ND COURT OF THE CAYMAN ISLANDS
ISION

FAM 319 of 2022
(Formerly G 193 of 2022)
L/A No. LACV0165/2022

IN THE MATTER OF AN APPLICATION UNDER THE 1980 HAGUE CONVENTION

Re: P (A Child)

CONSIDERED ON THE PAPERS

Coram: **Walters J. (Acting)**

Parties: **Ms Nikue Assarpour of Priestleys for the Applicant**
Ms Hayley Allister of Cayman Family Law for the Respondent

Date of Decision: **30 September 2022**

Draft Judgment Circulated: **30 September 2022**

Judgment Delivered: **10 October 2022**

HEADNOTE

Application under the Hague Convention on the Civil Aspects of International Child Abduction 1980 for return of child from Cayman Islands to USA, question of child's habitual residence, application of Article 13 consent and grave risks defences to order for return, extent to which protective measures are relevant to order for return.

JUDGMENT

1. This an application under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the "Convention"). The application was made by the Applicant by way of Form C53 dated 28 August 2022 which was filed on 30 August 2022 seeking an order for the return of the parties' son[1] to the United States and, in particular, the State of New Jersey.

2. The matter first came before me for directions on 1 September 2022. In accordance with those directions, the parties have filed statements/affidavits and position papers. I also ordered that the parties

[1] To whom I will refer as the "child".

attend concurrent mediation. I have considered the material filed and have dealt with this matter on the papers. Due to the relative urgency of providing the parties with a decision I have made considerable use of their helpful written submissions in preparing my judgment.

Summary of background

3. The Respondent has sworn an affidavit dated 12 September 2022 which sets out in some detail the background to the parties' relationship.

4. The Respondent has joint Caymanian and US citizenship and the Applicant is a US citizen. The parties met in New York in 2004. The Applicant moved to Grand Cayman to live with the Respondent in March 2005 and the parties got married in Grand Cayman on 11 June 2005.

5. In May 2016 the parties left Grand Cayman to move to live in New Jersey. At this point, the Respondent was pregnant with their son who was born in January 2017.

6. On 15 March 2022 the Respondent travelled to Grand Cayman with their son with the intention of moving here permanently. She commenced divorce proceedings in the Grand Court on 30 March 2022. In her Petition, the Respondent set out the Particulars of Unreasonable Behaviour as follows:

> *"4(a) The* [Husband] *has anger issues which permeated the marriage and made life difficult for the* [Wife].
> *(b) The parties' sense of being husband and wife has gone from the relationship."*

7. The Respondent unenrolled her son from school in New Jersey in April 2022.

8. The Applicant works in information technology and has been the main breadwinner for the family. Although the Respondent is qualified as a paralegal she has not been in regular employment recently, partly as a result of caring for their son after he was born and partly because of disruption caused by Covid. The parties have been living with their son in a rented apartment in New Jersey. A number of the Applicant's family members including his mother, aunt and cousin are also resident in the State.

9. It is not disputed that the parties had lived with their son in New Jersey since he was born. What is disputed is the question of whether the Applicant consented to the Respondent re-locating with their son to the Cayman Islands and whether it was agreed that, having done so, the Respondent would then file for divorce in the Grand Court.

10. There are also numerous allegations made by the Respondent in her affidavit dated 12 September 2022 that the Applicant was frequently drunk, took drugs, has anger issues, verbally abused her (on occasion in front of their son), sexually abused her, verbally abused their son, was financially controlling and was disinterested in their son. These allegations are specifically denied by the Applicant in his affidavit dated 16 September 2022. The parties have each produced further affidavits from family members, friends and, in the case of the Applicant, his work place manager. These support the respective positions of the party on whose behalf they were prepared.

The Convention

11. The relevant provisions of the Convention are as follows:

> *"Article 1*
>
> *The objects of the present Convention are -*
>
> *a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and*
>
> *b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.*
>
> *Article 2*
>
> *Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.*
>
> *Article 3*
>
> *The removal or the retention of a child is to be considered wrongful where -*
>
> *(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and*
>
> *b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.*
>
> *The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.*
>
> *Article 4*
>
> *The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.*
>
> *Article 5*

For the purposes of this Convention -

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

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.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

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

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

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue."

Proceedings before the Superior Court of New Jersey Chancery Division – Family Part, Warren County (the "New Jersey Court") Docket No.: FM-XX-XX-22 (the "New Jersey Proceedings")

12. Following the departure of the Respondent to live in the Cayman Islands with the parties' son, the Applicant commenced the New Jersey Proceedings on 7 April 2022. Those are divorce proceedings against the Respondent seeking various orders including that there be joint legal custody and shared residential custody of their child. On 25 April 2022 an ex parte interim order in relation to the return of the child to New Jersey was made by the New Jersey Court. Included in the Statement of Reasons for the making of the interim order, the judge, the Hon. Jonathan W. Romankow, JSC confirmed that good cause had been shown by "*clear and convincing evidence*" that the action of the Respondent in removing the child from the State of New Jersey was a clear violation of the State's anti-removal statue. He went on to say that the Respondent has improperly removed the child from his stable, familiar home environment and inappropriately unenrolled the child from school. He added that "*the degree of trauma which the child now faces at the prospect of a protracted custody battle in another country is extremely serious. In short, all of the [Respondent's] actions have served to create a risk of immediate and irreparable harm which justifies the entry of restraints*."

13. That order was made permanent on 27 May 2022 (the "Permanent Order"). The Permanent Order recites that it was made after hearing the application by the Applicant and receiving opposition and a

cross-motion filed by the Respondent, the court having read and considered the supporting papers and having heard oral argument on 27 May 2022[2]. The order included the following provisions:

13.1 that the Respondent immediately return the parties' child to the State of New Jersey;

13.2 that the State of New Jersey is the home state of the child under the Uniform Child Custody Enforcement and Jurisdiction act ("UCCJEA") and also the child's habitual residence under the Convention for purposes of jurisdiction for child custody and parenting matters;

13.3 that the New Jersey Court has and retains jurisdiction for the purpose of custody and parenting matters relating to the child;

13.4 that the New Jersey Court has and retains jurisdiction over the Applicant and Respondent for the purposes of dissolution of their marriage; and,

13.5 that the Respondent shall dismiss the divorce petition filed by her with the Grand Court.

14. In the New Jersey Proceedings the Respondent filed an Answer and Counterclaim for Divorce dated 16 June 2022 in which she does not contest venue and, amongst other things, seeks an order for sole legal custody of the child and child support pursuant to New Jersey's child support guidelines.

The position of the parties

15. In order to make an order returning the child (a "Return Order") the Court must be satisfied that:

15.1 The removal/retention was wrongful; and that

15.2 The child was habitually resident in a Convention Contracting State immediately before any breach of custody or access right.

16. In accordance with Article 3 of the Hague Convention, in order to ascertain whether the removal was wrongful the Court must be satisfied:

16.1 that the removal was in breach of rights of custody attributed to a person (in this case the Applicant) either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

[2] I note that, although the issues of consent to relocate to Grand Cayman and the allegations of abuse against the Applicant appear to have been raised before the New Jersey Court, it is the position of the Respondent that they were not fully argued and that no findings of fact were made by the New Jersey Court in that regard. The Respondent says that the issues before the New Jersey Court related solely to the proceedings under the Convention,

16.2 at the time of the removal or retention, those rights were actually being exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Wrongful Removal/Retention

17. The Applicant says that in accordance with Article 15 of Convention he has obtained a decision that the removal was wrongful. This is set out in the Statement of Reasons referred to above.

18. The Applicant has obtained an affidavit from Paul J. Concannon, his New Jersey attorney[3], which confirms that pursuant to New Jersey law[4], a parent may not remove a child who is a native of its State, or resident of its State for a period of 5 years without the consent of both parents or order of the court. He refers to the Permanent Order and the fact that the New Jersey Court has found that New Jersey is the home state of the child under the UCCJEA as well as the child's habitual residence for the purposes of the Convention and that the New Jersey Court has expressly ordered that it has jurisdiction for the purposes of determining custody. The Applicant says that removal of the child from the State of New Jersey without his consent is a clear breach of his custody rights.

19. The Applicant says that, in doing so, he was clearly exercising his custody rights

Habitual Residence

20. In respect of the subject child's habitual residence, it has been seen that the New Jersey Court has made an Order stating that the State of New Jersey is the home state of the subject child under the UCCJEA, and also the child's habitual residence under the Convention.

21. The Respondent has referred to a number of authorities in relation to the question of habitual residence. In the Cayman Islands case of *CMS v RGS*[5], the Hague Convention Network Judge for the Cayman Islands, Williams, J, held that it is the habitual residence immediately before a wrongful removal or retention that is the determining factor when considering habitual residence: *RE S (A Minor)*

[3] Exhibited to the First Affidavit of Sally Crane dated 30 August 2022.
[4] N.S.A. 9:2-2.
[5] FAM 177 of 2013, 9 September 2013, unreported.

(Abduction)[6] and *Re F (Minors) (Abduction: Habitual Residence)*[7]. Williams, J went on to quote the following in *CMS v RGS*:

> "*36 The legal principles in relation to habitual residence are helpfully set out by Mrs. Justice Pauffley in* ***FT and NT (Children), Re*** *[2013] EWHC 850 (Fam) when she states that:*
>
> > "*2 Habitual residence is a question of fact to be determined by the trial judge. He or she should normally stand back from the evidence and take a general view rather than conducting a microscopic search. An appreciable period of time and a settled intention will be necessary to enable a person to become habitually resident in country B as opposed to country A.*
> >
> > *3 The requisite period of time is not fixed and will depend upon the facts of each case. Bringing possessions, doing everything to establish residence before coming, having a right of abode, seeking to bring family, durable ties with the country of residence or intended residence and many other factors have to be taken into account. Habitual residence may be acquired despite the fact that the move may only have been temporary or on a trial basis. A month has been held to be 'an appreciable period of time' though that has been described as 'the high water mark' in a case where the Court of Appeal upheld the trial judge's finding that six weeks was sufficient to result in the acquisition of a new habitual residence.*
> >
> > *4 In relation to 'settled intention' it has been said that there must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general.*
> >
> > *5 The habitual residence of young children of married parents all living together as a family is the same as the habitual residence of the parents themselves and neither parent can change it without the express and tacit consent of the other or order of the court*."

[6] [1991] 2 FLR 1.
[7] [1992] 2 FCR 595.

37 ***In Re J (A Minor) (Abduction: Custody Rights)*** *[1990] 2 AC 562, Lord Donaldson MR stated:*

> *"...in the ordinary case of a married couple... It would not be possible for one parent unilaterally to terminate the habitual residence of the child by removing the child from the jurisdiction wrongfully and in breach of the other parent's rights."*

38 *Millett L.J. stated in* ***Re M (Abduction: Habitual Residence)*** *(1996)1 FLR 887:*

> *"Where both parents have parental responsibility, neither of them can unilaterally change the habitual residence of the child wrongfully and in breach of the other party's rights: Re J at 572 and 449 respectively per Lord Donaldson, MR."*

39. *In the Court of Appeal decision of* ***ZA & Anor v NA*** *[2012] EWCA Civ 13 Patten L.J. said at paragraph 52:*

> *" .... Whether one treats both parents or only the mother as having the care and control of the children, it is well established that the habitual residence of the children cannot be changed by the unilateral action of one parent, which is not consented to, or acquiesced in by the other. This would be a charter for abduction. The forced retention of the children in Pakistan cannot therefore found the basis of a claim that by passage of time and their inevitable involvement in family life and education in Pakistan the older children have ceased to be habitually resident in England."*

22. Nothing in those authorities suggests that the place of the habitual residence of the child could be anything other than the State of New Jersey and the Respondent does not seek to argue that the child was not habitually resident in the State of New Jersey.

23. Subject to the question of consent which is dealt with below, I am satisfied that, based on the above and consistent with the Permanent Order, the habitual residence of the child is the State of New Jersey.

24. However what the Respondent does argue is that Article 12 is subject to the defences which can be raised pursuant to Article 13 of the Convention.

25. The Respondent has raised 2 possible defences to the Applicant's application for return:

25.1 Article 13(a) Consent – She states that the Applicant consented to the move to Grand Cayman. Specifically she says that prior to her departure to Grand Cayman on 15 March 2022, the parties agreed that:

25.1.1 the Respondent would relocate to the Cayman Islands with the child;

25.1.2 the Applicant would make the necessary arrangements for the Respondent's dog to join them in Grand Cayman;

25.1.3 that the Respondent and child would return to New Jersey temporarily to collect the rest of their belongings; and,

25.1.4 the Respondent would file divorce proceedings in the Cayman Islands.

25.2 Article 13(b) - That there is a grave risk that his return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

26. The Applicant has included in his court bundle the Guide to Good Practice under the 1980 Convention – Part VI Article 13 (1) (b) (the "Guide")[8].

27. Before considering the parties' positions in relation to the possible defences raised by the Respondent, it is helpful to review some of the guidance in the Guide.

28. The Guide confirms that it is the duty of the competent court hearing an application for the return of a child wrongfully removed from their country or state of habitual residence to order the return of the child[9]. In doing so, the competent court has to act expeditiously but that does not mean that the court should neglect the proper evaluation of the issues, including where the grave risk exception is asserted. It does require, however, that the court only gather information and/or take evidence that is sufficiently relevant to the issues and examine such information and evidence including sometimes dealing with expert opinion or evidence in a highly focused and expeditious manner[10].

29. When referring to the exceptions to Article 12, the Guide states:

[8] https://www.hcch.net/en/publications-and-studies/details4/?pid=7059
[9] Paragraph 19 of the Guide.
[10] Paragraphs 21 and 22 of the Guide.

> *"25. These enumerated exceptions, however, must be applied restrictively. The Explanatory Report states that the exceptions* "must be applied only so far as they go but no further", *thus in* "a restrictive fashion if the Convention is not to become a dead letter". *It notes that* "a systematic invocation of the […] exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration".
>
> *26. In particular, while the exceptions derive from a consideration of the interest of the child, they do not turn the return proceedings into custody proceedings. Exceptions are focused on the (possible non-)return of the child. They should neither deal with issues of custody nor mandate a full "*best interests assessment" *for a child within return proceedings. The competent court or authority seized of return proceedings must apply the provisions of the Convention and avoid intervening on questions that are for the State of habitual residence to decide."*
>
> *27. This said, the exceptions serve a legitimate purpose, as the Convention does not contemplate an automatic return mechanism. Allegations that there is a grave risk should be promptly examined to the extent required by the exception, within the limited scope of return proceedings."*

Article 13(a) Consent

30. The Applicant strenuously denies ever consenting to the subject child relocating to Grand Cayman. He says that this is evidenced by a number of facts. Namely, no 'goodbyes' occurred. The subject child did not say goodbye to friends or family. The subject child has a very close bond with his paternal family, specifically his grandparents who cared for him 2 days per week for the last 5 years and yet they were not given the opportunity to say goodbye.

31. The Applicant claims that the majority of the Respondent and subject child's belongings were left behind in New Jersey at the Matrimonial Home. Apparently the Respondent left for Grand Cayman with only 2 suitcases.

32. The Respondent's dog was also left behind, when previously, the Respondent would have travelled with the family pet, including trips to Grand Cayman.

33. The Applicant asserts that the Respondent advised the subject child's school that she was taking him on vacation for a 4-week trip and that he would be back in school on the 11 of April 2022. This did not occur. The Applicant says that he was contacted by the school on the 13 of April 2022. The school advised him that the Respondent unenrolled the subject child. They went on to advise the Applicant by email dated 13 April 2022 that if this was a matter of safety; they would encourage him to contact the authorities in a timely manner and that they looked forward to re-enrolling the child in the fall.

34. The Applicant says that school were clearly unaware of any alleged relocation plans as once the subject child was unenrolled, they wrote to him informing him of this.

35. He says that the Respondent also failed to notify friends of her intention to relocate and refers to the affidavit of M.R. dated 14 September 2022. M.R. says that when she last saw the Respondent in March 2022 she made no mention of her plans to move to Grand Cayman and indeed discussions took place with respect to plans for the Respondent to go on a trip with friends in the autumn of 2022.

36. The Applicant says that the above supports his assertion that the move by the Respondent was not planned; that he did not at any point consent to the relocation of the subject child, and that he was not aware that the subject child's trip was anything more than a holiday, as was advised to him by the Respondent.

37. The Applicant refers to the case of *Re C. (Abduction: Consent)*[11] in which it was said:

> *"the issue of consent is a very important matter. It needs to be proved on the balance of probabilities, but the evidence in support of it needs to be clear and cogent. If the court is left uncertain, then the 'defence' under Art 13(a) fails."*

38. It is submitted by the Applicant that the evidence presented by the Respondent does not establish that he ever gave his consent for the subject child to relocate, and therefore he submits that this defence must fail in the circumstances.

39. On behalf of the Respondent, it is argued that, as discussed and agreed between the parties, the Respondent filed for divorce in the Cayman Islands on 30 March 2022. Based on the agreement that she says was reached between the parties, the Respondent proceeded to secure employment as a paralegal at a law firm in the Cayman Islands, unenrolled the child from his school in New Jersey on

[11] [1996] 1 FLR 414.

13 April 2022 (before she says that she was aware of the New Jersey Proceedings as she was served with them on 22 April 2022) and enrolled the child a Summer Camp in Grand Cayman. As of 25 August 2022, she says that the child is attending a Primary School in Grand Cayman.

40. While the Respondent is unable to provide documentary evidence of the verbal discussions which took place between the parties in respect of the Respondent and child's relocation to Grand Cayman, she says that is not unusual or unexpected. The Respondent says that she did not consider that the Applicant would renege on the agreement (particularly given what she says is the Applicant's lack of interest in the child since he was born and what she describes as his utter contempt for her personally), or that it would be necessary for the agreement to be enshrined in written form.

41. The Respondent argues that her actions in securing employment in Grand Cayman, unenrolling the child from school in New Jersey, registering the child in summer camp then school in Grand Cayman, and filing for divorce, were steps taken in good faith and reflect the natural logistical arrangements necessary for the Respondent and child's relocation from New Jersey to Grand Cayman, as had been consented to by the Applicant.

42. In the circumstances, it is the Respondent's position that the Applicant provided his express and tacit consent to the child relocating to the Cayman Islands, and thereby, both parties agreed to the change in the child's habitual residence from New Jersey to the Cayman Islands.

43. The Respondent goes on to argue that by giving his consent, the Respondent has not wrongfully retained the child in breach of the Applicant's custody rights and that the giving of consent was the Applicant exercising those rights.

44. The Respondent refers to *Re P-J (children) (removal outside jurisdiction: abduction)*[12] a leading English case on the meaning of consent in which the principles to be derived from the authorities are summarised by the Court of Appeal in paragraph 48 as follows:

> *1) Consent to the removal of the child must be clear and unequivocal.*
> *2) Consent can be given for removal at some future but unspecified time or upon happening of some future event.*
> *3) Such advance consent must however still be operative and in force at the time of the actual removal.*
> *4) The happening of the future event must be reasonably capable of ascertainment. The condition must not have been expressed in terms which are too vague or uncertain for both parties to know whether the condition will be fulfilled.*

[12] [2009] EWCA Civ 588, [2010] 1 WLR 1237.

Fulfilment of the condition must not depend on the subjective determination of one party; the event must be objectively verifiable.

5) *Consent or the lack of it must be viewed in the context of the realities of family life or more precisely in the context of the realities of the disintegration of family life. It is not to be viewed in the context of or governed by the law of contract.*

6) *Consequently, consent can be withdrawn at any time before actual removal. If it is, the proper course is for any dispute about removal to be resolved by the courts of the country of habitual residence before the child is removed.*

7) *The burden of proving the consent rests on the party who asserts it.*

8) *The inquiry is inevitably fact-specific, and the facts and circumstances will vary infinitely from case to case.*

9) *The ultimate question is a simple one, even if a multitude of facts bear upon the answer; it is simply this: 'had the other parent clearly and unequivocally consented to the removal?"*

45. In *Re C (Abduction: Consent)*[13] Holman, J pointed out that Article 13 does not use the words "*in writing*" and that:

> ". . . *parents do not necessarily expect to reduce their agreements and understandings about their children into writing, even at a time of marital breakdown. What matters is that consent is 'established'. The means of proof will vary*."

46. The Respondent described in her affidavit the discussions that she says took place between the parties leading up to the Respondent's relocation on 15 March 2022. During the verbal discussions between the parties, she says that the Applicant provided his clear and unequivocal consent to the child being removed. The Applicant had not withdrawn this consent prior to 15 March 2022 and accordingly, she says that the consent was still in place as of 15 March 2022.

47. The Respondent goes on to say that the parties were in agreement that their marriage had broken down with no prospect of reconciliation and they entered into discussions regarding the Respondent and child's residential arrangements. In February 2022 the Respondent says that she proposed that she and the child relocate to the Cayman Islands on the basis that: (1) the Respondent had been unable to find employment in New Jersey in over two years and had no likely prospects of securing work in New Jersey to support herself and the child, (2) the Respondent was the sole caregiver for the child and it was in the child's best interests for that to continue, (3) the Respondent's support network including family members and friends were in the Cayman Islands, (4) it was unsustainable for the parties to continue living in the same household given the level of conflict, (5) the Respondent always planned

[13] [1996] 3 FCR 222, [1996] 1 FLR 414, 418, [1996] Fam Law 266.

to return to reside in the Cayman Islands which is where she considered "home", and (6) the Applicant had no interest in the child and no desire to care for him.

45. Reviewing the authorities cited by the parties and having considered the evidence provided, I am not satisfied that there is clear and unequivocal evidence that the Applicant consented to the Respondent relocating to the Cayman Islands with the child. The lack of "goodbyes" and lack of communication with the child's paternal grandparents and family and the response from the child's school in New Jersey seems to be at odds with there having been a clear agreed re-location strategy that was communicated to third parties. I have not had the opportunity to hear from the parties personally or from their witnesses or to hear their evidence in cross-examination. That is not the level of fact finding that is appropriate to the current process. Having reviewed the parties written evidence I am left sufficiently uncertain that consent was given that, in accordance with *Re C. (Abduction: Consent)*, I find that the defence under Article 13 (a) fails.

Article 13(b) grave risk/intolerable situation:

46. The Applicant argues that a very high standard is required to demonstrate grave risk or intolerable situation, requiring substantial, clear and compelling evidence.[14]

47. As mentioned earlier, the Respondent has alleged a variety of abusive behaviour on the part of the Applicant. The Respondent's Affidavit describes what she says is the scale and volume of the abuse perpetrated against her and the child over a prolonged period of time. Paragraphs 27 - 43 of the Respondent's Affidavit describes the grave risk that she says the child's return to New Jersey would expose him to physical harm, psychological harm, or otherwise place him in an intolerable situation.

48. During the parties' 17 year marriage, the Respondent says that she has been subjected to serious domestic abuse in a multitude of fashions at the hands of the Applicant. The relationship has been significantly blighted by physical, emotional, verbal and sexual domestic abuse, perpetrated in what should have been a safe home environment. It is alleged that the child has been witness to many of the incidents of domestic abuse, and the child himself has been subjected to repeated emotional, psychological and verbal abuse.

[14] Re F (a minor) child abduction: rights of custody abroad) [1995] Fam 224.

49. The Respondent says that the evidence of domestic and child abuse that she has provided raises a prima facie case that the child would be exposed to a grave risk of physical harm, psychological harm, or otherwise place him in an intolerable situation if he were to return to New Jersey. While the Respondent did not report any incidents of domestic violence to the police, she says that it is not indicative that they did not occur. I should add that there is, in fact, no objective evidence from independent third parties recording complaints of abuse or mistreatment of the Respondent or the child on the part of the Respondent. Of course, as the Respondent says, that does not mean that they didn't happen it just makes the fact finding exercise by the Court in the context of these proceedings that much more difficult.

50. The Respondent says that she is terrified of what retribution the Applicant will have planned for her upon her return. The stress, anxiety and living in constant fear the Respondent will endure upon her return will unavoidably have an impact on her ability to care for the child.

51. It is submitted by the Applicant that the Respondent has failed to meet the standard required for this exception to apply. Exhibited to the Applicant's affidavit are WhatsApp messages sent from the Respondent to the Applicant on the 8 of April 2022. They are a discussion during which the Respondent comments:

> *"I want u in his life always* [the Father]*... I want him and u to always be constant in each other's lives. And the entire family. Always. My support system is down here though, and it would make the most sense for us to be here. I hope that we can come together with understanding for* [the child]*, and we can really work out getting him back and forth so that we can all be happy knowing we are doing the best for him."*

52. The Applicant says that this is expressed in a way that is inconsistent with the assertions that the Respondent makes against the Applicant and the grave risk that the Respondent says that the child (and she) would be in if the child returns to the State of New Jersey. He says that the question arises as to why a mother would wish for a father, who she alleges is unfit and abusive, to always be in their child's life.

53. The Applicant has provided affidavits sworn by Applicants friends or family who accompanied the family on various holidays, all of whom have reported a happy and harmonious father and son relationship.

54. Consistent with the Guide, Hale LJ in *TB v JB (Abduction, Grave Risk of Harm)*[15] helpfully set out, at 525, a summary of the approach of the English court to the application of the Hague Convention and the place of Art 13(b):

> *"'The policy of the Convention is that disputes about children should be determined in the courts of the country of their habitual residence. Children should not be uprooted and placed beyond their jurisdiction. It is for them to determine where the best interests of the children lie. Article 13(b) is the one exception to this. No requested country can be expected to return children to a situation where they will be at serious risk, but this must not be turned into a substitute for the welfare test, usurping the function of the courts of the home country*.'

55. The Respondent has referred to a leading authority in England on the grave risk exception which is the Supreme Court case of *Re E (Children) (wrongful return: exceptions to return)*[16]. The particulars of the grave risk exception are set out in paragraphs 32 to 35 of *Re E*:

> *"**[32]** First, it is clear that the burden of proof lies with the 'person, institution or other body' which 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 art 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination.*
>
> ***[33]** Second, the risk to the child must be 'grave'. It is not enough, as it is in other contexts such as asylum, that the risk be 'real'. It must have reached such a level of seriousness as to be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two. 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.*
>
> ***[34]** Third, the words 'physical or psychological harm' are not qualified. However, they do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation' (our emphasis). As was said in Re D [2007] 1 All ER 783 at [52], "Intolerable" is a strong word, but when applied to a child must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate". Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we*

[15] [2001] 2 FLR 515.
[16] [2011] UKSC 27, [2011] 2 FLR 758.

now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent….

***[35]** Fourth, art 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…"*

56. The exception is described as being "forward looking". The Guide states:

"37. However, forward-looking does not mean that past behaviours and incidents cannot be relevant to the assessment of a grave risk upon the return of the child to the State of habitual residence. For example, past incidents of domestic or family violence may, depending on the particular circumstances, be probative on the issue of whether such a grave risk exists…."

57. A summary of the approach to the grave risk exception was outlined in *Re IG (a child) (child abduction: habitual residence: Article 13(b)) KG v JH*[17]. Baker LJ stated the following at paragraphs 46 – 47:

"46. The leading authorities remain the decisions of the Supreme Court in Re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 AC 144 and Re S (A Child) (Abduction: Rights of Custody) [2012] UKSC 10, [2012] 2 AC 257. The principles set out in those decisions have been considered by this Court in a number of authorities, notably Re P (A Child) (Abduction: Consideration of Evidence) [2017] EWCA 1677, [2018] 4 WLR 16 and Re C (Children) (Abduction: Article 13(b)) [2018] EWCA Civ 2834, [2019] 1 FLR 1045. Since the hearing of the present appeal, this Court has handed down judgments in another appeal involving Article 13(b), Re A (A Child) (Article 13(b)) [2021] EWCA Civ 939 in which Moylan LJ carried out a further analysis of the case law. I do not intend to add to the extensive jurisprudence on this topic in this judgment, but merely seek to identify the principles derived from the case law which are relevant to the present appeal.

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

[17] [2021] EWCA Civ 1123.

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 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.

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

(9) In deciding what weight can be placed on undertakings, the court has to take into account the extent to which they are likely to be effective, both in terms of compliance and in terms of the consequences, including remedies for enforcement in the requesting State, in the absence of compliance.

(10) As has been made clear by the Practice Guidance on "Case Management and Mediation of International Child Abduction Proceedings" issued by the President of the Family Division on 13 March 2018, the question of specific protective measures must be addressed at the earliest opportunity, including by obtaining information as to the protective measures that are available, or could be put in place, to meet the alleged identified risks."

58. The Respondent says that parallels can be drawn between the present case and the case of *Re C (child)*

(abduction: Article 13 (b) and child's objections) RS v AM[18]. In that case, the wife was subjected to domestic violence throughout their relationship, and the child was witness to many of the incidents of domestic abuse, and was herself subjected to repeated abuse. The child in that case also expressed fear of the father and did not wish to return to her home country. In that case, Cobb J concluded as follows:

> *"37. The mother has filed what I regard as powerful substantive evidence in support of her case that she has been subjected to multiple forms of domestic abuse; her evidence is detailed, and is buttressed and corroborated by the evidence of third-party witnesses including the father's older (adult) daughter (with whom the father maintains that he has a "good relationship"), by C herself, and to a lesser extent by the authors of the independent OZSS report.*
> *38. The alleged abuse takes multiple forms; it is said that the father has violated the mother physically, sexually, and emotionally in a relationship characterised by his controlling behaviour. It is the mother's case that C has been exposed to this domestic abuse, and adversely affected by it. If the allegations of abuse are true, or even largely true, I am satisfied that there would be a grave risk that C would be exposed to physical or psychological harm or otherwise placed in an intolerable situation in the event of her return to Poland. To be clear, in this regard, I have drawn particularly on the evidence (albeit unproven) that C has been directly involved in incidents of domestic abuse (as she herself has alleged), and has further allegedly been the victim of direct harm herself; a photograph has been produced of an injury to C's head (said to be dated April 2020), allegedly caused by the father, although I know he maintains that this was accidentally caused by his granddaughter. In light of this, I have asked myself how C could be protected against that assessed risk, and have accordingly reviewed with care the proposed protective measures in §27 above."*

59. Whilst there may be some parallels between that case and the present one, it is notable that in *Re C,* the judge found that the proposed protective measures were unlikely to be capable of enforcement in Poland.

60. As is clear from *Re IG and Re C,* if the Court concludes that the allegations would potentially establish the existence of a grave risk exception, it 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.

61. Pausing there, I have considered the evidence from the Respondent. The allegations that she makes are serious and of concern and I by no means discount or dismiss them. I hesitate to find that they are sufficient to decide that, when adopting a forward looking approach they, provide sufficient evidence that there is a grave risk to the child if he returns to the State of New Jersey or that he will be placed in an intolerable situation. I say this taking into account two significant factors.

[18] [2022] EWHC 311 (Fam).

62. The first, is that the New Jersey Court is clearly seized of the question of custody of the child. Both parties have submitted to the jurisdiction of that court and it is clearly appropriate that, in those circumstances, custody issues should be resolved in that forum. The issues of dispute between the parties are best placed to be adjudicated upon in the country of habitual residence of the child. As stated in Re E (children) (international abduction)[19]:

> *"Where there are disputed allegations which can neither be tried nor objectively verified, the focus of the inquiry is bound to be on the sufficiency of protective measures which can be put in place to reduce the risk."*

63. There is also no question that the New Jersey Court is a specialist court that has already acted promptly and decisively when dealing with the application for the return of the child.

64. The second issue is the extent to which any future risk to the child can be ameliorated by protective measures. In that regard what have been described as "without prejudice" undertakings have been offered by the Applicant to the Respondent.

65. While the allegations against the Applicant are not accepted by him and are strenuously denied, without prejudice undertakings are provided which the Applicant says will ensure that the child will not be returning to the same situation from which he was wrongfully retained.

66. In the case of *W (A Child)*[20], Wall LJ states:

> *"That a South African Court could be trusted to make good, reliable welfare-based decisions and put in safeguards in place designed to protect her. I respectfully agree with Sedley LJ that the imposition of conditions of this sort is frequently a mechanism for ensuring that the threshold for the Art 13(b) defence is not reached."*

67. It is submitted by the Applicant that the undertakings provided in this instance are sufficient in the circumstances where it is submitted that the evidence with respect to the Article 13(b) defence does not meet the requisite threshold and undertakings have been given. Similarly, in this case, the New Jersey Court can be trusted to make good and reliable welfare-based decisions and to put in place adequate safeguards should it be deemed necessary to do so.

68. The measures proposed are as follows:

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[19] [2011] UKSC 27.
[20] [2004] EWCA Civ 1366.

Safe Landing Accommodations for [the Respondent and the child]

1. *The Applicant will either make, or pay for, flight arrangements for the Respondent, at her discretion, to return the parties' child to the state of New Jersey, USA.*
2. *In the event the Respondent does not wish to accompany the child in his return, then the Applicant will make arrangements to personally pick up the child in Grand Cayman and accompany him in his return to the state of New Jersey, USA.*
3. *Prior to their return trip, the Applicant will vacate the* [former matrimonial home] *for the Respondent and the child to stay. The applicant will continue to pay the rent for the* [former matrimonial home] *at a cost of about $1114.00 per month. The respondent and the child shall have sole and exclusive occupancy of the* [former matrimonial home].
4. *The applicant will continue to provide, and pay for, the utilities at the* [former matrimonial home]*, including the water, gas, electric, cable, and Internet, at a cost not to exceed $500 per month.*
5. *The applicant will continue to provide, and pay for, health insurance brackets i.e. medical and dental) for both the Respondent and the child under the existing policy with Horizon Insurance Company, at a cost of about $550 per month.*
6. *The Applicant will continue to provide, and pay for, automobile insurance for the Respondent, under the current policy with Progressive Insurance Company, at a cost of about $110 per month, and the Respondent will have sole and exclusive possession of the 2014 Nissan Altima.*
7. *The Applicant will provide the sum of dollars 500 per month to the Respondent, in supplement to her existing income, for food, gas, etc.*
8. *The Applicant will immediately enter into a Consent Order with the Respondent, that vacates any fine that may otherwise be lodged against the Respondent, including the fine of $100 per day under the New Jersey Court's May 27, 2022 order.*
9. *The Applicant has re-enrolled the child in the* [child's school] *for the 2022 – 2023 school year, which commenced on Tuesday, 6 September 2022, the same school where the child attended until the trip to Grand Cayman on 16 March 2022 after which he was unrolled by the Respondent on 11 April 2022.*
10. *The Applicant agrees that the above accommodations shall remain in place pendent lite, with review by the New Jersey Court when the Respondent obtains full-time employment, in accordance with her skill set, and diligent efforts expended to obtain such employment, in the state of New Jersey, USA and any other review the Respondent or the Applicant.*

69. It seems to me that these conditions/proposals are reasonable in the circumstances and mitigate any risks to the child. I will add to them the requirement that the Applicant and Respondent enter into a Consent Order within the New Jersey Proceedings to give effect to the protective measures/undertakings offered by the Applicant. They will clearly be subject to review as required by the New Jersey Court.

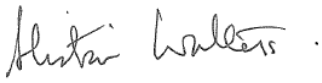
Conclusion in relation to exceptions to Article 12

70. As indicated earlier, I have not found that there is sufficient evidence of consent on the part of the Applicant to the re-location of the child to the Cayman Islands and change of his place of habitual residence. In light of that uncertainly, I have found that the defence under Article 13 (a) fails.

71. In relation to the grave risk exception under Article 13 (b), I am not satisfied that there is sufficiently clear evidence to establish that exception and, in any event, with the custody question firmly before the New Jersey Court and the safe landing or protective measures offered by the Applicant appearing to mitigate and possibly eliminate the risk of any future harm to the child, I also find that the defence under Article 13 (b) fails.

72. On that basis, in accordance with the provisions of the Convention, but subject to the terms of the undertakings/protective measures offered by the Applicant as I have extended them, I order that the child is returned to the State of New Jersey.

73. The Respondent is legally aided so I do not propose to make any order in respect of costs.



Hon Mr Justice Alistair Walters
Acting Judge of the Grand Court