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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION
OFFICE OF CARE AND PROTECTION

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

AND IN THE MATTER OF TWO CHILDREN

Between:

KL

Plaintiff

-and-

PQ

Defendant

Melanie Rice KC with Kelly Hyndman (instructed by Bernard Campbell & Co, Solicitors) for the Plaintiff
Noelle McGrenera KC with Sarah Walkingshaw (instructed by Andrew Russell & Co, Solicitors) for the Defendant
Louise Murphy KC (instructed by the Official Solicitor) for the children

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SIMPSON J

Introduction

[1] I have anonymised the parties to this case. Nothing should be published which might identify the family or the children. To the father of the children, the plaintiff in this matter, I have given the initials KL; to the mother, the defendant, the initials PQ. The initials given are not reflective of the parties names. In addition, I have given the two children initials which are not their actual initials.

[2] This is the father s application for, inter alia, a return order pursuant to article 12 of the Convention on the Civil Aspects of International Child Abduction 1980 (the

Hague Convention" or the Convention") which was enacted into domestic law by the provisions of the Child Abduction and Custody Act 1985. The application is brought following the removal by the mother of the children from the country in which they were living to Northern Ireland.

[3] Both the father and the mother were born in an African country, which I will not identify, and are in their early 40s. They met in 2012 when they were each living in a European country which, again, I will not identify. Both were asylum seekers in that country. The father was granted asylum in 2010; the mother in 2014. In 2014 they were married according to Sharia Law. The mother had previously been married and divorced. She has a son from the first marriage. These parties' children, the subject of this application, were born in the European country. Their first child, AB, was born in February 2015; their second child, CD, was born in August 2016. Both children are boys. In 2017 the parents relationship broke down and they were divorced in accordance with Sharia Law. In October 2019 the mother and the children, with the consent of the father, travelled from the European country to Dublin, and from there to Belfast. The father had agreed to the mother and children travelling for a short holiday. The mother later informed the father that she did not intend to return to the European country. In December 2019 the children started attending a school in Belfast.

[4] In March 2020 the father made his first request to the Central Authority for the return of the children under the Hague Convention. This application was withdrawn in August 2021 in circumstances which are in dispute between the parties. In May 2022 the mother and the children were granted leave to remain in the UK for five years.

[5] On 12 December 2023 the father brought the present application for a return order. Accordingly, at the date of hearing of this application, the children will have been in Northern Ireland for approximately four years six months.

The children

[6] AB is now aged nine years three months. He has been living in Northern Ireland since he was aged four years eight months. In August 2021 he was assessed as having severe learning difficulties, social and emotional difficulties and behavioural difficulties. A further diagnosis that he has a language disorder is currently being kept under review. Because of his problems he was allocated a place in a Special School in May 2022. He is in a class of 12 pupils. The class has one teacher and two, sometimes three, classroom assistants. The school staff are all trained by therapists to assist and support the children.

[7] He awaits an assessment in relation to Autistic Spectrum Disorder. The following are noted from his assessment by an Educational Psychologist in a report dated April 2021 and an advice document dated 21 July 2021:

> "(i) [AB]'s presentation is described as complex and significant."
>
> (ii) The Educational Psychologist expressed the opinion that [AB]'s "exposure to trauma, as well as his inability to form an appropriate attachment relationship within an emotionally stable environment from a young age, are the most significant factors impacting on his current presentation.
>
> (iii) In view of the nature, degree and complexity of [AB]'s educational needs, it would be appropriate that consideration be given to providing for his needs in a specialist provision with a pastoral ethos, adaptable environment, highly-structured, predictable routine and access to specialist teaching and therapies onsite."

[8] The Educational Psychologist included in her recommendations in the April report: In my opinion, it is crucial to [AB] s well-being that he is able to remain in Northern Ireland…"

[9] The Official Solicitor says in paragraph 9 of her skeleton argument:

> In the context of the significant difficulties previously displayed, [AB] has made good strides" in [the] Special School and has benefited from the small class size. He is now able to be more focused and is more content and happy to engage in activities than when he first arrived at the school. This is special educational provision to meet his specific needs and can offer him education until age 19."

[10] CD is now aged seven years nine months. He has been living in Northern Ireland since he was aged three years two months. He began in a school in Belfast in nursery class and has continued to attend the same school until now. In the summer of 2022, he was diagnosed with Type 1 Diabetes. He benefits from a dedicated medical classroom assistant to help him manage the condition while in school. The Official Solicitor, having spoken to staff at his school, notes that they report that he is making steady progress academically being above average in his class. He is very popular and has a lot of good friends. He is a very happy confident, social child who is very well liked by both peers and teachers."

[11] Both children speak English.

The Hague Convention

[12] Both the UK and the European country from which the children were taken are signatories to the Hague Convention, and both have incorporated the Convention into their domestic law.

[13] Articles 1 to 5 of the Convention provide:

Article 1

The objects of the present Convention are -

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose, they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where —

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

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

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason

of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention –

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

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

[14] It is common case that the children were (in 2019) habitually resident in a Contracting State (the European country). They are under 16. It is accepted by the mother that the father had rights of custody, although she asserts that he was not exercising those rights — an assertion not accepted by the father. The father s name is on the children s birth certificates, and it is agreed that he shares parental responsibility for the children. The mother also accepts that the removal of the children was wrongful in accordance with Article 3 and 12 of the Convention." It is accepted by the father that it is now more than four years since the removal of the children. Accordingly, the issues for resolution by the court are:

(i) are the children settled in Northern Ireland? — see article 12;

(ii) can the mother succeed in establishing an exception, or defence, under article 13, the burden being on her; the standard being on the balance of probabilities?

(iii) if she establishes either, should the court nevertheless exercise its discretion and order the return of the children to the European country?

[15] The provisions of articles 12 and 13 of the Convention are —

"Article 12

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

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

…

Article 13

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

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

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

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

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background

> of the child provided by the Central Authority or other competent authority of the child's habitual residence."

[16] In this case the first paragraph of article 12 does not apply. This application was not commenced within 1 year of the removal of the children. Therefore, as provided for in the second paragraph, the court must order the return of the child (but not forthwith) *unless* it is demonstrated that the child is now settled in the new environment.

[17] Article 13 provides a number of further exceptions, sometimes called defences, permitting the court to refuse to return the children — if the father was not exercising his custody rights at the time of removal; if he consented to, or subsequently acquiesced in, the removal or retention; if the return would expose the child to a grave risk of physical or psychological harm or if it would otherwise place the child in an intolerable situation; or if the child objects.

Some relevant authorities

[18] The nature of the present process is explained by Mostyn J in *FE v YE* [2017] EWHC 2165 (Fam) thus:

> 14. It is therefore important to recognise that the nature of the relief which is granted under the 1980 Convention is essentially of an interim, procedural nature. It does no more than to return the child to the home country for the courts of that country to determine his or her long-term future. The relief granted under the Convention does not make any long-term substantive welfare decisions in relation to the subject child. If one were to draw an analogy with a financial dispute the relief is akin to a freezing order coupled with a direction that the assets the subject of the dispute be placed within the jurisdiction of the forum conveniens.
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> 15. It is for this reason that the procedure for a claim under the 1980 Convention is summary. Oral evidence is very much the exception rather than the rule. The available defences must be judged strictly in the context of the objective of the limited relief that is sought. Controversial issues of fact need not be decided."

[19] In line with those sentiments the case proceeded before me by way of submission, with the submissions being translated by an interpreter for the benefit of the parties. The father attended by Sightlink.

[20] There is some judicial divergence of opinion as to the meaning of the word now' in article 12 ie whether it refers to the date on which the application is commenced, or the date of the hearing before the court. In *AX v CY* [2020] EWCA 1599 (Fam) Mr Robert Peel QC, sitting as a Judge of the High Court, said that the defence would be available to the mother if she can satisfy the court that [the child] was settled in her new environment as at the date of the application." In *ES v LS* [2021] EWHC 2758 (Fam) Mostyn J, after a much more detailed and thoughtful analysis of the matter and consideration of a number of authorities on the point, held that now meant settled at the date of the hearing before him.

[21] Being first instance decisions of the High Court in England and Wales, neither decision is binding on this court. However, I respectfully agree with the position adopted by Mostyn J, a judge with significant experience in family matters. I consider that the wording shall also <u>order the return</u> of the child, unless it is demonstrated that the child is <u>now settled</u> in its new environment" (emphasis added) carries with it the implication that the time for consideration of now" coincides with the time when the court is considering whether to return the child. In any event, in the context of this case, there is a less than five-month period between the date of the present application and the hearing, so the effect of any difference in the date is minimal.

[22] Subject to what I have just said, a helpful analysis of the concept of settlement is to be found in the decision of Williams J in *AH v CD* [2018] EWHC 1643 (Fam):

> [41] The courts have considered the principles of settlement in a number of cases, the principal amongst which are (a) *Re N (Minors) (Abduction)* [1991] 1 FLR 413, (b) *Cannon v Cannon* [2005] 1 FLR 169; (c) *C v C* [2006] 2 FLR 797; (d) *Re M (Zimbabwe)* [2008] 1 FLR 251. A recent example of the application of the principles is *Re T (A Child - Hague Convention proceedings)* [2016] EWHC 3554 (Fam). The principles which can be derived from those cases are these:
>
> (i) The proceedings must be commenced within one year of the abduction. The making of a complaint to police or an application to a Central Authority does not suffice.
>
> (ii) The focus must be on the child. Settlement must be considered from the child s perspective, not the adult s. The date for the assessment is that date of the commencement of proceedings not the date of the hearing. This is aimed at preventing settlement being achieved by delay in the process.

(iii) Settlement involves both physical and emotional or psychological components. Physically, it involves being established or integrated into an environment compromising a home and school, a social and family network, activities, opportunities. Emotional or psychological settlement connotes security and stability within that environment. It is more than mere adjustment to present surroundings.

(iv) Concealment and delay may be relevant to establishing settlement. Concealment is likely to undermine settlement. Living openly is likely to permit greater settlement. The absence of a relationship with a left-behind parent will be an important consideration in determining whether a child is settled.

(v) A broad and purposive construction will properly reflect the facts of each case — it does not require a 2-stage approach but must, to use a probably over-used expression, involve a holistic assessment of whether the child is settled in its new environment. It has to be kept in mind that the settlement exception is intended to reflect welfare. The Article 12 settlement exception of all the exceptions is most welfare focused. The underlying purpose of the exception is to enable the court in furtherance of the welfare of the child to decline a summary return because imposing a summary return (ie without a more detailed consideration of welfare) might compound the harm caused by the original abduction by uprooting a child summarily from his by now familiar environment.

[42] As I have said earlier, there is clearly a degree of overlap between the concepts of settlement and habitual residence. Settlement does not require a complete settlement any more than habitual residence requires full integration. Settlement is plainly an evaluation which is, to some degree, subjective. There will be a spectrum ranging from the obviously and completely settled to the very unsettled. In between there are many possibilities."

[23] In *ES v LS* [2021] EWHC 2758 (Fam) Mostyn J described settled thus:

> [35] Therefore, on this classic definition, the phrase the child is settled in its new environment means the child has become established in, or accustomed to, a new home, abode or surroundings.
>
> [36] Clearly, in order to be settled somewhere, a person must not only physically reside in a new home as a permanent residence but must genuinely intend to establish that place as a new home. Thus, there must be proof of both a physical constituent and a mental constituent. For a younger child the relevant mental state will be that of her primary carer; for an older child it will be the mental state of the child herself.
>
> [37] Unsurprisingly, the case law has stipulated a definition of settlement which incorporates both a physical constituent and a mental constituent. The leading authority is the case of *Cannon v Cannon* [2004] EWCA Civ 1330 [2005] 1 FLR 169."

[24] In *In re M and another (Children) (Abduction: Rights of Custody)* [2007] UKHL 55 Lady Hale discussed the general policy of the convention:

> [42] In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the contracting states and respect for one another s judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the contracting states.
>
> [43] My Lords, in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child s rights and welfare. I would, therefore, respectfully agree with Thorpe LJ in the passage quoted in para 32 above, save for the word overriding' if it suggests that the Convention objectives should always be given

more weight than the other considerations. Sometimes they should and sometimes they should not.

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

[25] The potential significance of the passage of time was also considered by Lady Hale in *In Re M*. She said, paragraph [47]:

In settlement cases, it must be borne in mind that the major objective of the Convention cannot be achieved. These are no longer hot pursuit cases. By definition, for whatever reason, the pursuit did not begin until long after the trail had gone cold. The object of securing a swift return to the country of origin cannot be met. It cannot any longer be assumed that that country is the better forum for the resolution of the parental dispute. So, the policy of the Convention would not necessarily point towards a return in such cases, quite apart from the comparative strength of the countervailing factors, which may well, as here, include the child s objections as well as her integration in her new community."

[26] I also bear in mind that even where a court concludes that a child has become settled for the purposes of article 12 the court still has a discretion to return the child within the Convention procedures — see *In Re M* (op cit), paras [2] (Lord Hope) and [30]-[31] (Lady Hale).

[27] Article 13 of the Convention was discussed by the Supreme Court in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27. The judgment of the Court was given by Lady Hale and Lord Wilson. Beginning at para [31] they said, of article 13:

"… there is no need for the article to be narrowly construed.' By its very terms, it is of restricted application. The words of article 13 are quite plain and need no further elaboration or gloss.

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

[33] Second, the risk to the child must be grave.' It is not enough, as it is in other contexts such as asylum, that the risk be real.' It must have reached such a level of seriousness as to be characterised as grave.' Although grave characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus, a relatively low risk of death or really serious injury might properly be qualified as grave while a higher level of risk might be required for other less serious forms of harm.

[34] Third, the words physical or psychological harm are not qualified. However, they do gain colour from the alternative 'or *otherwise*' placed in an intolerable situation' (emphasis supplied). As was said in *In Re D* [2007] 1 AC 619, para 52, Intolerable' is a strong word, but when applied to a child must mean a situation which this particular child in these particular circumstances should not be expected to tolerate.'" Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the

> physical or psychological abuse of her own parent. [Counsel for the father] accepts that, if there is such a risk, the source of it is irrelevant: eg, where a mother s subjective perception of events leads to a mental illness which could have intolerable consequences for the child.
>
> [35] Fourth, article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home. [Counsel for the father] accepts that if the risk is serious enough to fall within article 13(b) the court is not only concerned with the child s immediate future, because the need for effective protection may persist."

[28] I take into consideration all of the above guidance.

The parties' cases in brief

[29] The father s allegations and assertions are set out in detail in two affidavits; the first dated December 2023; the second dated March 2024. I do not intend to rehearse detailed facts in the judgment. In very short compass, the father says that while he agreed to the children being taken for a holiday to Dublin in October 2019, he did not consent to their being taken to Belfast and he certainly did not and does not consent to their remaining in Northern Ireland. The first application was withdrawn, not following any family mediation, but because, while he knew that the family was in Northern Ireland, he did not know, and was unable to ascertain, their address. He says that the mother deliberately hid the precise location from him, and the authorities were unable to locate the mother or children, partly because she gave different names for her and the children. He denies allegations of domestic abuse made against him by the mother. He admits to an incident in 2018 when both parties assaulted each other, during which he slapped the mother. He says both parties acknowledged their misconduct towards each other and that the local authorities in the European country had no welfare concerns. He asserts that the actions of the mother to conceal her whereabouts from him must inform the court's approach to the mother's case that the children are settled.

[30] The facts underlying the mother s case are detailed in an affidavit dated February 2024. Again, in very brief compass, her case is that the children are settled

in Northern Ireland; that she was subjected to domestic abuse from the father and that this, of itself, poses a grave risk should the children be returned; that the children would be exposed to a grave risk of physical and psychological harm or otherwise placed in an intolerable situation if returned; that there was a family mediation, as a result of which the father withdrew his first application; that he has consented to or acquiesced in the retention of the children in Northern Ireland.

The position of the Official Solicitor

[31] There is a very helpful report (dated 19 April 2024), supplemented by a skeleton argument, from the Official Solicitor, Ms Rosemary Carson. She has taken the trouble to speak to teachers at both the children s schools, and to the children. Her unequivocal position is that the children should not be returned to the European country.

[32] She reports the vice-principal of the Special School as saying that AB was well supported by mum… a fabulous child who has relaxed into an environment that suits him better than his previous school…the school is a perfect fit for" him. He is now making steady progress" at school. Over the past two years he has become more focused, and more content and happy to engage in activities which would not have been the case at the start of his time at the school." He has lots of friends.

[33] She spoke to the principal of the school in which CD has been a pupil since his arrival in Northern Ireland. He is very settled at the school and has come on leaps and bounds." She spoke to CD s teacher and noted him confirming that CD is competent in the use of English and can communicate freely and knows more words than most in his class." She also spoke to a classroom assistant who has known CD since his P1 days. She described him as very active, and very energetic"; very well settled"; very friendly, confident and very caring."

[34] The staff in both schools told Ms Carson that there were no welfare concerns in respect of either child. CD s diagnosis of Type 1 diabetes was being well managed. Both also said that the mother was very supportive or responsive.

[35] Having spoken to the children and outlined in her report the detail of each child s responses to her, she says (paragraph 76) that it is her assessment that the children have no memories of their life in [the European country]…"

[36] Her report goes on to state:

> 77. All evidence points to how extremely happy and settled both children are in Belfast, and it is evident that they are both flourishing in their respective environments, which address their needs medically, psychologically, cognitively and also in terms of their identity and cultural background. [CD] has [African country] friends in class,

the school is multi-cultural, and they both have [African country] friends outside school speak [the African country language] to each other at parties.

78. Both children have expressed a clear wish to continue to live in Northern Ireland with their mother. Life is here , said [CD]. They both love their school and have close relationships with their peers, both are popular at school. Neither child wishes to move from Belfast and neither child has indicated a wish to either speak to or see their father. They have knowledge of their father that has been given to them as opposed to acquired through memory and they are clearly influenced by this. They clearly have no relationship with their father. This has not been maintained.

…

80. Due to the passage of time the two boys have now resided in this jurisdiction for approximately 4½ years. They have a wholly settled life here in Belfast. They have made friends, have grown up learning and integrating into the community and life in Northern Ireland, using the English language. They love school and their friends and their teachers."

[37] In relation to the issue of settlement the Official Solicitor identifies, in her skeleton argument, the following matters:

"(i) The children have been physically present and have had their home in Northern Ireland for over 4 years;

(ii) In May 2022 (nearly 2 years ago), they, along with their mother, were each granted leave to remain in the UK for 5 years — indicating a settled intention to remain here;

(iii) Throughout their period living in Northern Ireland they have attended school here;

(iv) Both children have learnt English and have been able to fully integrate in this country;

(v) [AB] has been engaged in assessment of his educational needs, which has achieved a Statement of Special Educational Needs and specialist provision to meet those needs — which is being

implemented to really good effect, assisting him to make progress;

(vi) [CD] has been medically assessed and diagnosed with Diabetes Type 1, with special arrangements in school to assist him with this condition. He is described as very well settled by his school;

(vii) They each see their home as Belfast with developed friendships for each of them, demonstrating an emotional integration;

(viii) [AB] does not make any reference to [the European country] on a day-to-day basis in school. He told the Official Solicitor that he didn't like [the European country], but it is acknowledged that he is unlikely to have real memories of his time living there given his needs, his age and the passage of time;

(ix) [CD], save for one reference to his father in recent weeks, makes no reference to his father or [the European country] in school. He doesn't remember living with his father. He sees himself as living in Belfast until he is 21 and at this time wants to stay in his current school and home. In his words (aged 7½ years old): "My life is here."

(x) Their mother is settled in Northern Ireland.

[38] To these factors the Official Solicitor, in submission, added that the mother s child from her first marriage has now been given permission to be in the UK as family reunion" from May 2024 until May 2027.

[39] The Official Solicitor concludes her report to the court in the following terms:

> 83. To contemplate a return to [the European country] for these children would be to contemplate taking away everything these young boys know, that has supported and nurtured them thus far into young, happy, confident children. They have complex needs and all the special support to address their needs is in place and working very well to meet their needs. I was very struck by the progress the two boys have made in their development since they started school in December 2019. They are both extremely well suited to their environments which clearly accommodates all their needs to an exceptional standard.

> 84. These children have expressed unequivocally how much they love their school, they love their friends and their life here in Belfast. To contemplate taking that away from them would in my opinion need very serious and careful assessment as to what detriment this may have on the boys, who are clearly happy and well settled in Northern Ireland and where their needs are being supported in environments that allow both to flourish and develop. It is all they have ever known and, in an environment where their primary language while learning has been English."

Consideration — article 12

[40] I have read the documents in the Trial Bundle, including the affidavits of the parties and their exhibits, and those further documents subsequently lodged. I have had the benefit of detailed skeleton arguments from both parties and the Official Solicitor, and succinct and helpful oral submissions from all three. I take all those matters into account in reaching my decision. My failure to mention specifically any particular matter in this judgment does not mean I have not considered it in arriving at my decision. I approach the issue of settlement from the point of view of the children and remind myself that of all the exceptions in the Convention, the issue of settlement is most welfare-focused."

[41] Although the mother did not make it easy for the father to find her and the children this is not a "fugitive" case such as described in *ES v LS* (op cit) where, according to Mostyn J, it "is just not possible to intend in a bona fide way to establish a place as your permanent residence if you are always looking over your shoulder for the arrival of the authorities and making ready to flee if it looks that they are closing in." There is no such suggestion in the facts of this case. In all the circumstances I am satisfied that the children are settled in Northern Ireland. In paragraph [37] above I listed those ten matters identified in her report by the Official Solicitor as supporting the proposition that the children are settled in Northern Ireland. I agree with all of those. In my view the evidence clearly points to the children being well established in, and integrated into, their present environment of home and school and social network of friends. The evidence garnered by the Official Solicitor makes it clear, in my view, that they are emotionally and psychologically secure and stable in Northern Ireland. In the circumstances I conclude that the evidence demonstrates that each child is now settled in his new environment.

[42] I consider that the children s habitual residence is now Northern Ireland. I am satisfied that the courts in this jurisdiction are now best placed to decide on future welfare and other considerations in relation to each of these children.

Consideration — article 13

[43] In case I am wrong about the question of settlement under article 12, I also consider the exceptions in article 13. First, I am not satisfied on the evidence that the father was not exercising custody rights at the time the children were removed. The mother asserts that he was not; the father asserts that he was. Since the onus is on the mother to prove this defence, I consider that she has failed to do so.

[44] Equally, I am not persuaded on the evidence (again the onus being on the mother) that the father consented to or acquiesced in, first, the (wrongful) removal of the children. The father brought an application within three months or so of the removal, but it was withdrawn in August 2021. The parties, as noted above, disagree on the reason for this. In *Re C* (Abduction: Consent) [1996] FLR 414 Holman J said, of consent:

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

In the present case I am left uncertain. The mother, therefore, has failed to prove consent to, or acquiescence in, the children s removal.

[45] The mother also says that the father has consented to or acquiesced in the retention of the children in Northern Ireland. He withdrew his first application in August 2021, and this, his second, application was not commenced until December 2023. In *Re H (Minors) (Abduction: Acquiescence)* [1998] AC 72 Lord Browne-Wilkinson (with whom the other Law Lords agreed) said (87H):

> 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? This is the approach adopted by Neill L.J. in *In Re S (Minors) (Abduction: Acquiescence)* [1994] 1 F.L.R. 819 and by Millett L.J. in *In Re R (Child Abduction: Acquiescence)* [1995] 1 F.L.R. 716. In my judgment it accords with the ordinary meaning of the word acquiescence in this context. In ordinary litigation between two parties, it is the facts known to both parties which are relevant. But in ordinary speech a person would not be said to have consented or acquiesced if that was not in fact his state of mind whether communicated or not."

[46] At page 88D he said:

In my judgment, therefore, in the ordinary case the court has to determine whether in all the circumstances of the case the wrongered parent has, in fact, gone along with the wrongful abduction. Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world s perception of his intentions."

[47] Having reviewed all the evidence I am not persuaded that the father consented to or acquiesced in the retention of the children in Northern Ireland.

[48] As noted above the mother alleges domestic abuse — which the father denies — as posing a grave risk to the children if returned. The matter is hotly contested in the affidavits of each party. There is also medical evidence before the court, translated into English. However, in the absence of oral evidence and cross-examination of the parties, I find it impossible to decide where the truth lies. In the circumstances I make no finding in relation to the issue of risk arising from domestic abuse.

[49] However, in light of the evidence in this case, and in particular that contained in the report of the Official Solicitor, I am satisfied first, that there is a grave risk that the return of each child would inevitably expose each to psychological harm and would place each of the children in this case in an intolerable situation, ie one which each of these children in these particular circumstances should not be expected to tolerate.'

[50] Article 11(4) of Council Regulation 2201/2003 provides:

A court cannot refuse to return a child on the basis of Article 13(b) of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return".

[51] Although there was no evidence before me, I have no reason to doubt that if the children were now living in the European country from which they were removed, adequate arrangements could be put in place such as are available to them in their respective schools and to secure their protection. However, I am satisfied that the very fact of uprooting these children from their social, educational and domestic environments for the purposes of return would inevitably cause such significant disruptive consequences that each would be exposed to psychological harm or otherwise placed in an intolerable situation.

[52] Accordingly, I am satisfied that the mother has made out, on the balance of probabilities, the exception, or defence, in sub-paragraph (b) of article 13 of the Convention.

[53] It is not clear to me whether the mother also seeks to rely on the children s objection to being returned; the matter was not dealt with in oral submission but was

included in the father s skeleton argument. However, while the children have expressed their views to the Official Solicitor, some of which are set out earlier in this judgment, I am not satisfied that there is a sufficient evidential basis for the court to conclude that each child objects. I therefore find that this exception has not been proved.

[54] I referred above (paragraph [26]) to authorities relating to the court s discretion. In addition, article 18 of the Convention provides:

> The provisions of this Chapter [articles 12 and 13 are contained in this Chapter" of the Convention] do not limit the power of a judicial or administrative authority to order the return of the child at any time."

[55] Given my findings on the issue of settlement (article 12) and my findings in relation to grave risk (article 13(b)) I consider that it would be perverse, in the circumstances of this case, to exercise my discretion nonetheless to order the return of the children. Accordingly, in all the circumstances of this case I decline to exercise my discretion to order the return of the children.

Disposition

[56] I dismiss the father s application.

[57] I make the usual order as to costs.