Neutral Citation Number: [2020] EWHC 1566 (Fam)

Case No: FD19P00712

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

AND IN THE MATTER OF THE COUNCIL REGULATION EC NUMBER 2201/2003 (BRUSSELS IIR)

IN THE MATTER OF THE SENIOR COURTS ACT 1981

IN THE MATTER OF G (a girl), F (a boy) & E (a boy)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/06/2020

Before:

Nigel Poole QC, Sitting as a Deputy High Court Judge

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Between:

JK (Mother)	**Applicant**
- and -	
LM (Father)	**Respondent**

- -

Mr Paul Hepher (instructed by **Williscroft & Co**.) for the **Applicant**
Mr Michael Gration (instructed by **Waldrons Solicitors**) for the **Respondent**

Hearing date: 27 May 2020

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Approved Judgment

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

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on 17th June 2020.

Nigel Poole QC:

Introduction

1. The court is concerned with three of the parties' children, E, a boy aged 9, F, a boy aged 12, and G, a girl aged 14. The mother issued an application on 17 December 2019 for the summary return of the three children from Wales, where they live with the Respondent father, to the Republic of Ireland. The father opposes the application. The parties have a fourth child, H, a boy aged 6, who lives with the mother in Ireland.

2. In early November 2018 the mother and four children found themselves homeless, living in a bus in County X, Ireland. The mother asked the father to take over the care of the children on a temporary basis until she found accommodation. The father brought all four children to his home in Wales. The mother's application states that "o*n 19th December 2018 the mother travelled to England to collect the children but the father refused to return them to her care*." That is disputed. On 3 January 2019 the mother wrote an email to the father seeking his agreement to return the children. He did not do so. In March 2019 the mother turned up at the school attended by the youngest three children, put H in her car, and returned with him to Ireland. There is then no evidence of communication between the mother and father from 3 January 2019 until the mother made her application over 11 months later. H remains in Ireland with the mother. The three children who are the subject of this application remain in Wales with the father.

3. I have been provided with a bundle of documents including with three witness statements from the mother and one from her solicitor, Lucy Cohen. The father has made two statements. Ms Toni Jolly, Family Court Adviser from Cafcass, has provided a report following discussions with the three children at court on 30 January 2020. She gave oral evidence about that report and about further discussions she had with the children on 26 May, the day before the hearing. She also provided me with an email that G asked I should see, dated 26 May 2020 and headed, "Things I wanted to say". I have been provided with records of social services' involvement with the family. Other than the email of 3 January 2019, the bundle contains no written communications between the parties. Page references in this judgment refer to the section and page number within the bundle. There are inconsistencies and gaps in the evidence about the children's whereabouts and circumstances in early 2018. However, these are summary proceedings, there was no submission that I should hear oral evidence from the parties, and I must make determinations on the evidence available. I am very grateful to Counsel, Mr Hepher and Mr Gration, for their helpful submissions.

The Issues

4. The issues to determine are:

   a) What agreement did the parents of the children reach in early November 2018 pursuant to which the children came under the care of the father in Wales?

   b) Whether the respondent father wrongfully retained the children in the UK on 19 December 2018 or on any later date?

   c) Were the children habitually resident in the Republic of Ireland or the United Kingdom at the time of their allegedly wrongful retention in the UK?

d) Whether an article 13 exception has been established? In particular,

i) Did the mother consent to or acquiesce in the retention of the children in the UK?

ii) Would there be a grave risk that return to Ireland would expose the children to physical or psychological harm or otherwise place them in an intolerable situation?

iii) Do the children, or any of them, object to returning to Ireland and have they attained the age and degree of maturity at which it is appropriate to take account of their views?

If there has been wrongful retention and one of the exceptions above is established,

e) Whether I should exercise my discretion not to order return of the children or any of them.

Background and History of Events

5. I am grateful to both Counsel for each providing a chronology in their skeleton arguments. Some of the evidence as to the history of events is inconsistent or absent, but there are no significant differences between Counsels' chronologies.

6. Both parties were born in England. They formed a relationship some years ago but never married. G and F were born in Wales. E was born in Hereford but his parents were living in Wales at the time of his birth. The three children were still living in Wales when their parents' relationship broke down in 2013 when the applicant mother was pregnant with their fourth child, H.

7. The parties then lived nearby each other sharing care of the children until on a date around 4 September 2014, the mother moved with the children to Ireland "to stay with a friend" [C30, para. 3]. She did not tell the father she was leaving with the children. Subsequently, he visited the children and mother in Ireland on two occasions. There is a dispute about exactly what occurred on the second occasion, which I do not need to resolve for the purposes of this application, but there was clearly considerable animosity between the parents.

8. The mother and children stayed in Ireland for about two months until in November 2014 they travelled to Scotland where they lived in a static caravan until February 2016. The mother accepts that the children did not attend school during this period.

9. In February 2016 the mother and children returned to Wales, living first in Anglesey, where the children were enrolled in school, then in 2017 in South Wales, where they were not, and then in Holyhead, where the children were again enrolled in a school. The father was not kept informed of the whereabouts of the children

and in August 2017 he hired a private investigator to find them. Thereafter there appears to have been some contact between the children and the father.

10. In January 2018, the mother moved the children away from Holyhead. They lived in a campervan, arriving in the Republic of Ireland probably in or about March 2018. I do not know where they were in the early months of 2018 but probably in Scotland for at least part of that time. The Social Services records reveal at [E70] that when the children were reported missing, vehicle registration number checks led the police to conclude on 16 May 2018 that the mother's campervan was in Scotland. The mother contends that she arrived in Ireland in January 2018 but on the face of her application, and in Ms Cohen's statement, the date given is May 2018. Mr Gration accepts that the mother and children arrived in the Republic of Ireland in March 2018 and I am prepared to proceed on that basis.

11. During the first few months in Ireland in 2018 the mother and children travelled around in a campervan. The vehicle did not have a toilet but the mother says she bought a camping toilet to use. They lived on beaches and sometimes on campsites. The children were not in school. G reported to Ms Jolly in January 2020, that,

> "*they then moved to Ireland where they lived in a bus for a month, with 2 dogs, 3 cats and no running water or cleaning facilities. E said they had to "hold on" if they needed toilet. G remembers them hanging around on the beaches, knocking on doors to ask for water, and sometimes having to go to toilet behind bushes. She and F said a couple of times they stayed on a camping site if there was money."* [D9, para.29]

12. The father was informed of their whereabouts and visited the mother and children in Ireland in the early summer. The mother states that by July 2018 she had secured a temporary home, a cottage, from a man called Mick. It is not clear exactly when she and children began to occupy that cottage but the father visited it in August 2018, so they were clearly in occupation by then. At some point the water supply to the cottage dried up. G told Ms Jolly on 30 January 2020, that they had "*stayed in the summer house of a friend. There was no bathroom lock and he was "creepy*". G said they were "*kicked out when their mum fell out with her friend for not looking after the house properly.*"

13. G, F and E did attend school in Ireland for a short period. At [E7] there is a record of a communication from Mr N, Principal of Q School in County X, to Powys Social Services, in which he states that G attended the school from 10 September to 25 October 2018. The school bought G's uniform and books for her, and on occasion fed her because she arrived at school hungry. On one afternoon Mr N had to take G home because she was not picked up by her mother. G said to Ms Jolly that it was lovely being in the school. F told her that he had been in school and it had been "amazing". E told Ms Jolly that he was in school in Ireland for about one month and it was "fine".

14. In October 2018, the mother was evicted from Mick's property. She says that she was offered a job which ought to have come with a mobile home as accommodation, but the accommodation did not materialise and the family became homeless.

15. On 8 November 2018, according to the father, G telephoned him [C12, para.8]: "s*he was crying and was clearly distressed telling me that the bus had broken down and that* [she] *wanted me to come over. I could hear the fear in her voice and the younger three boys wailing in the background. They [sounded] terrified and G was trying to negotiate with her mother as well as speaking to me, begging for her to let me come and collect them"*. On talking to all three children in January 2020, Ms Jolly reports [D9, para.30]:

> "*It was against this background, as well as being in the middle of nowhere and being chased by the police, that G said she convinced her mum to ask their dad for help. In our discussion, G was clear to me that she was instrumental in encouraging her mum to let their dad look after them temporarily: "…until she got her act together". G said none of the children wanted to stay with their mum but she is pretty sure if their mum knew at the time, she would not have let them go. F complimented his sister's role here by calling her "independent". E added that none of them wanted living with their dad to just be temporary."*

16. The mother accepts that at that time it was not acceptable for the children to live on the bus. She agreed that the father would care for the children. He then travelled to Ireland. He says that, "*When I arrived I found the bus to be in a terrible state, [dirty] and with no proper bedding or washing facilities. The two dogs were in a dire state and were needing to see a vet. The cats were being kept on leads.... all of the children had head-lice and they had barely eaten for days. The dogs were incontinent and JK had been keeping them in a cupboard in their own mess.*" [C12, para.20].

17. The father brought the four children back to his home in Wales. Neither party specifies the date when that happened. The Social Services records show that Katy Cherrington, lead assessor of the Powys Children's Assessment team, carried out a care and wellbeing assessment in respect of the children, completed on 22 January 2019, further to a referral received from social services in County X after contact from the mother on 12 November 2018. Ms Cherrington was informed that the mother had reported being made homeless and living in her van as from 31 October 2018, then seeking help from the father asking him to collect the children on 2 November 2018. However, on Social Services making contact with the father he had recalled that G had called him for help on 8 November. Doing the best that I can I find that the children came back to the UK with the father on 9 November 2018 as stated in Mr Hepher's skeleton argument for the mother.

18. On 18 December 2018 the mother travelled to Wales from Ireland. There is no evidence of any prior communication with the father. She says [C33-34, para.19], "*I tried to collect* [the children] *in December, I had by this time got a 2 bedroom flat, and a 3 bedroom house I could move into when the children returned. However, when I arrived he refused to allow them to come with me and he was threatening to me, and my friends. I therefore returned to Ireland without them. At this point I was at the top of the housing list in Ireland and so was ready to provide them with a stable home.*"

19. The mother wrote an email on 3 January 2019 which she sent to the father and to Powys Social Services [C24-25]:

> *"I am concerned and puzzled as to why you felt it necessary to threaten me and our friend, who I had asked to collect the children from you, so that I could see them before Christmas, and that neither you nor the children were at home, on the 19th December when I called …. I got the following text from you on the morning of 20th December when I was returning to Ireland, "You are not allowed near the children until you can prove you have got on your feet. You cannot be trusted to not take the children on the road and into more dangerous environments." As you are well aware, I asked you to take the children, on a temporary basis, for about two weeks until I could sort out suitable accommodation for us in West X. The arrangements have been in place since the first week of last month. I thought that my mother or the children would have told you of that, or possibly the social worker, but judging from your text either you were not told, or you don't believe them. So here is a summary of arrangements for the children."*

The mother set out the proposed arrangements in a small island community in County X called YY and said of her accommodation:

> *"I stayed on W farm when I first arrived on the island, as the Z family are part of the WWOOF volunteer programme and happened to have space for me, but I am now living at V Farm, which is a visitor farm… where as a temporary measure, RS has given us the use of one floor of her house; we will have shared bathroom and kitchen facilities. This arrangement will stand until a house being renovated, at Q Harbour on the island, becomes available in the spring or early summer..."*

She then states,

> *"I would be grateful if you would acknowledge that you got this email and would let me know when it would be convenient for you to return the children to me. Please respond by the 06/01/19. I am prepared to collect them to save you any inconvenience, but I am sure you should be able to see why this needs to be very soon."*

20. As noted, there is no evidence of any arrangements for the mother to see the children in December 2018. The email shows that the purpose of her attendance was to see the children before Christmas, not to return them to Ireland as she claims in her first statement noted above. It is now accepted that there was no meeting between the parties in December 2018. I can find no evidence that the mother was "top of the housing list in Ireland". The evidence suggests that at most the mother had the opportunity to move into a 3 bedroom house in the spring or summer of 2019, but not that she had one available for her and the children in December 2019. Paragraph 19 of the mother's first statement, dealing with the date on which she claims the father was guilty of wrongful retention, is at odds with the other evidence before me.

21. Mr Z, a resident of YY, contacted Powys Social Services on 28 November 2018, and reportedly advised,

> "*To confirm what we were saying this morning: JK is currently staying with us on the W farm on YY. She has been here for around 2 weeks, since I was asked to see if I could help her by the mother of a school friend of JK's oldest, G. The school on the mainland, which both G and her friend were attending is very happy for JK's daughter to return. There are places in the primary school on the island for her other children and in the long term, starting in February, there is a house currently under renovation which the owner is happy to rent to the family. In the meantime, there is accommodation available on a neighbouring farm in the farm house. We wouldn't have enough space for the family..."*

22. There is no evidence that the father did respond to the email of 3 January 2019 and no evidence of any further communication between the parties aside from during the event in March 2019 described below.

23. Ms Jolly reports that G joined a High School on 15 January 2019. E has been a pupil at a Primary School since 9 January 2019 and F was, as I understand, a pupil there from the same date, moving to the same High School as his sister in September 2019.

24. The mother says [C34, para.21] "*By March 2019 things had still not been resolved and LM was stopping me from having contact with the children*." She came over to the UK and went, unannounced, to the Primary School attended by F, E and H. She tried to persuade the boys to come with her and return to Ireland. F and E would not do so. The school contacted the father. He arrived and there was a row between the parties, but the mother managed to get H into her car and drove off. She took H back to Ireland. Ms Jolly reports that the Primary School head teacher in Wales, recalled later receiving a call from H's school in Ireland. His headteacher there said that he had raised with JK that the school was unsuitable because it is entirely Irish-speaking and extremely small with no children of H's age.

25. There is no evidence of any further requests by the mother to the father for return of the children until she made the present application on 17 December 2019, over 13 months after the children had left Ireland, and two days before the anniversary of the date she alleges the father wrongfully retained the children in the United Kingdom.

26. The mother continues to live on YY, an island with a population of about 120, off the coast of County X. There is no secondary school on the island. Until very recently the mother's case has been that, upon the children being returned to Ireland, she would live with them on the island but that G would stay with a family on the mainland when attending the school there. As recently as 21 May 2020 the mother changed her plans, saying in her third witness statement that she has rented a three bedroom apartment on the mainland.

27. Social Services have been involved with the children after their arrival in Wales in 2018, following concerns expressed by the mother about the father's character. Their conclusion has been that the children are thriving, with good attendance at school, and are benefiting from the stability they now have in their lives.

The Convention and Regulation

28. Article 1 of the Hague Convention states that its objects 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 access under the law of one Contracting State are effectively respected in other Contracting States.

29. These principles also underlie the policy of Council Regulation EC No. 2201/2003 (Brussels IIR). Baroness Hale, in Re D (A Child: Abduction Rights and Custody) [2006] UKHL 51, at para.48, said:

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

30. By Article 3 of the Convention the removal or retention of a child is considered to be wrongful if,

> "(*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*."

31. Article 12 of the Hague Convention provides that:

> "*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".*

32. If this position is reached, then it is necessary to go on to consider whether the case falls within one of the recognised exceptions under Article 13 which provides that:

> *"13. Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:*
> *(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or*

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

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

33. If one or more Article 13 exception is made out, I have a discretion whether or not to order return.

34. Article 11 of Brussels IIR reinforces the 1980 Convention in the European context and, in relations between Member States, in so far as both the Convention and the Regulation cover the same matters, the Regulation takes precedence. Article 11(2) provides that

"*When applying Article 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity."*

35. It is not the role of this court to determine the longer term arrangements for these children. The nature of these proceedings does not allow me to conduct a detailed welfare assessment. Nor, for clarity, is the child H the subject of the present application.

36. The burden of proof in relation to wrongful retention and habitual residence is on the applicant mother. The burden of proof on the Article 13 defences is on the respondent father. The civil standard of proof, on the balance of probabilities, applies.

The Agreement between the Parties

37. On 8 November 2018 the mother and father agreed that the father should care for the children. It was implicit that he would do so at his home in Wales, he did return with the children to Wales and the mother does not contend that she opposed him doing so. Accordingly, this is not a case of wrongful removal: the parties agreed to the children being removed from Ireland to be relocated in the United Kingdom.

38. The agreement between the parties was reached in distressing circumstances, without the benefit of legal advice and it was unwritten. Nevertheless, Mr Gration for the father places considerable emphasis on this agreement, relying on it to submit that there has been no breach of the mother's custody rights and therefore no wrongful retention.

39. The mother states [C33, para.19]:

"... it was agreed that he would care for the children, but that I would have them back as soon as I had found suitable accommodation."

In her email of 3 January 2019 [C24] the mother wrote:

> "*As you are well aware, I asked you to take the children, on a temporary basis, for about two weeks until I could sort out suitable accommodation for us in West X."*

40. The mother's solicitor, Lucy Cohen, wrote at [10],

> "*The mother instructs me that she reached an agreement with the father that he would look after the children while she found alternative accommodation for the family and that on renting another property the children would be returned to her."*

41. Powys Social Services noted a conversation with the father [E19] which probably took place in or around December 2018, in which, "*LM explained that JK had contacted him on the 8th November to ask if he could look after the children until she found housing*." In his second witness statement, the father says, "W*e agreed that I would let her have the children back if and when she got back on her feet and was able to provide a stable home for the children.*" [C27-28, para.9].

42. I am very mindful of the fact that the arrangement reached by the parties was entered into in the heat of difficult and distressing circumstances, without legal advice, and that it was verbal. It would be wrong to be over-analytical. Nevertheless, I am quite satisfied that the mother and father made an agreement on or about 8 November 2018 which they intended to be the basis of arrangements for the children in the immediate future. The agreement was that the children would live with their father in Wales for a temporary period until the mother had secured suitable accommodation in which she and the children could live. There was no agreement as to the duration of this temporary arrangement. The mother hoped it would be for a period of only two weeks but there was not agreement to that effect. The agreement was reached in the context of the mother and children finding themselves homeless. The family had not been used to living in expensive or well-appointed housing, and so there was no agreement or expectation that any newly found accommodation should be of a good standard. However, both parties understood that accommodation found by the mother would only be "suitable" accommodation if it met some basic standards. It had to be fit for habitation by the four children and the mother, it had to be located so that the children could go to school, and it had to be stable and secure in the sense that there would be no substantial risk of the children having to move from the accommodation, or of them becoming homeless, within a short time after return. These were not express conditions, but I am satisfied that in the circumstances they were features of "suitable" accommodation that the parties mutually understood at the time. The parties agreed that once the mother had secured accommodation meeting those minimum requirements the children would be returned.

43. The mother was given a room in the home of Mr Z on YY in November 2018 but this was temporary and could not accommodate the children. This was accommodation but it was not "suitable" accommodation and the mother did not ask for the children to be returned to live with her there. This demonstrates that the

mother understood that it was not sufficient for her merely to find accommodation, it had to be "suitable" accommodation.

44. I also find that it was implicit in the agreement reached that the father would comply with arrangements to return the children to the mother's care once she had secured suitable accommodation, informed him of that fact and had sought the children's return.

45. Mr Gration submits that on proper analysis the conclusion of the agreement (and so the return of the children to the mother) involved "*two elements, both of which were subjective. Firstly, it required the mother to consider that she had found stable accommodation, and so to seek the children's return. Secondly (and importantly) it required the father also to consider that the mother had found stable accommodation*." I disagree. This would effectively give the father a veto as to return of the children, depending on his subjective view of whether any accommodation acquired by the mother was "suitable" or "stable". I am not satisfied that the parties agreed to the father having a veto of that kind. On the other hand, neither did the parties agree that the children should be returned on the mother's demand, whatever the nature of the accommodation she had acquired.

Wrongful Retention

46. In *In re C and another (Children) (International Centre for Family Law, Policy and Practice Intervening)* [2018] UKSC 8, [2019] AC 1 Lord Hughes said at [42] to [45]:

> "42 .... *If there is no breach of the rights of custody of the left-behind parent, then it is clear that the Convention cannot bite; such a breach is essential to activating it, via articles 3 and 12. It is clearly true that if the two parents agree that the child is to travel abroad for a period, or for that matter if the court of the home State permits such travel by order, the travelling parent first removes, and then retains the child abroad. It is equally true that both removal and retention are, at that stage, sanctioned and not wrongful. But to say that there is sanctioned retention is to ask, rather than to answer, the question when such retention may become unsanctioned and wrongful.*
>
> 43. W*hen the left-behind parent agrees to the child travelling abroad, he is exercising, not abandoning, his rights of custody. Those rights of custody include the right to be party to any arrangement as to which country the child is to live in. It is not accurate to say that he gives up a right to veto the child's movements abroad; he exercises that right by permitting such movement on terms. He has agreed to the travel only on terms that the stay is to be temporary and the child will be returned as agreed. So long as the travelling parent honours the temporary nature of the stay abroad, he is not infringing the left-behind parent's rights of custody. But once he repudiates the agreement, and keeps the child without the intention to return, and denying the temporary nature of the stay, his retention is no longer on the terms agreed. It amounts to a claim to unilateral decision where the child shall live. It repudiates the rights of custody of the left-behind parent, and becomes wrongful.*

44. *The plain purpose of the Abduction Convention is to prevent the travelling parent from pre-empting the left-behind parent. The travelling parent who repudiates the temporary nature of the stay and sets about making it indefinite, often putting down the child's roots in the destination State with a view to making it impossible to move him home, is engaging in precisely such an act of pre-emption.*

45. *It is possible that there might also be other cases of pre-emptive denial of the rights of custody of the left-behind parent, outside simple refusal to recognise the duty to return on the due date. It is not, however, necessary in the present case to attempt to foresee such eventualities, or to consider whether fundamental failures to observe conditions as to the care or upbringing of the child might amount to such pre-emptive denial. It is enough to say that if there is a pre-emptive denial it would be inconsistent with the aim of the Abduction Convention to provide a swift, prompt and summary remedy designed to restore the status quo ante to insist that the left-behind parent wait until the aeroplane lands on the due date, without the child disembarking, before any complaint can be made about such infringement.*"

47. In *Re H; Re S (Abduction: Custody Rights)* [1991] 2 AC 476 at 499, having referred to examples of retention as category (2) cases Lord Brandon held,

"So far as category (2) is concerned, it appears to me that a child can only come within it if it has first been removed rightfully (e.g. under a court order or an agreement between its two parents) out of the state of its habitual residence and subsequently retained wrongfully (e.g. contrary to a court order or an agreement between its two parents) instead of being returned to the state of its habitual residence. The wrongful retention of a child in one place in the state of its habitual residence, instead of its being returned to another place within the same state, would not be a wrongful retention for the purposes of the Convention. The typical (but not necessarily the only) case of a child within category (2) is that of a child who is rightfully taken out of the state of its habitual residence to another contracting state for a specified period of staying access with its non-custodial parent, and wrongfully not returned to the state of its habitual residence at the expiry of that period."

He continued,

"The period of one year referred to in [Article 12] is a period measured from the date of the wrongful removal or retention. That appears to me to show clearly that, for the purposes of the Convention, both removal and retention are events occurring on a specific occasion, for otherwise it would be impossible to measure a period of one year from their occurrence…With regard to the second point, whether removal and retention are mutually exclusive concepts, it appears to me that, once it is accepted that retention is not a continuing state of affairs, but an event occurring on a specific occasion, it necessarily follows that removal and retention are mutually exclusive concepts. For the purposes of the Convention, removal occurs when a child, which has previously been in the State of its habitual residence, is taken away across the frontier of that State; whereas retention occurs where a child, which has previously been for a limited time

outside the State of its habitual residence, is not returned to that State on the expiry of such limited period. That being so, it seems to be that removal and retention are basically different concepts, so that it is impossible either for them to overlap each other or for either to follow upon the other."

48. In cases where the agreement between parents is for the travel to be for a specified period, fixed by an end date, it is usually not difficult to identify when the travelling parent has retained a child wrongfully. It will usually be when the agreed end-date has passed and the child has not been returned. Counsel have not been able to refer me to any judgment in which the end date was fixed by reference to a condition such as suitable accommodation being acquired, and there is a dispute as to whether the condition has been met. That may be because such cases are addressed as disputes about cross-border child arrangements rather than child abduction. Mr Gration referred to *Re NY (A child) (Hague Abduction Convention)(Inherent Jurisdiction)* [2019] EWCA Civ 1065 in which the Court of Appeal held that it had been necessary to determine whether retention in England had been wrongful by reference to the terms under which the parents had agreed together to bring the children to England. The Court of Appeal referred to the following part of the judgment of Wall J, as he then was, in *In Re S* [1994] Fam 70, in which parents had agreed to leave Israel and stay in England for one year. Their relationship then broke down before the year had expired and the father returned to Israel. In this context Wall J said, at p. 78H to p. 79A:

"*The mere fact that the relationship between the parents has come to an end cannot entitle one parent unilaterally to resile from that which has been agreed between them. The example which springs to mind is an agreement that children should visit a foreign country for a specific time, such as a school holiday. Clearly, a parent in such circumstances could not unilaterally change his mind and demand the return of the children before the term of the contract had expired.*"

49. Applying that principle to the present case, having agreed with the father on or about 8 November 2018 that the children should be returned once she had obtained suitable accommodation, the mother could not unilaterally demand return of the children before that agreed condition had been met. Accordingly, I have to consider whether and when the condition for return was met. In doing so I remind myself not to approach the evidence as though I were considering a commercial contract.

50. I have already referred to the evidence of the mother's accommodation arrangements as at December 2018. Her own email of 3 January 2019 [C24], and the information given to Social Services by Mr Z [E12] show that paragraph 19 of the mother's first statement at [C33] is misleading when she says: *"I tried to collect them in December, I had by this time got a 2 bedroom flat and a 3 bedroom house I could move into when the children returned."* She did not have a 3 bedroom house into which she and the children could move upon their return in December 2018 (or January 2019) – that property would not be available for occupation until later in 2019. The evidence provided suggests that by mid -December 2018 the mother had been granted, as a temporary measure, the use of one floor of a house at V Farm. She was apparently in occupation of this floor by 19 December 2018 and had to

share kitchen and bathroom facilities with other occupants of the house. She said in her email that this arrangement would "stand" until another, 3 bedroom, house was renovated, but the mother has not produced any evidence from the owner of V Farm as to what arrangements the owner had agreed to, no evidence of a written agreement, no pictures of the accommodation, and no other evidence of its condition, size or furnishing.

51. At paragraph 23 of her first statement [undated but the exhibits are dated 1 April 2020] [C34] the mother says, "*I am working for the Co-op doing cleaning and as a result I can live in one of their properties. The property I am currently living in is two bedroomed – one double room which is mine and H's room has 3 beds. I have paid a deposit on a 3 bedroomed property which is currently being refurbished and I will move in when this is completed*." The implication is that this 2 bedroom property is owned by the Co-operative. It is not V Farm, and her stated address is not V Farm, but she has not told the court when she left V Farm, why she left, or when moved to the Co-operative's property.

52. The scant evidence available establishes only that the mother had been granted a temporary roof over her head at V Farm by mid-December 2018 and that she was still living there by 3 January 2019. This was a floor in a house. It probably comprised two bedrooms only, with no exclusive use of a bathroom or kitchen. The premises were on a small island, YY, with a population of about 120, where she had resided for at most a few weeks. There was no secondary school on the island and any children at the primary school were taught in Irish not English. She was at that stage entirely reliant, as Mr Gration put it, on the kindness of strangers for her accommodation. There is no evidence of any security of tenure or occupation of the floor in the house. There is no evidence of how long the mother was in fact able to continue to occupy those premises after 3 January 2019. There is no evidence that the 3 bedroom house was completed and ready for her occupation by spring or summer 2019 or at all.

53. I have given this matter very anxious consideration but am driven to conclude that the evidence does not establish that the mother had secured suitable accommodation by December 2018 or early January 2019. It can barely be said that the accommodation would have allowed the children to go to school – the younger children would have had access only to a school where teaching was in Irish, a language they did not have, and G would have had to live alone on the mainland for much of the week during term times. Nevertheless, the children would have had schools to attend. However there is insufficient evidence to establish that the accommodation was otherwise suitable. All the mother had secured was temporary permission, for an unknown duration, to use two rooms on a floor of V Farm. I have no evidence of her accommodation arrangements thereafter until her statement in April 2020 that she was living in accommodation provided by the Co-operative. There is insufficient evidence to show that the V Farm arrangement provided sufficient room for all four children and the mother, that it was in a suitable condition for them to live in together, or that it provided any kind of stability. Even allowing for low expectations, given the standards of accommodation the children had been living in previously, this was not suitable accommodation as the parents had agreed would be required before return.

54. The mother brings this application and it is incumbent on her to show that there was wrongful retention and that the Convention and Regulations "bite". Mr Hepher for the mother rightly submits that the arrangement between the parties was only ever intended to be temporary. The difficulty with that submission is that a temporary arrangement could last for several days, several weeks or several months. The mother could not have rightly alleged wrongful retention if she had continued to be homeless, however long that had lasted. She had to have secured suitable accommodation in order for the agreed period of care of the children in the UK to come to an end.

55. The mother's case that retention was wrongful from 19 December 2018 faces a further obstacle. As already noted, I am not persuaded that on or before that date the mother sought return of the children. There is no evidence that she informed the father verbally or in writing that she had secured accommodation and wanted the children to be returned. Accordingly, she had not sought to bring the agreed period of relocation of the children in the United Kingdom to an end. Even if she had done so, I have found that she had not secured suitable accommodation and so could not unilaterally resile from the agreement. I am not satisfied that there was wrongful retention on 19 December 2018.

56. On receipt of the email of 3 January 2019 it must have been evident to the father that the mother had obtained some accommodation and was seeking the return of the children. She clearly considered that the temporary arrangement had come to an end and wanted to arrange for the children to return to her care in Ireland. However, as I have already concluded, there is insufficient evidence before me that the accommodation at V Farm was "suitable" accommodation. Accordingly, I find that the condition that the parties had agreed would trigger the children's return had not been met by 3 January 2019. The information in the email certainly did not demonstrate that the accommodation was suitable. I have not been provided with any response from the father but he says at [C28, para.12] that he has not returned the children because the mother has not found a suitable property in which to look after them. On my findings, as at 3 January 2019, the father was entitled to take that position and was not pre-empting the custody rights of the mother by doing so. His retention of the children at that time was not wrongful.

57. I have no evidence as to when the mother moved from V Farm to the Co-operative's accommodation, or whether she lived anywhere else in between, and no evidence about the suitability of the Co-operative's accommodation other than that it comprises two bedrooms. Accordingly, the mother has provided the Court with no evidence on which to make a finding that she had found suitable accommodation after 3 January 2019. I am unable to find that the mother had secured suitable accommodation prior to 17 December 2019 when she made this application. I am not satisfied that the father was guilty of wrongful retention of the children at any point prior to the application being made. The Convention and Regulations do not bite, and cannot assist the mother in her application for summary return.

58. The application must therefore be dismissed. Nevertheless, I shall consider the other issues in dispute out of respect for the seriousness of the case, the careful submissions made, and in the event that I am wrong in my judgment on the agreement and wrongful retention.

Habitual Residence

59. I have carefully considered the guidance of the Supreme Court in *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2013] UKSC 60, [2014] AC 1, sub nom *Re A (Children) (Jurisdiction: Return of Child)* [2014] 1 FLR 111 ("*A v A*") and *In re B (A Child) (Reunite International Child Abduction Centre intervening)* [2016] UKSC 4; [2016] A.C. 606, in which Lord Wilson explained as follows:

> "45. *I conclude that the modern concept of a child's habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo in which the courts below have placed B. The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new state, up will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it.*
>
> 46. ….. *The identification of a child's habitual residence is overarchingly a question of fact. In making the following three suggestions about the point at which habitual residence might be lost and gained, I offer not sub-rules but expectations which the fact-finder may well find to be unfulfilled in the case before him:*
>
> – *the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state;*
>
> – *the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and*
>
> – *were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it."*

60. In *Re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174 (Fam), [2016] 4 W.L.R. 156, Hayden J summarises the leading authorities on habitual residence, emphasising that "*if there is one clear message emerging 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*." He identifies thirteen core points to consider. For the sake of economy I shall not set them all out in this judgment but they include:

> *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).

…
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).

...
viii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move (In re B —see in particular the guidance at para 46).
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)".

61. Duration of stay is relevant but not at all determinative. The stability of residence is important – Lord Reed in *AR v RN (Habitual Residence)* [2015] 2 FLR 503 at [16]. I also follow the dicta of Baroness Hale in *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 1 at paragraph 63:

"The quality of a child's stay in a new environment, in which he has only recently arrived, cannot be assessed without reference to the past. Some habitual residences may be harder to lose than others and others may be harder to gain. If a person leaves his home country with the intention of emigrating and having made all the necessary plans to do so, he may lose one habitual residence immediately and acquire a new one very quickly. If a person leaves his home country for a temporary purpose or in ambiguous circumstances he may not lose his habitual residence there for some time, if at all and correspondingly he will not acquire a new habitual residence until then or even later…"

62. With all those principles in mind, my assessment is as follows:

    a. The children had all been born in the United Kingdom, and brought up in Wales, until September 2014. At that point G was 8, F 6, and E 3. Although they then travelled to Ireland for a few weeks, and then to Scotland, they returned to Wales in February 2016 where they remained, in different locations, until early 2018. By the time the mother moved the children to the

Republic of Ireland in March 2018 the children had spent all but about 18 months of their lives in Wales. G was nearly 12, F nearly 10 and E was 7.

b. The children have two elder half-sisters, daughters of the mother, A and B. There are some emotional bonds between G and these two half-sisters but it is not clear on the evidence provided where they are living now, or where they were living in 2018.

c. The children were clearly habitually resident in Wales as at March 2018. Both parents had been living there and the children had spent most of their lives there. Although their schooling had been intermittent, and they had spent over a year in a campervan in Scotland, they were integrated in Wales.

d. The mother then took the children, probably via Scotland, to Ireland. At [C32, para.13] the mother says that she took the children to Ireland for safety reasons, the father allegedly being in a relationship with a violent woman and mixing with "unsuitable" friends. He denies these allegations, but even on the mother's own account, she took the children to Ireland because of safety concerns. She does not say that they moved to Ireland to relocate permanently. She had previously taken the children to Ireland in 2014, staying only temporarily.

e. Ms Jolly reports her conversation with the children about their time in Ireland in 2018 including at [D9, para.29] as already quoted. The first months in Ireland were itinerant, unstable, and rather chaotic.

f. As previously noted the children appear to have been in school in Ireland only from 10 September to 25 October, just over 6 weeks. It does appear that G made some friends there, and one, also called G, may have kept in touch. The children enjoyed being at school, an experience which their mother's lifestyle had often prevented them from having.

g. At [C33, para.16] the mother states that Mick was only interested in selling, not renting out, his cottage. It seems that this accommodation was only ever likely to be temporary.

h. At [C33, para.17] the mother states that upon being evicted from Mick's cottage, she "*then managed to sort out a horse-riding job which had a mobile home to live in at the same time, although the children and I were very upset to leave the schools that they were settled in.*" The children's six weeks at their schools therefore ended, and they were again on the move and not attached to a school. The evidence shows that was the position from 25 October until 9 November 2018 when they were returned to Wales.

i. At the time the children were moved back to Wales, on or about 9 November 2018 they were homeless in Ireland. According to G's report to Ms Jolly they were in the middle of nowhere and being chased by the police. I have not been told of any contact with extended family in Ireland. I have no evidence that the children were involved in any group activities there other than their brief period in school.

j. The mother's intentions as at the end of October 2018 were not clear. She has in fact stayed in Ireland having found somewhere to stay, and ultimately some work, on the small island of YY. Whether that is where she would have gone with all four children had they not returned to Wales is not at all clear. She would not have been able to stay, as she did on arrival on YY, with Mr Z had she had the children.

63. I recognise that the children do not have to have been contented and well cared for to have been integrated into society and family life in Ireland, or indeed anywhere else - *In Re R (Jurisdiction: Habitual Residence)* [2015] EWCA Civ 674, [2016] 1 FLR 1119. I also recognise that full integration is not required to establish habitual residence.

64. Mr Gration submits that children never became habitually resident in Ireland. Mr Hepher submits that they did so, pointing in particular to the period when they had a home – Mick's cottage – and were enjoying school.

65. In my judgment, notwithstanding the period from the end of 2014 to the beginning of 2016 when the mother and children were not in Wales, the children had a fairly deep integration into that country. In contrast, their life in Ireland was peripatetic and unstable. From arrival in or about March 2018 until August 2018, and again from 25 October to 9 November 2018, they were perpetually on the move and the children were not in school. Their life became frankly chaotic by the end of October 2018. There is no evidence of them becoming integrated in any wider family or social life in Ireland during those periods. The children did enjoy a period of relative calm from about the beginning of August 2018 to 25 October 2018 when living in Mick's cottage. In early September they attended schools. Nevertheless, their school attendance lasted for only six weeks and a few days. Mick's cottage was only ever a temporary arrangement, and when Mick evicted the mother and children they moved on again and the children had to leave their schools.

66. In my judgment the see-saw did not tip to Ireland in 2018 and prior to the children's return to the United Kingdom on 9 November 2018. They remained habitually resident in the United Kingdom throughout.

67. Even if I were wrong in the conclusion that the children remained habitually resident in Wales throughout 2018, I would have found that they became habitually resident in Wales very soon after their return there in November 2018. Although the parents had expected the return to Wales to be temporary, there was no agreed timescale and by 19 December 2018 the children were not expecting any imminent changes. They had a stable home with their father. By the end of 2018, as I have found, the mother had not even asked the father to return the children, so the children had certainly not been prepared for a return to Ireland. Powys Social Services had become involved and were encouraging the father to register the children with local doctors and to enrol them in school. The Social Services records show that G was looking forward to returning to school and seeing friends, and was also making plans for her bedroom at her father's house. The children had no face to face, and only sporadic telephone contact with their mother during this period (November and December 2018) according to the Social Services records. There

was some talk from the mother to G about a house on YY, but no concrete plans discussed. The children did not therefore have any grounds to believe that they would imminently leave for Ireland. They were integrated in Wales where there had lived for most of their lives.

68. Even in March 2019 it evidently came as a complete shock to the children when their mother arrived at school and attempted to take them back with her to Ireland. By then they were established at their new schools and clearly fully integrated in family and social life in Wales.

69. Accordingly, in my judgment all three children were habitually resident in Wales as at 19 December, the date when the mother alleges they were wrongfully retained, and remained habitually resident there after that time.

Consent

70. Mr Gration submits that the Article 13(a) defence of consent applies. In my judgment it is not relevant to this case. I have found that the mother exercised her rights of custody by agreeing to the children travelling to the United Kingdom in the care of their father and remaining there until she had secured suitable accommodation. The mother did not seek the return of the children until her email of 3 January 2019. From that point it is clear to me that she did not acquiesce in their retention. Rather, since she probably did not have suitable accommodation, she was seeking unilaterally to resile from the agreement reached.

Repudiatory Breach

71. It was not argued on behalf of the mother that the father was guilty of repudiatory breach. However, I have already referred to *In re C* [2018] and it seems appropriate for me very briefly to address whether there is evidence that the father pre-empted the mother's custody rights in a repudiatory breach. No evidence has been produced that would allow me to find that that the father had pre-emptively decided to repudiate the mother's rights and to refuse to return the children irrespective of the suitability accommodation she had secured. The mother's email of 3 January 2019 purports to quote a text from the father, which I have not seen, in which he says that the mother cannot have the children returned until "you have got on your feet" [C24]. This is not an assertion that the children are to be retained permanently. It is in effect, a restatement of the agreement reached – he was seeking to uphold the agreement rather than repudiate it.

Article 13 Exceptions

72. In relation to both the Article 13b exception, and the children's objections exception, I have to consider the position as it is now. The general position has been set out in Ms Jolly's report as well as in the father's evidence. The children have been resident in Wales since November 2018. They have had a stable life living

with the father. They attend schools in Wales. They have made friends there. As discussed below, they do not wish to live with their mother in Ireland even though they would dearly like to be reunited with their brother, H.

73. The Headmistress at G and J's High School in Wales told Ms Jolly that,

> "*G seemed anxious when she first joined the school but has grown in confidence. G's attendance is 97% and F's attendance is 96%. Both are punctual, generally work and behave well in lessons, and are making good progress. I was provided with G's Year 9 report (F's Year 7 report will be written in the summer). G's report shows a conscientious and academically able pupil … LM communicates well with school. Both pupils wear school uniform and appear clean and there are no concerns about them*." [D5].

74. Ms Jolly reports that the Headmistress of the boys' Primary School told her that,
> "*it was evident, including from F and E's account, that they had hardly been in school before. F described a chaotic and disruptive account of living in a van and that his father had come to rescue them. E in particular could barely read and was provided with intensive support. The Headmistress said E is a bright child and enthusiastic learner, and within a few weeks his progress was substantial. E is expected to achieve the academic levels for his age in his subjects and exceed expected level in maths.... [she] said LM has a good relationship with the school. He wants his children to do well and is an attentive and cooperative parent. E is always well equipped for his lessons and well presented. This attendance and punctuality levels are excellent. The Headmistress described E as a "laid back….sweet natured" child. He is adored by other children who turn to him as the voice of reason when there are disagreements."*

75. Ms Jolly also reported, accurately, that the Social Security records showed that the children are "*thriving in the father's care. Their school attendance is excellent, and they are benefiting from being provided with stability.*" [D4, para.9].

Article 13(b)

76. The principles to be applied in relation to grave risk are well established and were set out in In *re E (Children)(Abduction: Custody Appeal)* [2011] UKSC 27, in particular at [31] to [36]. The applicable principles were helpfully summarised by Mr Justice MacDonald in *H v K and others* [2017] EWHC 1141 (Fam) as follows at [42]:

> *i) There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.*
> *ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.*

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

iv) The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'. 'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'.

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

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

77. *In Re D (Abduction: Rights of Custody)* [2006] UKHL 51, Baroness Hale held as follows:

> *""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". It is, as article 13(b) makes clear, the return to the requesting state, rather than the enforced removal from the requested state, which must have this effect. Thus the English courts have sought to avoid placing the child in an intolerable situation 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. In many cases this will be sufficient. But once again, the fact that this will usually be sufficient to avoid the risk does not mean that it will invariably be so."*

78. Ms Jolly's evidence is relevant not only to the issue of the children's objections, but also to the impact of a return to Ireland on the children. Ms Jolly reported that G told her that "*she likes to change, but this also makes her anxious. G explained this is because of her experiences having to move around. She wiped tears away, saying she wants the family life that her friends have. G referred to keepsakes other children have from infancy, such as teddies. G said she has lost things from having to move around often*" [D12, para.41]. In her recent discussions with Ms Jolly on 26 May 2020, G said she had not changed her mind. She was much happier "here" and was happy with her school. She described threats her mother had made to abandon her. G recalled an incident in the past when the mother left G's elder half-sisters on the roadside. G wrote an email on 26 May in which she describes her mother feeling "malice" towards others, and that "*the way mom tells you off is scary, and*

she will get really close to your face and scream at you that your wrong, and that your insane, and that anything you think is evil." She describes being with her mother as "scary". F and E also told Ms Jolly on 26 May about their concerns about being returned to Ireland, E adding his view that his mother could cope with one child, H, but could not "handle" four.

79. Given the chaotic circumstances that that they found themselves in in Ireland in 2018 the children should not be expected to tolerate returning to Ireland without the reassurance of a degree of stability and security. Until a few days before the final hearing, the mother's case was that the children should return to Ireland to live on YY. Arrangements had been made, she said, for G to attend the secondary school she had previously attended which is on the mainland, and to lodge with a family there. The same arrangements would have applied to F were he to attend the same school. E would attend the Irish speaking primary school on the island. The mother then changed the plan. She filed and served a third statement dated 21 May 2020 saying that she had rented a three bedroom flat on the mainland, paying a deposit and two months' rent. She exhibited a rental agreement which she said was signed. The copy exhibited is not signed by her and is dated "April 2020". Its terms indicate that the total cost of a deposit and two months' rent would be EUR 2,850. She says that future rent would be covered by benefits. The mother has exhibited evidence that she has taken steps to enrol the children in schools on the mainland. However, the mother's address remains on YY, indicating that although she says she has paid a deposit and two months' rent in advance, she has not moved into the rental property on the mainland. Under the heading "income" the mother says that on moving to the mainland she will try to obtain work. She does not say whether she still works for the Co-operative on YY. In any event she would be not be able to continue that work were she to move to the mainland.

80. Accordingly, the mother's proposal is that the children should return to Ireland to live on the mainland, whereas she currently lives on the island of YY, in a house which she does not currently occupy, to be supported in part by income from a job that she has not yet obtained. These matters and the late change in her plans, are particularly concerning given the mother's history of failing to provide stability for the children.

81. I have been struck by the lack of insight shown by the mother in her written evidence. There is some recognition that the children should not have been expected to live in the conditions that prevailed in late October and early November 2018, but virtually no awareness of the impact that the lack of schooling and lack of stability in 2018 (and even in the years before that) have had on the children. The mother has not adopted a realistic and consistent approach to securing suitable accommodation for the children in Ireland.

82. In many cases, undertakings offered by the left behind parent provide the court with the necessary assurances that children will be protected against any risk of harm or an intolerable situation upon return. At [C36] the mother sets out undertakings she would be willing to give if return of the children were ordered. These envisage the possibility of LM returning with the children. LM has a house, and partner, in Wales and has no desire to live in Ireland. He is not a man of significant means. Caring of his children though he is, it is not a realistic expectation that he would

travel to Ireland and stay there with or near to the children. The mother's undertakings do not provide clarity as to where the father would live with the children, or how that would be funded. In any event the mother's case, as stated clearly at the conclusion of her third statement [C57, para.13], is that the father should hand over the children to her. The undertakings offered do not provide any measure of reassurance to the court as to the protection of the children upon return.

83. I do bear in mind that Ireland is an advanced country with a functioning benefits and social services system. Indeed, social services there are already aware of this family. To that extent there will be a safety net for the children were they to be returned.

84. The burden of proof on this issue is on the father, but I have to consider all the evidence, including the mother's arrangements for accommodation. Return to Ireland would not resolve the question of the longer term arrangements but it would cause the children to return to Ireland in very uncertain and precarious circumstances. In my judgement there would be a grave risk that return would place the children in an intolerable situation. It would place them into a situation which these children should not be expected to tolerate. "Intolerable" is a strong word, but it applies in this case where there would be a grave risk of the children being plunged into the same chaotic circumstances that prevailed in Ireland in 2018. The undertakings offered would not provide any real protection for the children. In reality, on return to Ireland the children would not have any security. Given the mother's previous fortunes, bare statements that she will occupy a suitable rented property or that she intends to acquire work, provide no real reassurance. The rental agreement is unsigned. There is no evidence of the payment of monies to the landlord. The fact that the proposed arrangements upon the children's return, having been settled in the mother's mind for well over a year after the issue of the application, have so recently and significantly changed, adds to the concern about how realistic, stable and secure they are. Given past events, it would be intolerable for these children to be placed back into the care of the mother in Ireland amidst such lack of stability and security.

85. My view on "intolerability" is fortified by the fact that the children have been settled in Wales for over 18 months. They are happy and thriving there. Accepting that the Article 13b exception would only apply if the children had been wrongfully retained in the United Kingdom and had been habitually resident in Ireland at that time, I would nevertheless consider it right to take some account of the fact that they had been settled here for 18 months when considering the exception – *L-S (A Child)* [2017] EWCA Civ 2177.

86. In any event, I am satisfied to the requisite standard that the Article 13b exception applies. That being so, the court has a discretion whether to order return. In circumstances where the children are thriving in Wales, and there would be a grave risk that return to Ireland would place the children in an intolerable situation, I would have no hesitation in exercising my discretion so as to refuse return, had I found that there had been a wrongful retention from the children's country of habitual residence.

Children's Objections

87. The approach to the children's objections exception which I adopt is that set out by the Court of Appeal in *Re M (Republic of Ireland) (Child's Objections)(Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26.In that judgment Black LJ, as she then was, identified a gateway stage and a discretionary stage. She stated at paragraph 69:

> *"In the light of all of this, the position should now be, in my view, that the gateway stage is confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views. Sub-tests and technicality of all sorts should be avoided. In particular, the Re T approach to the gateway stage should be abandoned."*

If the gateway stage is crossed the court is then required to go on and consider the court's discretion as to whether to order a return. In relation to the discretionary stage Black LJ stated at paragraph 71:

> *".....It would be unwise of me to attempt to expand or improve upon the list in §46 of Re M of the sort of factors that are relevant at that stage, although I would emphasise that I would not view that list as exhaustive because it is difficult to predict what will weigh in the balance in a particular case. The factors do not revolve only around the child's objections, as is apparent. The court has to have regard to other welfare considerations, in so far as it is possible to take a view about them on the limited evidence that will be available as part of the summary proceedings. And importantly, it must give weight to the Hague Convention considerations. It must at all times be borne in mind that the Hague Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned and returned promptly. To reiterate what Baroness Hale said at §42 of Re M, "[t]he message must go out to potential abductors that there are no safe havens among contracting states".*

88. At paragraph [46] of *In re M and another (Children)(Abduction: Rights of Custody)* [2007] UKHL 55 (Re M), to which Black LJ referred, Baroness Hale discussed the factors to be considered at the discretionary stage:

> *"Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances."*

89. In *B v P (Children's Objections)* [2017] EWHC 3577 (Fam), MacDonald J helpfully summarised the law in relation to the defence of a child's objections:

"60. The law on the 'child's objection' defence under Art 13 of the Convention is comprehensively set out in the judgment of Black LJ in Re M (Republic of Ireland)(Child's Objections)(Joinder of Children as Parties to Appeal) [2015] 2 FLR 1074 (and endorsed by the Court of Appeal in Re F (Child's Objections) [2015] EWCA Civ 1022) and I have regard to the clear guidance given in that case. In summary, the position is as follows:

i) The gateway stage should be confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.

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

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

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

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

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

90. Ms Jolly was clear in her report that the children all objected to return to Ireland:

a. At [D11, para 39] "*G said she would like to go back to Ireland to see friends, see YY and where her mum lives. However, she does not want to stay there.*" at [D12, para 40] she added, "*G calmly said that in "...all honesty" if a judge says she has to go back and live with her mum she would probably try and run away, which she had attempted once before."*
b. At [D14, para 47] "*F had said he does not want to visit Ireland out of a worry they will be made to stay there and not go back. He grimaced when I*

asked about returning for a judge there to make the forever decision. F said he was unsure but thought he would be upset."

c. At [D15, para 53] "*E said he does not want to go back to Ireland: "…Probably because I'd have to live with mum and all the torment she put us through, living on a bus and stuff. She'd probably do another crazy thing again".*

91. The children have been consistent in their objections from their first meeting with Ms Jolly on 30 January 2020 until their recent discussion with her nearly four months later. They appear to be settled in their views, and those views amount to more than mere preferences or wishes. Even the pull of being reunited with H did not sway the children in stating their objections to return. They would like H to come to the United Kingdom to reunite the siblings.

92. Ms Jolly took pains to test out whether the children were expressing their own views or were parroting or were heavily influenced by their father's views. I shall discuss this in a little more detail below, but I am quite satisfied that the children each held the views they expressed for themselves. In reliance on Ms Jolly's assessment I am also satisfied that each child was of sufficient maturity and understanding for it to be appropriate to take account of their views. Ms Jolly concluded in her written report at [D17 para 56],

> *"The children, G and F in particular, conveyed a good understanding and appreciation as to how people have different perspectives, how they reach them and the influence they may have. I spoke to G, F and E at some length after they had experienced a long journey, often relaying on them to provide me with key background information. They struck me as engaging, articulate, patient and accommodating young people. Assisted with the information from their English schools, and my own impression from this swift assessment, is that their cognitive, social, and emotional development is at least in line with their respective chronological ages; with the amount of insight shown into their complex family dynamics may even suggest an emotional maturity beyond their chronological age*."

93. Mr Hepher warned of the distinction between objection to being cared for by the mother, and objection to being returned to Ireland, a country for which the children clearly have some affection. Ms Jolly says in terms [D16, para.55] that the children's objections are rooted in the prospect of returning to the care of their mother rather than in the country of Ireland itself. However, in this case the only realistic mechanism by which the children can be returned to Ireland is into the sole care of their mother, and I consider it appropriate to take that into account when considering whether the children have objected to return to Ireland - *Re R (child abduction: acquiescence)* [1995] 1 FLR 716, CA).

94. I am quite satisfied therefore that the gateway stage is met. In relation to the discretionary stage, I note that Ms Jolly was well aware of the potential influence on the children's views of their father. Strikingly however in this case G and F articulated that potential influence and appeared to weigh it in their minds. For example, G told Ms Jolly that "*she understands her mum took heroin a very long time ago. G said that information came "second hand" from her dad. She laughed*

slightly as she reflected that given he "hates" her mum that could be a "biased" account". [D10, para.34]. Ms Jolly concluded that,

> *"The children, G and F in particular, conveyed a good understanding and appreciation as to how people have different perspectives, how they reach them and the influence they may have."* [D17, para.56].

95. The children's views appear to be strongly held. They have been consistent and firm in their objections. Perceptively the children's objections were grounded in concern about the stability of life under their mother's care in Ireland in 2018, memories of the chaos into which their lives descended, and anxiety about her erratic behaviour, decision making and lack of reliability.

96. I have considered and weighed the importance of upholding principles underlying the Convention, but note that in this particular case the opportunity promptly to return the children has long since passed, and so the particular objective of expeditious return of children to their country of habitual residence (had I found that to be in Ireland) would already have been thwarted by the passage of time.

97. Whilst not determinative, G's objections carry particular weight given her age and the considered reasoning she has applied when stating her objections. However, all three children object and I do not distinguish between the children in relation to the exercise of discretion. Were I to find that one of the children objected but the other two did not, then it would clearly give rise to a grave risk of intolerability to separate these three close and loving siblings by returning one or two, but not all three of them. Weighing the importance of upholding the principles of the Convention and Regulations, the strength and reasoning behind the children's objections, the insight and independence of mind exercised by the children, in particular G and F, the nature of the objections, which coincide with welfare considerations relating to the conditions in which the children would find themselves upon return, I am sure that I should exercise my discretion so as to refuse return of the children in the light of their objections.

98. Hence, in the event of a finding of wrongful retention from the country of habitual residence, I would nevertheless have refused to order return to Ireland given the children's objections, taking into account those views and exercising my discretion.

Conclusions

99. The mother's application for summary return of the three children to Ireland is dismissed. The children have not been wrongfully retained in the United Kingdom. The mother had agreed to the children being brought to the United Kingdom and remaining here until she secured suitable accommodation. She has not established that she had done so by the date of this application. In any event, at all relevant times the children were habitually resident in the United Kingdom. Hence, the children have not been wrongfully removed or retained. Had I found that they had been wrongfully retained I would nevertheless have found that exemptions under Article 13 applied, namely the Article 13b and "children's objections" exemptions, and would have exercised my discretion to refuse an order for return.

100. The hearing of this application was conducted remotely. Ms Jolly gave oral evidence and was questioned by Counsel without any difficulty. The parents were able to see and hear all the evidence and submissions and were not required to give evidence. Experienced Counsel provided written submissions and ably made further oral submissions. No technical difficulties disrupted the hearing and I am quite satisfied that the proceedings were fair to the parties.