Whereas acquiescence is expressly recognised to be acquiescence subsequent to the removal, consent is not so limited in Article 13 and must, therefore, include permission which is given before the removal. If clear unequivocal and informed consent is given to the removal of a child, then it is difficult to see why the court should not exercise the discretion conferred by Article 13 to permit the child to remain in the country to which it was agreed he or she should go. The policy of the Convention is to protect children internationally from the harmful effects of their wrongful removal or retention. If a child is removed in *prima facie* breach of a right of custody, then it makes better sense to require the removing parent to justify the removal and establish that the removal was with consent rather than require the claimant, asserting the wrongfulness of the removal, to prove that he or she did not consent. Article 3 should govern the whole Convention and Article 13 should take its place as the exception to the general duty to secure the return of the child which is, after all, the basic principle of the Convention.

11. Leaving aside the underlying question of the children's habitual residence at this point, I will deal first with whether there has been such a prima facie breach, if that residence were to be established, and if so when it might have taken place. Having heard oral evidence from both parties, and having also read a statement made by the maternal grandfather, and a written translated record by the Italian police officer who was involved with the parties on the day, the following factual matrix for the period around the children's departure clearly emerged.

- a. The parties' relationship had by this stage completely broken down, and the father was aware that the mother wished to return to England with the children. Both sides had instructed Italian lawyers. The father was seeking the mother's agreement to an arrangement whereby she left the children in his care in Italy, with the support of his family, whilst she would then see them for a period of defined visits throughout the year. He had proposed on 17 December that the mother would be permitted to take the children back to England for Christmas, on the basis initially that he would accompany them, but that the children would in any event be returned to Italy by 7 January 2023.
- b. Whilst the mother never accepted this proposal, she may initially have agreed to a temporary trip to England with a return by 7 January, but by the next day, 18 December, she had made clear that she would not to agree to any return to the father's care in Italy in the New Year. With Christmas fast approaching there was therefore no agreement between the parties, and the father declined to release the children's passports to the mother other than on the basis that she agreed to the terms that he was proposing. On 13 December 2022, the father had in fact initiated Court proceedings in Italy about the children, but these had not by then progressed or been served on the mother.
- c. The mother then contacted the British Embassy in Italy, seeking assistance, and they advised her to contact the local police; the mother therefore went on the morning of 19 December to the local police station

at Galluzzo, Florence, and spoke to the Chief Warrant Officer Cillis. At that point the father telephoned her, and she handed the phone to the Officer, who invited the father to attend at the Police station, which he duly did. Although the parents did not speak to each other on that day, they each spoke to the Officer, and the father was persuaded to return home during the morning to collect the children's passports which he subsequently brought back to the station. The officer also had conversations during that morning with the father's lawyer, who informed him that there were discussions ongoing between the parties over arrangements for the children.

- d. I find that on that morning there was no further agreement between the parties that the mother would return the children to Italy by 7 January, although subsequently both the father and his lawyer have both variously suggested that there was, and that that was the basis on which the father agreed, as he did, to hand over the passports to the mother on that morning. Instead, it was apparent that the father did feel obliged to hand over the passports by the involvement of the Italian police. And whilst the Officer understood the issue between the parties to be a visit to England over Christmas, there was no condition attached to the handover of the passport when it happened. The Officer recorded that the decision was made *'in reliance on the ongoing efforts of their respective legal counsel to establish joint custody of the children'*.
- e. I do find that the father subsequently accosted the mother and children as the grandfather recounts in his statement, saying *'well done you did it, you will now raise the children in London council housing and just know you will not receive a penny from me to help raise them till you turn to prostitution in order to feed them!'* Whilst the father therefore clearly understood that the mother could now leave the country with the children, and may not return, he was very far from being content with the position.

- f. This was made very clear when later that afternoon the father returned to the police station and told the Officer that he would now be pursuing ‘*a formal complaint for child abduction*’ against the mother, he said on advice from his lawyer. That lawyer, Ms Bartolini, had written to the mother’s lawyer by email at 12.50 that afternoon, asserting that the passport had been handed over ‘*following heavy and pressing threats*’ by the mother, stating that he ‘*expressly denied her*’ consent to take the children out of Italy, and saying that if she did take the children abroad she would ‘*appeal to all competent offices to protect the minors*’.
- g. Ms Bartolini made no reference then to any agreement for a short-term removal and return. A letter from her dated 30 January 2024 was produced by the father, in which she asserted that the handover had been on the basis of a declaration by the mother that she would bring the children back by 7 January. This declaration is not referred to by Officer Cillis, nor by the mother or the maternal grandfather (who was there), and is also not referred to in Ms. Bartolini’s contemporaneous email, nor is it consistent with its contents. I therefore find the content of her 2024 letter to be unreliable in this regard, and also reject the father’s evidence to the same effect.
- h. What Officer Cillis did say in his statement was that he spoke to Ms Bartolini after the father notified him of his intended complaint on 19 December 2022, and that she concurred with him that it would be premature to issue such a complaint. This was because he took the father as having ‘*granted his consent*’ for the removal by handing over the passports. He then records Ms Bartolini as concurring with him ‘*considering the recent agreements that stipulated the children’s stay in England until 7 January 2023*’. This date had not been previously mentioned by him as having been discussed between the parents on that day, and the ‘*recent agreement*’ was one which Ms Bartolini acknowledges in her letter of 30 January 2024 the mother had rescinded via her solicitors on the previous day.

High Court Approved Judgment:

- i. It seems the consensus was to wait to see whether notwithstanding her lack of agreement, the mother in fact would bring the children back by 7 January, as she had initially agreed, before launching any proceedings. Fearing that her client may have unwittingly consented to a removal, Ms Bartolini has tried to fall back to the prior rescinded agreement.
 - j. The mother says, and I accept, that the email from Ms Bartolini sent to her Italian lawyer on 19 December 2022, and threatening proceedings if she removed the children from Italy, was not notified to her until the following day, 20 December, by which time she had arrived in England with the children.
12. Having made the above findings, and before dealing with any issues of consent which may arise under Art.13, it is clear that the relevant time to determine the habitual residence of the children will be the 19 December 2022, or at the latest, 20 December, when the mother received notice via her Italian lawyer that the father was not consenting to any removal of the children from Italy. I cannot find that there was in place an agreement when the mother removed the children that she could so only provided that they were returned by 7 January 2023.
13. The background against which the determination of that habitual residence takes place is as I find, as follows:
 - a. The parties were never married but were in a relationship together for 7 years. Although both are of Albanian heritage, the mother has lived in England for many years and the father in Italy. While the mother was pregnant with XR, she spent some time in Italy with the father, but she returned to the UK before XR's birth. Both children were born in the UK, and are British citizens. The mother obtained a council tenancy for a flat in London W10 in 2015, which she has retained ever since. After the birth of XR, the father came to live with the family in London on a visitor visa, and although over the years since mother and children have spent time in Italy with the father, including the father says for over a

year up to late 2019, I accept this had always been on a temporary basis at least up until the summer of 2022.

- b. From September 2021, XR attended a nursery until the following summer when the mother accepts that she took him out a few weeks before the end of the school year so that she could take him to visit the father in Italy. He was at that stage registered to attend the main Academy from the start of the following school year in September 2022. The father says that the mother and the children joined him in Italy on 10 June 2022, he having gone out to find accommodation some weeks earlier. They stayed in that accommodation until September, when they moved to a different property. Up to this point neither child had attended school in Italy.
- c. Although one letter which has been produced by his school in Florence suggests that XR started school there on 15 September 2022, a second letter from the school suggests that this didn't happen until 20 October, on the day after the mother and XZ had returned to England for a period. Both letters are signed by the school's head teacher, and are in otherwise identical terms, the first from October 2023, the second from January 2024. Whilst I cannot determine how the school have sent out these two different accounts, I am satisfied that XR's time at the school was not especially settled. The mother says that he was unhappy as he did not speak Italian from the outset, and that she was told by the father that he would have to redo a year to catch up with his peers. Whilst the father does not accept that he struggled at all, his lack of native Italian must have been a challenge at first, and I therefore prefer the mother's account in this respect. It is accepted that XZ never attended school in Italy, and spent the vast majority of her time with her mother.
- d. The mother says that during their stay in the country they in fact stayed in 3 different properties – and there is no evidence aside from the father's bare assertion that the family settled well, which the mother denies.

Indeed, given that the mother was evidently unhappy in Italy, and arguing with the father about her desire to return to England, and the disintegration of their relationship, it is hard to see how the children could have settled into life as the father says that they did.

- e. The mother further makes allegation of repeated acts of domestic violence towards her by the father, which if true would further undermine any sense of stability which the mother or children would have felt during the last months of 2022.
- f. There were also issues between the parents about the father's disciplining of the children, as well as that of the paternal grandmother. I can make no findings about the truth of the concerns raised by the mother, but it is clear that there was at this time an unhappy and embittered relationship between the parents, with the mother, who was the children's primary carer, keen to return with the children to England.
- g. The father's case is that the mother was suffering from bouts of mental illness and also conducting an affair. He says that the children however assimilated easily. Generally, I prefer the mother's accounts of this time as being significantly more credible than the father's.
- h. It is true that on 6 December 2022, the father did attempt to register the children as resident in Italy, but in fact that this was done without the mother's knowledge, and no doubt with a view to reinforcing his position in the discussions which were then ongoing, whereby he was seeking through his lawyer an agreement that the mother would leave and that the children would stay with him. Equally, he then filed a petition seeking their custody on 13 December 2022, but this had not been served when the mother and children departed on 19 December. This says little about the children's position on a daily basis, and rather more about the father wishing to make permanent a situation which by

then he knew the mother was anxious to leave herself, and to enable the children to depart from with her.

14. I now have to determine what impact those findings might have on the father's application for summary return of the children; and primarily in relation to the children's habitual residence for the purposes of the 1980 Hague Convention, Art.3 of which sets out that:

The removal or the retention of a child is to be considered wrongful where – a) it is in breach of rights of custody attributed to a person... either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention;

The relevant time to determine the children's habitual residence must as explained above be the point of or immediately after the children's return to England in December 2022.

15. The law in relation to habitual residence has been much considered by the higher courts, and I adopt the distillation of that jurisprudence by Hayden J in *Re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174 (Fam) between paragraphs 16 and 19, subsequently approved in the higher courts, save that in *Re M (children) (return order: habitual residence)* [2020] EWCA Civ 1105, Moylan LJ at [63] recommended the removal of one element to ensure that 'the court is not diverted from applying a keen focus on the child's situation at the relevant date'.

16. So adjusted, the test was set out in *Re B*, at [17], as follows:

(i) The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (*A v A*, adopting the European test).

(ii) The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual inquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (*A v A, In re L*).

High Court Approved Judgment:

(iii) In common with the other rules of jurisdiction in Council Regulation (EC) No 2201/2003 (“Brussels IIA”) its meaning is “shaped in the light of the best interests of the child, in particular on the criterion of proximity”. Proximity in this context means “the practical connection between the child and the country concerned”: *A v A* , para 80(ii); *In re B* , para 42, applying *Mercredi v Chaffe* (Case C-497/10PPU) EU:C:2010:829; [2012] Fam 22 , para 46.

(iv) It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (*In re R*).

(v) A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (*In re LC*). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration.

(vi) Parental intention is relevant to the assessment, but not determinative (*In re L*, *In re R* and *in re B*).

(vii) It will be highly unusual for a child to have no habitual residence. Usually a child loses a pre-existing habitual residence at the same time as gaining a new one (*In re B*).

(viii)...

(ix) It is the *stability* of a child's residence as opposed to its *permanence* which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there (*In re R* and earlier in *In re L* and *Mercredi*).

(x) The relevant question is whether a child has achieved *some degree of* integration in social and family environment; it is not necessary for a child to be *fully* integrated before becoming habitually resident (*In re R*) (emphasis added).

(xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (article 9 of Brussels IIA envisages within three months). It is possible to acquire a new habitual residence in a single day (*A v A*; *In re B*). In the latter case Lord Wilson JSC referred (para 45) to those “first *roots*” which represent the requisite degree of integration and which a child will “probably” put down “quite *quickly*” following a move.

(xii) Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (*In re R*).

(xiii) The structure of Brussels IIA, and particularly recital (12) to the Regulation, demonstrates that it is in a child's best interests to have an habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence; As such, “if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former” (*In re B supra*).

18 If there is one clear message emerging both from the European case law and from the Supreme Court, it is that the child is at the centre of the exercise when evaluating his or her habitual residence. This will involve a real and detailed consideration of (inter alia): the child's day to day life and experiences; family environment; interests and hobbies; friends etc and an appreciation of which adults are most important to the child. The approach must always be child driven...’

17. The excision of sub-paragraph (viii) by Moylan LJ in *Re M* firmly places the emphasis of the enquiry on the situation of the child as at the date of removal, as opposed to a weighing of comparative connections between competing jurisdictions. More recently, in *A (A Child), Re (Habitual Residence: 1996 Hague Child Protection Convention) (Rev2)* [2023] EWCA Civ 659, the Court of Appeal cautioned that “‘some degree of ‘integration’ is not a substitute for the required global analysis”, drawing, in particular on two decisions of the Supreme Court:

(1) Lady Hale's comments in *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] AC 1038, when she referred, at [59], to whether the residence had ‘the necessary degree of stability’ and when she said, at [60]:

"All of these factors feed into the essential question, which is whether the child has achieved a sufficient degree of integration into a social and family environment in the country in question for his or her residence there to be termed 'habitual'."

(2) Lord Reed in *Re R (Children) (Reunite International Child Abduction Centre intervening)* [2016] AC 76:

"[17] As Baroness Hale DPSC observed at para 54 of *A v A*, habitual residence is therefore a question of fact. It requires an evaluation of all relevant circumstances. It focuses on the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It is necessary to assess the degree of integration of the child into a social and family environment in the country in question. The social and family environment of an infant or young child is shared with those (whether parents or others) on whom she is dependent. Hence it is necessary, in such a case, to assess the integration of that person or persons in the social and family environment of the country concerned. The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce."

18. So, to what extent can it be said that XR and XZ were truly integrated to any extent into a social and family environment during their time in Italy? It is the case the children have only ever held British passports, speak English as their primary language and remained registered with their GP surgery in England. XR had spent the preceding academic year at nursery in London. At the point of their arrival they would have strong and clear links to England and Wales.

19. However, I cannot accept the mother's case that the trip to Italy was only ever intended as a holiday. I do accept that, if the move had worked out and been successful, it might have become permanent. Notice had been given to XR's school in England that he would not be returning in September. However, it is clear that very soon after the family's arrival, there were serious difficulties in the parent's relationship which meant that the mother had soon determined to manage a permanent return to England with the children, something that the father sought to prevent as far as the children were concerned.

20. The father blames the mother's disengagement as explained upon her commencing another relationship, but says that she became very unwell with a depressive illness in October 2022, and returned to England for treatment in November. The mother, who gives an account of a worsening abusive relationship, denies any mental illness, and says that between temporary residences in Italy, the family in fact moved between England and Italy between 4 and 6 times during this period. She describes staying at home with the children whilst the father went out to work all day, and that neither she nor the children made many friends during the period, hampered by their language difficulties as none of them were fluent in Italian. She blames her own unhappiness and the breakdown of the relationship squarely on the abuse which she says that she was receiving from the father throughout this period. Since her return to England she has sought counselling for the effects of this abuse and has been referred to MARAC, assessed as at high risk due to domestic violence.

21. She makes significant complaints about the father verbally abusing the children, as a means of disciplining them, and of the maternal grandmother using inappropriate force when controlling XR, but also failing to administer mosquito spray despite knowing that if bitten he would likely suffer an allergic reaction, as happened several times. Overall, the picture which she paints, and which on balance I accept, is one of unhappy uncertainty and impermanence, and very little evidence of any stability, or of integration into social and family life in Italy.

22. I should make clear that I am not in fact helped in this by the Italian decision in January 2023 not to accept the children as resident in Italy in response to the father's application made on 6 December 2022, because by that January, they had returned to the UK, and the father was unable to tell the Italian authorities when he expected their return.

23. However, I am satisfied that despite their being present in Italy for the greater part of the last 6 months of 2022, they did not in fact become habitually resident there, as they never achieved a sufficient degree of integration into family or

society. XZ was then of an age when she was primarily cared for by her mother, who I accept was both unhappy and isolated throughout this period. There is no evidence of her making any independent life for herself, or of XZ engaging with life in Italy. I accept that XR did spend some weeks in an Italian school, but aside from the father's assertion that he was happy, there is no independent evidence that he was truly settled in his environment, and his lack of Italian must have been a significant hurdle for him in beginning school, especially if his attendance began halfway through a term.

24. There is equally no evidence that the properties which the family occupied, whether there were 2 or 3 of them, were treated as long term homes, as opposed to temporary staging posts as the mother suggests. And there is no persuasive evidence of any meaningful integration into the father's family, in circumstances where the mother and the paternal grandmother were clearly at odds with each other.

25. On that basis, I am satisfied on the balance of probabilities that the circumstances required for the operation of Art.3 of the Hague Convention 1980 are not made out, as the children who are the subject of this application have never become habitually resident in Italy, the state to which their father now seeks an order for their summary return. If he wishes to pursue his case that their best interests would be served by an order that they go to live with him in that country, he must therefore pursue that application through the courts of England and Wales, which are unquestionably the courts in whose jurisdiction both children are currently habitually resident.

26. As I have heard significant argument on the other aspects of this application I will continue to set out in brief my findings in relation to the other contentious issues, although as explained, they are not in fact necessary for the purpose of determining this application as explained above.

27. Had the children become habitually resident in Italy, then:

High Court Approved Judgment:

- a. If it had it been necessary for the mother to demonstrate on the balance of probabilities that the father consented to the move, pursuant to Article 13 of the Convention, to avoid the automatic consequences set out in Article 12¹, I would not have found that consent made out, applying *Re K (Abduction: Consent)* [1997] 2 F.L.R. 212, and *Re P-J (Children)* [2009] EWCA Civ 588. Whilst the father in handing over the passports was aware that the mother would use them to leave the country with the children, I find she well knew that he did not actually agree to that departure, as the letter sent by his lawyer later that day would make clear. His consent was certainly not clear and unequivocal. I do not accept that the mother believed that the father was truly consenting, although he felt obliged to hand the passports to her. Whilst she told me, and I accept, that she only received the father's lawyer's letter the following day, after her arrival in England, I am satisfied that this will only have confirmed to her the father's position as she understood it.
- b. I was not persuaded that the father could be said to have acquiesced following the removal, applying *Re H* [1998] AC 72 from 86G, although his 10-month delay in initiating Hague proceedings was significant. Whilst on occasions during 2023 he has appeared to acknowledge that the children would be staying in England with their mother for the time being, most notably when speaking to the CAFCASS officer in July 2023, I did not take this to be more than his seeking the initiation of direct arrangements for him to spend time with the children. It is clear from an overall consideration of the father's attitude that he has always wanted to achieve a return order for the children, although it took him

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- a. ¹ Those articles provide, as relevant, as follows:

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 ...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 ...authority of the requested State is not bound to order the return of the child if the person, ...which opposes its return establishes that – a) the person... having the care of the person of the child ...had consented to or subsequently acquiesced in the removal or retention; b) there is a grave risk that his or return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation...

The judicial ...authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

until October 2023 until he finally made an application for their summary return under the Hague Convention 1980.

- c. I will deal in a little more detail with the mother's defence under Art.13(b), as I was satisfied that a grave risk existed that a return would have exposed the children to physical or psychological harm, or otherwise placed them in an intolerable situation, prior to the consideration of any further protective measures available, additional to those initially offered by the father.

28. In relation to the operation of that defence, the Supreme Court in *Re E (Children)* [2011] UKSC 27, provided a detailed overview at paragraphs 29 to 36 of the Court's judgment, which I will not set out in full. Most pertinently:

35. ...article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home... if the risk is serious enough to fall within article 13(b) the court is not only concerned with the child's immediate future, because the need for effective protection may persist.

36. There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. [Counsel] submits that there is a sensible and pragmatic solution. Where allegations of domestic abuse are made, the court should first ask 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 ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country...

29. Here, if the mother's allegations against the father are found to be true, then he has been guilty of persistent physical, emotional and sexual abuse against her, and of physical and emotional abuse of the children. There are also allegations against the paternal grandmother. I note that there is evidence that the mother reported the abuse to Officer Cillis, at about the time of her departure. I cannot determine whether these allegations, which are all denied, are in fact true, but I must proceed on the basis that they may be true, and if so, there can be no doubt that a return to Italy would cause significant stress for the mother, and for the children, they would be potentially impacted not only by the risk of further abuse, but also both by their own memories of suffering previously, and also by the mother's potential reaction to a return to a place where she has been both profoundly unhappy, and the victim of abuse herself.

30. The protective measures offered by the father might be described as conventional. He offers limited funding to cover travel and rental costs, including a deposit, which he agreed to extend through counsel from his initial offer of covering only the period up to the first welfare hearing after return in the Italian court, to a later date; and to pay undefined 'reasonable maintenance' for the same period. He also offered not to support any criminal proceedings against the mother in respect of the abduction, not to attend at the airport on her arrival with the children, not to communicate with her save in respect of the children's arrangements, and not to go within 200 meters of any property in which she or the children were living, pending that first hearing. He has also offered a standard form non-molestation undertaking.

31. Ms Chaudhry for the father indicated that if these were not sufficient, then instructions could be taken about augmenting them. Given the serious nature of the as yet unproved allegations which the mother makes, I consider that these measures would fall significantly short of what a court might require before a return order could be considered. Because of my findings about habitual residence, however, I need not go further in this judgment.

32. I would also add that, in the event that by application of Article 13, the Court had been left with a discretion as to whether to order the return of the children in the context of these Convention proceedings, another factor would have militated strongly against a return order being made. I remind myself that in *Re M & Anor (Children)* [2007] UKHL 55 Baroness Hale made clear in relation to the operation of the discretion that:

43. ...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. ...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.

45. By way of illustration only, as this House pointed out in *Re D (Abduction: Rights of Custody)* [2006] UKHL 51; [2007] 1 AC 619, para 55, "it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate." It was not the policy of the Convention that children should be put at serious risk of harm or placed in intolerable situations...

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 apart from the comparative strength of the countervailing factors...

33. In this case, these 2 children have now been living in England and Wales with their mother since they returned here from Italy in December 2022 – nearly 14 months ago. They are currently aged 6 and 3. XZ was 19 months old when she

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returned, but will now turn 4 in 3 months' time, in May 2024. Aside from her unsettled time in Italy in 2022, she has always lived here. XR is a little older, but he has now been at his new school in England for over a year since his return. A move now to Italy would in no real sense be a 'return home' for either of these children. Indeed, I am satisfied that it would be disruptive and unsettling for both of them in the circumstances of their current lives.

34. Whilst the father brought his application within the 12 month period stipulated by the Convention, his delay, for whatever reason, in commencing Hague proceedings until October 2023, 10 months after the children travelled back from Italy, will have profoundly affected the emotional and psychological landscape for both of them, and would have been a very significant factor for any court exercising its discretion, as explained in *Re M* (above).
35. For the reasons that I have explained, however, I am not satisfied that this is a case where either child can properly be described as having been habitually resident in Italy as at 19 or 20 December 2022. In those circumstances, Art.3 of the Hague Convention 1980 does not apply, and the question of discretion under Art.13 does not arise. The father's application for summary return of the children to Italy must therefore be dismissed.