Neutral Citation Number: [2021] EWHC 315 (Fam)

Case No: FD20P00677

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
Sitting remotely

Date: 22/02/2021

Before :

MR JUSTICE MOSTYN

- -

Between :

JM	**Applicant**
- and -	
RM	**Respondent**

- -
- -

Katy Chokowry (instructed by **IFLG LLP**) for the **Applicant**
Mark Jarman (instructed by **MSB Sols**) for the **respondent**

Hearing dates: 15-16 February 2021
The case was heard remotely using Microsoft Teams

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Approved Judgment

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

Mr Justice Mostyn:

1. I shall refer to the applicant as "the father" and to the respondent as "the mother".

2. I have before me the father's application dated 23 October 2020 made pursuant to the 1980 Hague Convention on the Civil Aspects of International Child Abduction, whereby he seeks the summary return of his children P and O to Australia.

3. P was born in Australia and is 3½ years' old; O was also born in Australia and is 1¾ years' old. They have dual British and Australian citizenship.

4. The father was born in Australia and is 32 years old. He is a professional sportsman. The mother was born in England and is also 32 years old. The parties met in Sydney in 2011 and began a relationship. They were married on 17 July 2012. Their children were born on 11 October 2017 and 27 May 2019. Up to 26 February 2020 the parties lived exclusively in Australia, although there were annual trips back to this country for the mother to visit her parents and wider family.

5. The mother brought the children to this country on 26 February 2020, with the agreement of the father, for the purposes of the annual visit. She has been here ever since. The father claims that by early May 2020, at the latest, she had committed a wrongful act of retention in breach of his rights of custody within the terms of Article 3 of the Convention and he seeks that the children be returned to Australia forthwith pursuant to the terms of Article 12.

6. The primary defence of the mother is that there was no relevant wrongful act of retention, because the original due date of return was frustrated and no alternative due date ever substituted. This is a novel argument. It arises in the context of the Covid-19 pandemic.

7. When the mother left Australia with the children on 26 February 2020 she admits that she did so in the context of a functioning, if troubled, marriage with the intention that, as usual, it would be for a fixed and finite holiday period in England with her family. The plan was that the father would join them on 9 April 2020 and that the whole family would return to Australia on 23 April 2020. Flights were booked for the return trip on that date.

8. However, following her arrival, the mother formed the intention around the date of her birthday on 16 April 2020 that she would not return to Australia with the children as she was not happy living there and saw no future in the marriage. She did not then express that view to the father.

9. By that stage the global Covid-19 pandemic had erupted and countries all over the world were going into lockdown. The Australian government imposed restrictions on leaving the country; the father could not fly to England on 8 April 2020. The return to Australia on 23 April 2020 was taken out of the parties' hands. The flights back to Australia on that day were cancelled; rebooking would however be available when flights became possible.

10. On 3 May 2020 the mother emailed the father. She said:

> "I've been doing a lot of thinking over the last few days/nights, and when I told you I wasn't really looking forward to going back to Australia the other night you didn't seem to say much back to me about it and in some respects I'm not wanting to go back."

11. The mother was hardly categorical about her intention not to return to Australia and to end the marriage, although her thinking was clear enough. The email plunged the father into despair and his course of action thereafter was to do everything he could to seek to restore family life.

12. The following day, 4 May 2020, he texted the mother to say that he had found out that he could apply for a spousal visa to join her in England, which could lead in due course to the grant of indefinite leave to remain. He also said that he had been looking at real estate. The mother replied in highly equivocal terms saying:

> "I'm not saying move here or else. I'm saying we need to know if this is still working. Which is why I suggested speaking to a professional.… I'm not saying moving here [fixes] everything either."

13. By that stage, as stated above, the return flights had been cancelled. At that time the father did not stipulate either an alternative fixed return date or even that he was insisting on a return in principle, albeit on a date yet to be fixed. There was not a hint that he might take legal steps to get the children back. Rather, he was focusing on seeking a reconciliation, or if that were not possible, participation by him in family life with his children. His conduct at that time was largely ruled by emotion, at the centre of which was his despair at the loss of his family life. In his oral evidence he explained to me that his policy in his communications with the mother was one of appeasement.

14. There was no straight talking by either the mother or the father.

15. After two failed attempts to obtain compassionate permission to leave Australia, on 9 July 2020 the father succeeded on the third attempt, and he travelled to England the following day.

16. At no stage between 23 April 2020 (the original planned date of return) and his arrival in England on 9 July 2020 did the father stipulate that the children had to be returned to Australia by a given date, or even that they had to be returned in principle on a date yet to be crystallised.

17. On 9 July 2020 the mother texted the father to say:

> "Just understand I don't want this relationship regardless of you coming here or in the future moving to be closer to the kids. You need to grasp that."

18. That was the first time that the mother had stated with any clarity in writing that the marriage was over and (inferentially) that she was intending to stay in England with the children.

19. After his arrival here on 10 July 2020 the father entered quarantine. Following its completion he did not resume cohabitation with the mother but he has shared the care of the children. He told me in his oral evidence that on 1 August 2020, in their first physical meeting following his arrival, he made it clear to the mother that he wanted the children to return to Australia. The mother does not agree that he did so.

20. On 14 September 2020 the father commenced proceedings about financial remedies in Australia but, perhaps curiously, did not issue proceedings there for child arrangements orders. On 16 September 2020 the parties participated in mediation. The mother says that it was on that occasion that she was first told by the father that he wanted the children to return to Australia (neither party has objected to that piece of information being given to me). The following day the father's Australian lawyers contacted the solicitor who now represents the father in these proceedings to seek advice about getting the children back to Australia.

21. I accept the father's evidence that he told the mother at their first face-to-face meeting on 1 August 2020 that he wanted the children to return to Australia. He may not have been as crystal-clear as he was on 16 September 2020, but I am satisfied nonetheless that he made his position clear to the mother on that earlier date.

22. On 22 October 2020 the mother commenced proceedings in the Family Court at Liverpool for a child arrangements order and a specific issue order. The following day the father issued the Hague Convention proceedings which are before me. The proceedings in Liverpool have been stayed.

Was there a retention?

23. It is the mother's case that a trip which had been for a fixed period with a due date of return of 23 April 2020 became open-ended with the eruption of the pandemic and the cancellation of the return flights. The mother argues that retention as a concept requires there to be an operative agreement between the parents that one of them can take the children to another Convention country for a "fixed", "stipulated" or "limited" period with a "due date" of return.

24. In the preceding paragraph I have put words in quotation marks because they are all used by the Supreme Court in *Re C (Children)* [2019] AC 1 to describe the visit to England from Australia in that case. At [1] Lord Hughes wrote:

> "This appeal concerns the Hague Convention on the Civil Aspects of International Child Abduction (25 October 1980) ("the Abduction Convention"). It raises general questions relating to: …(2) whether and when a wrongful retention of a child may occur if the travelling parent originally left the home State temporarily with the consent of the left-behind parent or under court permission, and the **agreed or stipulated time for return** has not yet arrived."

And at [36]:

> "If the child has been removed from the home State by agreement with the left-behind parent for a **limited period** (and

> thus the removal is not wrongful), can there be a wrongful retention before the **agreed period** of absence expires?"

And at [37]:

> "There is some difficulty in devising a suitable shorthand for the possibility of wrongful retention in advance of the **due date for return**. One which has been used is "anticipatory retention". This is certainly convenient but it may lead to misconceptions. If early wrongful retention is a legal possibility, it is not because there is an anticipation of retention. On the contrary, the child is retained in the destination State from the moment of arrival, just as he is removed from the home State at the moment of departure. If the departure and arrival are permitted by agreement with the left-behind parent, or sanctioned by the court of the home State, they are still respectively removal and retention, but they are not wrongful. So what is under consideration is a retention which *becomes wrongful* before the **due date for return**."

Lord Kerr wrote at [60]:

> "A strong imperative exists for discouraging travelling parents from the view that they can avoid the consequences of the Abduction Convention by concealing an intention to retain the child in the country to which they have travelled, on the pretext, for instance, of a holiday of **fixed or limited duration**. To insist that wrongful retention can only occur at the end of an agreed period of absence could lead to absurd results; would encourage dissimulation on the part of the travelling parent; and would permit habitual residence to be acquired by the perpetration of deception on the left-behind parent."
>
> (my emphasis)

25. Mr Jarman argues that these passages show with abundant clarity that a retention has to operate in the context of an agreement for a period of care with the other parent which is for a fixed, limited time-span. While the holiday here began with such an agreement in place, that agreement was frustrated by the pandemic. Thereafter there was a tacit understanding, a form of stand-off, between the parents that the stay in England would be open-ended, and not be governed by a *terminus ad quem*.

26. That open-ended understanding endured until 1 August 2020. On that occasion, although he did not stipulate a return date, the father made it clear that the children had to return to Australia.

27. The mother's position on 1 August 2020 continued to be that she would not voluntarily return with the children to Australia. Therefore, Mr Jarman submits that the operative act of retention took place on (and continued after) 1 August 2020.

28. On that date the children had been here for over five months. They were by then living with their mother in rented accommodation. The rent and the cost of furniture had been funded by the father. They were attending a local nursery, paid for in part by the father. In May 2020 O was registered with a local GP (P had been registered on a previous trip in 2018). Therefore, argues Mr Jarman, they were on any view habitually resident in England as the test of "some degree of integration in a social and family environment" laid down by the Court of Justice in *Proceedings Brought By A* [2010] Fam 42 and *Mercredi v Chaffe* [2012] Fam 22 is easily met.

29. In such circumstances, Mr Jarman argues that *Re C* applies. There Lord Hughes wrote at [25]:

> "The 1996 Convention adopts, by article 7(2) a definition of wrongful removal and retention in the same words as article 3 of the Abduction Convention. Substantively, article 7(1) provides for cases of wrongful removal and retention a limited exception to the ordinary rule in article 5 that jurisdiction moves with the habitual residence of the child. In effect, the State of habitual residence immediately before the wrongful removal or retention keeps jurisdiction until not only habitual residence has shifted but also there has been an opportunity for the summary return provided for by the Abduction Convention. The effect, plainly intended, is to preserve the regime of the Abduction Convention, and in particular the mandatory summary return. **But if, at the time of the wrongful act, the requested State had become the State of habitual residence, the extension by article 7(1) to the jurisdiction of the previous State of habitual residence would have no application and the requested State would have sole jurisdiction; in such an event, there could be no question of a mandatory summary return without consideration of the merits**."

After analysing the interpretation of the Convention in a number of other jurisdictions, including in the Court of Justice of the European Union, Lord Hughes concluded at [34]:

> "These various examples of the practice as to the application of the Abduction Convention thus all point in the same direction. **The Convention cannot be invoked if by the time of the alleged wrongful act, whether removal or retention, the child is habitually resident in the State where the request for return is lodged.** In such a case, that State has primary jurisdiction to make a decision on the merits, based on the habitual residence of the child and there is no room for a mandatory summary return elsewhere without such a decision. It may of course be that in making a merits decision, the court of the requested State might determine that it is in the best interests of the child to be returned to his previous home State, and indeed might do so without detailed examination of all possible evidence, as the English courts may do (see *In re J (A*

> *Child) (Custody Rights: Jurisdiction)* [2005] UKHL 40; [2006] 1 AC 80). But so to do is very different from making a summary order for return without consideration of the merits under the Abduction Convention."
>
> (my emphasis)

The highlighted sentence in [34] applies directly in this case, argues Mr Jarman. By 1 August 2020 England had become the state of habitual residence, and so the 1980 Convention cannot apply and no summary return order under it can be made.

30. The father had to admit in his oral evidence that at no stage prior to 1 August 2020 had he stipulated that the children must be returned to Australia, sooner or later, whether on a fixed date or even in principle. However, he argues through his counsel Ms Chokowry that this is completely irrelevant. It was a clear common understanding that the trip to England was always going to be fixed or limited. That the original return date was frustrated by the pandemic is neither here nor there; the trip retained its temporary characteristic. Had the pandemic not erupted the mother would not have returned on 23 April 2020, and the case would have been an open and shut one of actual retention on that date. The mother cannot opportunistically seek to jump on the bandwagon of the pandemic and try to convert what was at all times, and for all purposes, a limited trip into an unlimited one.

31. This has not been an easy issue for me to resolve. I have with some hesitation decided that Mr Jarman is correct. It seems to me that a wrongful act of retention, whether anticipatory/repudiatory (i.e. happening before the due date for return), or actual (i.e. happening after the due date of return), requires there to be, as a matter of fact, a clearly agreed due date of return. I believe that every reported case about retention has involved a finite period away with a due date of return. In my opinion it is implicit in the concept of wrongful retention, as referred to in Articles 1, 3, 12, 13, 14, 15 and 16, that the wrongful act must take place within, or immediately following, an agreed finite period of care by the retaining parent.

32. Let me test the correctness of the proposition in this way. Assume that on 26 February 2020 the mother and children travelled from Australia to England on return tickets but where the return flight was not specified but left open. Let us assume that the understanding between the parents was that the mother could go for as long as she wanted and could return when she felt comfortable to do so. Three months later she writes to the father saying that she would not return at all. Could this be a retention for the purposes of the Convention? Surely not.

33. This case is in substance no different. The original due date of return was frustrated by the pandemic. Thereafter, until 1 August 2020 the parties operated an uneasy understanding or stand-off whereby no alternative due date of return was substituted. The father did not even in that period stipulate in principle an insistence that the children should in due course be required to return to Australia.

34. I am completely satisfied that on 1 August 2020 both children were habitually resident in England. In *Proceedings Brought By A* [2010] Fam 42 the Court of Justice stated at [38] – [39]:

> "38. In addition to the physical presence of the child in a Member State other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment.
>
> 39. In particular, the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration."

I take all these factors into account and reach the clear conclusion that on 1 August 2020 the children were habitually resident in England.

35. My primary conclusion is that on 1 August 2020, when the operative act of retention occurred, the children were habitually resident in England and that therefore, per Lord Hughes, "the Convention cannot be invoked".

Consent and acquiescence

36. My primary conclusion hinges on my factual finding that the mother did not commit an act of retention on 3 May 2020, because at that point there did not exist an agreed finite period of stay in England with a due date of return.

37. If I am wrong in my analysis, and the concept of retention does not require an agreed finite period of stay in the other place with a due date of return but can cover an open-ended stay, then the question would be whether the mother has committed a repudiatory act of retention.

38. In her skeleton argument Ms Chokowry submitted that the wrongful retention took place by 23 April 2020, and in any event by no later than early May 2020. With respect, I cannot see that the cancellation of the flights for 23 April 2020 can possibly lead to a conclusion that the mother committed an act of wrongful retention on that day. It seems to me to be a *non sequitur*. But what of her contention that such an act was committed no later than early May 2020? Here Ms Chokowry is relying on the mother's email of 3 May 2020.

39. Lord Hughes in *Re C* held that for such an act to be committed there had to be, first, the formation of the subjective intention to retain the children, followed by an objectively identifiable manifestation of that intention: see [51]. The mother admitted forming the necessary subjective intention around the date of her birthday on 16 April 2020. Did her email of 3 May 2020 constitute the necessary manifestation of that intention? In my judgment, it is so ambiguous and equivocal that it is impossible so to construe it. Furthermore, at the time that it was written the return flights had been cancelled and there was no due date for return.

40. If I am wrong about that, and a wrongful repudiatory act of retention was indeed committed by the mother by 3 May 2020, then Mr Jarman accepts that at that

relatively early stage of the stay in England the children would not have established habitual residence here.

41. In such circumstances Article 3 would be engaged. Given that a higher court may disagree with my primary conclusion it would be as well that I express my views on the mother's secondary defence of consent and acquiescence under Article 13(a).

42. I am quite sure that it cannot be said that the father clearly and unequivocally consented *ex ante* to the repudiatory act of retention which, on this scenario, was committed by the mother on 3 May 2020. There is, however, evidence which suggests that he subsequently acquiesced in it.

43. Article 13(a) opens the door to a discretion not to return "if the person … having the care of the … child …. **consented to** or subsequently **acquiesced in** the removal or retention." Looking at these intransitive verbs from first principles I consider that when the words were written down in 1980 it was intended that there should be a clear difference in meaning between "consented" and "acquiesced". Thus, it would be wrong to regard the words as virtual synonyms, with the only difference being that the former is consent *ex ante*, and the latter is consent *ex post*.

44. In *Re G (Abduction: Consent/discretion)* [2021] EWCA Civ 139 Peter Jackson LJ at [26] stated:

> "…as a matter of ordinary language the word 'consent' denotes the giving of permission to another person to do something. For the permission to be meaningful, it must be made known. This natural reading is reinforced by the fact that consent appears in the Convention as a verb ("avait consenti/had consented"): what is required is an act or actions and not just an internal state of mind. But it is at the practical level that the need for communication is most obvious. Parties make important decisions based on the understanding that they have a consent to relocate on which they can safely rely. It would make a mockery of the Convention if the permission on which the removing parent had depended could be subsequently invalidated by an undisclosed change of heart on the part of the other parent, particularly as the result for the children would then be a mandatory return. Such an arbitrary consequence would be flatly contrary to the Convention's purpose of protecting children from the harmful effects of wrongful removal, and it would also be manifestly unfair to the removing parent and the children. "

45. Therefore "consented" means, for the purposes of the Convention, active, advance, communicated permission granted by the left-behind parent for the period of care with the other parent. In contrast, according to the OED "to acquiesce" means "to agree, esp. tacitly; to accept something, typically with some reluctance; to agree to do what someone else wants; to comply with, concede". The word carries with it a much greater sense of passivity; of acceptance of a state of affairs by doing nothing; of tacit compliance. In ordinary language it obviously covers active consent *ex post*; but it also covers passive acceptance by just "going along with" the proposal. This dual

meaning is to be found in the leading authority on the defence of acquiescence namely the decision of the House of Lords in *In re H (Minors) (Abduction: Acquiescence)*[1998] AC 72. In his speech Lord Browne-Wilkinson stated at p.87:

> "What then does article 13 mean by "acquiescence?" In my view, article 13 is looking to the subjective state of mind of the wronged parent. **Has he in fact consented** to the continued presence of the children in the jurisdiction to which they have been abducted?" (my emphasis)

Here Lord Browne-Wilkinson is clearly using acquiescence in its first sense. However, at p.89 he says:

> "In my judgment, therefore, in the ordinary case the court has to determine whether in all the circumstances of the case the wronged parent has, in fact, **gone along** with the wrongful abduction." (my emphasis)

Here he is using acquiescence in its second sense.

46. In my judgment, to succeed in a defence of acquiescence, it is not necessary to show more than the second sense of its meaning, namely that the left-behind parent has passively gone along with the removal or retention. This is not to reintroduce the distinction between active and passive acquiescence disapproved in *In re H*. That distinction had given rise to different legal treatments of the left-behind parent's subjective intentions. That distinction was overturned. Whether the conduct of the left-behind parent was active or passive, his intentions had to be established as a matter of fact.

47. Lord Browne-Wilkinson identified two separate factual scenarios where the defence might be established. The first, which Lord Browne-Wilkinson described as "the ordinary case", is where the left-behind parent has subjectively consented to, or has gone along with, the continued presence of the children in the place to which they had been taken. Lord Browne-Wilkinson explained that this state of subjective intention is a pure question of fact. In determining that question the court will pay more attention to outward conduct than to self-serving evidence of undisclosed intentions. As part of the normal process of fact-finding the court may infer the actual subjective intention from the outward and visible acts of the left-behind parent, but will not impute to the left-behind parent an intention which he did not in fact possess. Judges should be slow to infer an intention to acquiesce from attempts by the left-behind parent to effect a reconciliation or to reach an agreed voluntary return of the abducted child. Nonetheless, it is for the judge, in all the circumstances of the case, to attach such weight as he thinks fit to such factors in reaching his finding as to the state of mind of the left-behind parent

48. The second factual scenario capable of demonstrating the defence of acquiescence was described by Lord Browne-Wilkinson as exceptional. It is where the left-behind parent did not in fact internally acquiesce but where his outward behaviour demonstrated the contrary. If that outward behaviour showed clearly and unequivocally that the left-behind parent was not insisting on the summary return of the child then:

> "…he cannot be heard to go back on what he has done and seek to persuade the judge that, all along, he has secretly intended to claim the summary return of the children." (p.88)

49. The sort of conduct that might engage this defence would have to be very explicit, for example by signing a formal agreement allowing the child to stay where she is, or by participating in proceedings about the child in the other place (p.89). Passing remarks or letters written by a parent who has recently suffered the trauma of removal of his children, or requests for contact will not normally amount to the requisite clear and unequivocal conduct (p.90).

50. It seems to me that the happening of the second factual scenario will be vanishingly infrequent. It will surely be a very rare case where a left-behind parent will inwardly consent to, or go along with, the retention, but will nonetheless outwardly be vociferously objecting to it.

51. Although Mr Jarman bravely argued that this exceptional scenario arose in this case, I am completely satisfied on the facts that it does not apply, and will say no more about it.

52. The question is, therefore, whether this is an "ordinary" case of acquiescence. Did the father after 4 May 2020 subjectively consent to, or go along with, the retention by the mother of the children in England?

53. The burden of proof is on the mother to establish on the balance of probabilities that the appropriate inference to be drawn from all of the circumstances is that the father did acquiesce in the retention (see p.78). I have already analysed the evidence in question and have decided above that the father's ambiguous and equivocal conduct could not be construed as insisting on a return of the children to Australia before 1 August 2020. It is not inconsistent for me to construe the same evidence and to conclude that it is capable of demonstrating that the father acquiesced. On the contrary, I consider it to be wholly consistent.

54. In reaching my conclusion I identify the following facts.

55. An important fact, which has loomed large in my primary decision, is that nowhere in the written communications between the parties (which have been by text and email) does the father say prior to 1 August 2020 that if things cannot be agreed they all have to return to Australia. Nowhere does he seek to persuade the mother of the merits of life in Australia for all of the family. At no point did he ever stipulate a date for return as a deadline. Indeed to this day he has not done so.

56. On the contrary, his messages were all consistent with him passively going along with the mother's decision:

    i) As mentioned above, after the mother dropped her bombshell on 3 May 2020, the father's response the following day was he would look into obtaining a UK spousal visa with the aim of gaining indefinite leave to remain.

    ii) On 6 May 2020 he emailed the mother to say: "Australia is not my home, my home is with you, P and O wherever that is".

iii) On 10 May 2020 he emailed the travel agent to find out if it would be possible for him to get on a flight going from Australia to the UK.

iv) In emails dated 11 May and 14 May 2020 to the mother he said nothing in opposition to her embryonic intention not to return to Australia.

v) On 23 May 2020 he emailed to say: "I understand after eight years away you would want/wanted to return to England and I did want to be part of that even if I struggle to communicate and convey that to you.… As I have said my home is with you guys wherever that is and I never wanted to hurt you… I have applied for special permission to try and get across and like I said it won't be to get in your way".

vi) On 16 June 2020 he emailed the mother in the context of his application for special permission to travel to England, saying: "if I could get a letter from your counsellor explaining current challenges and benefits of me coming over to help where I can be present and support kids. Whatever you are comfortable with though really x".

vii) On 20 June 2020 the father emailed the mother to say: "on reflection moving to England would not be a big issue for me, nothing is tying me here and as I have said before my home is you guys. At best I maybe have two seasons left… But that pales in significance when compared to you P and O and doesn't even factor into the equation if I had to choose. I would do anything for you three".

viii) On 13 July 2020 father texted the mother to confirm he had paid over Aus$1500 as nursery fees.

ix) On 22 July 2020 the father texted the mother about sorting out the electrics at rental property taken by the mother,

x) On 27 July 2020 the father texted the mother about furniture for that property.

In my judgment these communications are clear evidence of acquiescence in the second sense. They clearly show that the father was going along compliantly with the mother's decision not to return to Australia.

57. The father's own evidence makes clear that his emotional response was principally about reconciliation, or at least participation by him in the lives of his children. It is clear that his reasons for coming here were far more than merely to sort things out so that the family could return. I heed Lord Browne-Wilkinson's advice that I should treat cautiously the father's beseeching of the mother. However, none of the written material suggests that the mother was really giving the father much hope about reconciliation. Notwithstanding that the father was acting in desperation and was deploying a policy of appeasement I am satisfied that I must take into account all of his outward conduct when drawing inferences about his subjective intentions.

58. An example of the father going far further than merely sorting things out so that the family could return to Australia was his payment for items such as nursery fees, rent and the cost of furniture which embed the children here. The father's response that

these were merely practical interim measures is not in my judgment particularly convincing. They seem to me, to amount to clear condonation of the mother's decision to keep the children here.

59. I have recorded that on 1 August 2020, at their first face-to-face meeting, the father told the mother that he wanted the children back in Australia. He repeated this in mediation on 16 September 2020. Yet, even after 1 August 2020 the father's outward and visible conduct signified an inward acceptance by him of the mother's decision. On that very day at 8:10 PM, he texted her:

> "if we are separated then we pay half… I don't keep paying for everything. I want to work on our relationship. I'm frustrated that that has never been an option to you and that we would throw eight years away over the phone. I'm willing to do whatever it is you need me to do and see whoever. But at no stage has that been an option and you want me to keep paying for you to leave me with the kids and set up a life without me. It's not fair… I want you in my life and I want to watch my children grow up."

This text does not show that the father had repented of his prior acquiescence and now was following the path of obtaining the return of the children to Australia. It is highly significant that in none of the written messages from the father to the mother between 4 May 2020 and 1 August 2020 does he even refer to, let alone threaten, legal proceedings to get the children back to Australia.

60. It is significant that when on 14 September 2020 he issued proceedings in Australia he issued for financial relief and not in respect of child arrangements. Australia is a Hague 1996 Convention country. Certainly until May 2020 the children remained habitually resident in Australia. Absent acquiescence, under Article 7 of the 1996 Convention jurisdiction would have been maintained in Australia even after the children acquired habitual residence in England. Therefore, there was every reason for him to have commenced proceedings in Australia as it would have established exclusive jurisdiction in that country. The father was not able to give me an explanation as to why he did not take this obvious step. After all, he knew from 9 July 2020 that the mother was not going to be returning voluntarily to Australia. There was plainly going to be a child arrangements case somewhere and it is hard to understand why the father did not establish the Australian court as the court of exclusive jurisdiction. I have noted in para 20 above that on 17 September 2020 the father's Australian lawyers contacted the English solicitor who acts for him in these proceedings. This fact makes the father's failure to establish Australian jurisdiction all the more perplexing.

61. The conclusion that I have drawn is that even at that late stage it was a symptom of acquiescence and appeasement.

62. A curious piece of evidence that emerged for the first time during cross-examination was that the father had purchased a flight back for himself alone in October. In the event he did not take the flight and received a refund or credit. Again, this was to my mind another piece of evidence demonstrating the symptomology of acquiescence. The impression which I gained was of a single man planning on going back to a single

life, acting independently and unilaterally, but reluctantly and with much heart-ache, because the focus of the children had shifted to England.

63. Weighing all the evidence I find as a fact that during the period 3 May 2020 to 1 August 2020 the father subjectively consented to the continued presence of the children in England in the sense that he had "gone along" with the wrongful retention. Therefore, acquiescence is established.

64. This finding leads to the potential exercise of the discretion provided for within Article 13(b). This provides that I am not bound to order the return of the child if, among other things, acquiescence is proved. In many fields of law there are so-called discretionary powers granted to the court which are more theoretical than real and where their exercise is almost invariably driven by proof of the threshold facts that trigger the discretion. Consider, for example, the power of the court to award a discretionary stay of proceedings in a *forum conveniens* dispute pursuant to s.5(6) of, and Schedule 1 paragraph 9 to, the Domicile and Matrimonial Proceedings Act 1973. In such a case the court, if it satisfied that the balance of fairness and convenience is such that it is appropriate for the proceedings to be disposed of in the other forum, may, if it thinks fit, stay the proceedings. That is not really a discretion at all. Proof of the threshold condition will invariably lead to the grant of a stay.

65. Closer to home, consider a case where under Article 13(b) proof is made of a grave risk that the return of a child would expose her to physical or psychological harm. Such a finding in theory triggers the discretion, but again it is not really a discretion at all because it is inconceivable that the court, having made the threshold finding, would order the child back to the other place. Thus, in *In re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619, HL Baroness Hale stated at [55]:

> "But, as my noble and learned friend, Lord Brown of Eaton-under-Heywood, pointed out in the course of argument, it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate"

66. One would expect that same reasoning would apply where the threshold fact that is proved is consent or acquiescence. It is extremely hard to conceive of any circumstances where consent or acquiescence is proved but a return of the child should be ordered nonetheless. The essence of such conduct is that the left-behind parent has condoned the wrongful behaviour of the other parent and has in effect waived his rights for implementation of the policy objectives of the Convention as set out in the preamble and Article 1. But, in *In re M (Children) (Abduction: Rights of Custody*) [2008] AC 1288, HL at [45] Baroness Hale (after citing the above passage from *In re D,* and observing that it was not the policy of the Convention that children should be put at serious risk of harm or placed in intolerable situations) stated:

> "In consent or acquiescence cases, on the other hand, general considerations of comity and confidence, particular considerations relating to the speed of legal proceedings and approach to relocation in the home country, and individual

> considerations relating to the particular child might point to a speedy return so that her future can be decided in her home country."

67. This is quite a challenging passage. It suggests that even if a parent has positively agreed, before or after the event, with a removal to or retention in this country, but has later repented of that decision, there may nonetheless be general, particular or individual considerations militating in favour of the child being returned to her home country.

68. In the recent case of *Re G (Abduction: Consent/discretion)* [2021] EWCA Civ 139 the Court of Appeal considered this passage and contrasted it to an earlier statement by Baroness Hale when she was a puisne judge in *In re K (Abduction: Consent)* [1997] 2 FLR 212 at 220 where she said:

> "The final thing which I have to weigh in the balance is the purpose of the Convention. This is something to which the courts attach the greatest possible importance. We all want children to be returned as soon as possible to the place from which they have been wrongfully removed. The reasons why the Convention exists to secure this are partly that it is bad for children to be uprooted from one jurisdiction to another and partly to fulfil the obvious proposition that if there is a dispute between parents as to the future of their child it is better dealt with in the courts of the country where the child has hitherto been habitually resident because that is where the best information lies.
>
> However, I have to bear in mind in particular that that factor has a different weight in a case in which consent to the removal or retention has been established. Indeed, in cases of consent, all of those factors carry a rather different weight. But if it has been agreed between parents that a mother may bring her child to another country and, if she so chooses, remain here with the child, then frustrating those two purposes of the Convention scarcely comes into question."

69. Peter Jackson LJ went on to observe that Hale J's dictum had been followed in a number of cases. He concluded:

> "40. The observations on discretion in consent cases in paragraph 45 of *Re M* therefore need to be read with care. They were made when drawing a contrast with cases of grave harm, where policy considerations in favour of return may be weak and welfare considerations against return are likely to be particularly strong. They do no more than say that the relevant considerations "might" point to a speedy return so that future decisions can be made in "the home country". However, they carry a different emphasis to the earlier analysis in *Re K*, which was not cited in *Re M* and where the decision actually turned on the exercise of discretion.

> 41. To sum up, the exercise of the discretion under the Convention is acutely case-specific within a framework of policy and welfare considerations. In reaching a decision, the court will consider the weight to be attached to all relevant factors, including: the desirability of a swift restorative return of abducted children; the benefits of decisions about children being made in their home country; comity between member states; deterrence of abduction generally; the reasons why the court has a discretion in the individual case; and considerations relating to the child's welfare.
>
> 42. In a consent case, the better view is that the weight to be given to the policy considerations of counteracting wrongful removal and deterring abduction may be relatively slight, while the weight to be attached to home-based decision-making and comity will depend critically on the facts of the case and the view that the court takes of the effect of a summary return on the child's welfare."

70. I accept, naturally, the general principle concerning the Convention discretion set out in *In re M* at [43]:

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

I agree entirely with Peter Jackson LJ, however, that in a consent case the fact of consent will loom large and that the weight to be given to the Convention objectives will be slight. Further, I would extend the reasoning to cover acquiescence also. It seems to me for these cases the threshold condition will heavily influence the resultant exercise of discretion.

71. I weigh up all the relevant matters. The fact of acquiescence is a matter of great weight in the exercise. I do not contribute much weight to the benefit of decision-making in Australia rather than Liverpool. A summary return in the context of Covid-19 will be difficult to manage and will involve considerable expense as there will have to be quarantine on arrival in Australia in Sydney or Melbourne (there are no direct flights to Adelaide) at a cost of about £1750 a week and possibly further internal quarantine on travel from Sydney or Melbourne to Adelaide. The children have now spent nearly a year here – more than half of O's life. A summary return will cause them considerable upheaval. On the facts of this case I do not attribute much weight to the Convention objectives.

72. The result is, on this alternative scenario, that I decline to order the return of the children to Australia.

Conclusions

73. I now state my final conclusions. For the reasons I have set out above, my primary conclusion is that there was no operative retention by the mother until 1 August 2020 by which time the children were habitually resident in England. Accordingly, the father cannot invoke the Convention and his application must be dismissed. My secondary conclusion is that even if there were an operative retention by the mother in early May 2020 the father subsequently acquiesced in that retention and that in all the circumstances the court should not exercise its power to order a return of the children under the Convention to Australia. On this footing also the father's application should be dismissed.

74. The parents, to their credit, have throughout treated each other civilly and respectfully. There is no reason why they should not now agree child arrangements which could be recorded by me in an order to be made in the Liverpool proceedings. The child arrangements would no doubt record that the children live with and spend time with both of their parents, albeit unequally. The Liverpool application had sought a specific issue order. I fail to understand what specific issue the court was being asked to resolve; that aspect of the application strikes me as spurious and should be withdrawn.

75. That is my judgment.