Re G (Abduction: Withdrawal of Proceedings, Acquiescence, Habitual Residence)

	No Substantial Judicial Treatment

Court
Family Division

Judgment Date
30 November 2007

Case No: FD0701762

High Court of Justice Family Division

[2007] EWHC 2807 (Fam), 2007 WL 4190656

Before: Sir Mark Potter The President of the Family Division

Date: 30/11/2007, Hearing date: 23 October 2007

Representation

Mr Timothy Scott QC and Ms Clare Renton (instructed by International Family Law Group) for the Applicant.
Mr Marcus Scott-Manderson QC (instructed by Dawson Cornwell Solicitors) for the Respondent.

Approved Judgment

Sir Mark Potter the President of the Family Division

1. These proceedings between the plaintiff father and defendant mother concern their two young children: X born in Canada on 2 July 2005 (now aged two years and 4 months) and Y born in England as recently as 24 May 2007 (now aged 6 months). They are brought by the father pursuant to the Child Abduction and Custody Act 1985 and the inherent jurisdiction of the court. There are also before me subsidiary proceedings under the Children Act 1989 dependent upon the outcome of the father's application for a summary order for the return of the children to Canada.

2. It is a most unusual case, stated by leading counsel to be unique in their experience, in that the father's application involves what is essentially the revival of earlier Convention proceedings brought by him in January 2005 on the basis of an alleged wrongful retention of X in England by the mother, who was then pregnant with Y, which were withdrawn by consent without adjudication. Following Y's birth in England in May 2007, the father now brings a second application alleging wrongful retention of both children. Issues arise as to the habitual residence of the children and, in the case of X, consent and acquiescence under Article 13(a) of the Convention. It is also said for the mother, who is in a depressed state, that there is a grave risk that an order for return would expose the children to an intolerable situation because the mental health of the mother as their primary carer would deteriorate so that she would be unable properly to care for them.

3. The background is as follows. The father was born in Canada where his family live and he was brought up. The mother was born in Zambia. However, at the age of eight she moved to England where her extended family live and where she was brought up. The parties met in Canada and married in Calgary on 13 September 1999, subsequently undergoing a religious ceremony of marriage in England in 2001. They lived principally in Canada where X was born in July 2005, but the mother spent much of her time over in England with her own family.

4. When the parties married in civil proceedings in Canada in September 1999, they did not tell either the maternal or paternal family, nor did they co-habit as man and wife until the marriage had been consummated by a religious ceremony in 2001 in the United Kingdom. Thereafter they still did not co-habit, the father returning to Canada where he was employed as a lawyer and the mother remaining living in England with her parents and working in employment here as an IT Consultant. However, in December 2002 the mother joined the father in Canada. They lived in the home of the father's mother until March 2004. This placed a considerable strain on their marital relationship and the parties moved to their own flat in Canada on the mother's insistence. The position improved for a time, but the mother felt undermined by the father's family and sorely missed the absence of the support system provided by her own family in England. After X's birth in July 2005, for which the maternal grandmother came out to Canada for 3 months, the mother returned to England in September 2005 with the maternal grandmother to recover from a difficult birth. She remained there till February 2006.

5. By then the marriage was in trouble and it is the mother's case that on returning to Canada on February 2006, the parties agreed to live separately but that the father subsequently refused to move out of the flat as agreed. Instead they moved to a house with a garden and the father was persuaded to attend marriage guidance sessions, but he missed a number and failed to follow the programme set by the counsellor. By then there was a considerable degree of hostility between the two extended families and the divided loyalties of the parties aggravated the position between them.

6. In October 2006, the father agreed to the mother taking a three week holiday in England from 13 October to 5 November 2006. The maternal grandmother was unwell at the time and, after discussion with the father, the mother extended her holiday to 3 December 2006.

7. On 20 November 2006 the father informed the mother that he was taking leave from his job in Canada from 19 December 2006 to 5 January 2007 in expectation that the parties would travel to Winnipeg for Christmas with his wider family and thereafter to a family wedding in Los Angeles. However, in December 2006 the mother, by now 3 months pregnant with Y, was experiencing complications with her pregnancy and was in a fragile state. She informed the father that she was ill and seeking medical attention in England. A report dated 19 December 2006 from her Consultant Obstetrician shows that the pregnancy itself was by then progressing satisfactorily but that because of the mother's 'severe distress' and concern that her unhappiness was affecting her child and unborn child, she was referred to a consultant psychiatrist who, on 28 December 2006 recommended that she remain in the United Kingdom with her family during the vulnerable period of her pregnancy and should continue to receive the support of her family for her complete recovery.

8. On 28 December 2006 the father e-mailed the mother to say that he was coming to England on 9 January 2007 to collect the mother and X and take them back to Canada.

The First Convention Proceedings

9. On 5 January 2007 the mother, wishing to remain in England and fearing removal of X by the father, obtained ex-parte from His Honour Judge Ryland (sitting as a judge of the Family Division) an interim residence order in respect of X and a prohibited steps order preventing the father from removing her from the care and control of the mother. The order was served on the father on 8 January 2007, the return date being 12 January 2007.

10. In her sworn statement of 5 January 2007 in support of her application, the wife set out the unhappy history of the marriage from her point of view, the complications she was experiencing with her pregnancy, and her current state of health supported by medical reports. She stated that she had reached the conclusion that the father and she did not have a future together as a married couple. She referred to the support she received from her family in England which was lacking in Canada she stated: 'I have had difficulties with this pregnancy and consider that it is in the best interests of the unborn baby and X that I am able to remain in England for the remainder of my pregnancy and a short period after the birth of the unborn baby.' She also stated that she had reached the conclusion that she wished to seek the father's agreement or, in its absence, permission from the Canadian Court 'to live with X and our unborn baby long-term' in England. She stated that in spite of the significant periods of time she had spent with X in England since her birth she recognised that X's home was in Canada and that it was appropriate for her to apply to the Canadian Court for permission to remove X in order to live in England. She also stated that before Christmas 2006 she had instructed her Canadian lawyer to apply

for permission for her to remove X temporarily while she remained in this country but that her Canadian lawyer had been unable to make the application before the courts in Calgary closed on 21 December 2006. Her lawyer intended to make an application as soon as practicable after the courts re-opened on 8 January 2007, but she made her present application because of her fear that the father might attempt to remove X before her Canadian application had been heard.

11. In the event, on 8 January 2007 the mother's Canadian lawyer filed a statement of claim for divorce. At paragraph 10 it stated 'The parties are resident in Alberta'. On 11 January prior to service, the lawyer informed the father by letter that she had instructions from the mother to apply for an Order allowing X to reside in the interim with the mother in London. However, (for reasons which have not been made clear) an application in Alberta for permission to remove X was not filed at that time.

12. Upon 12 January 2007 the father, who had so far remained in Canada despite his earlier e-mail of 28 December 2006, issued an originating summons under the Hague Convention seeking the summary return of X to the jurisdiction of Canada and on the same day directions were given which inter alia stayed the mother's Children Act proceedings pending the outcome of the father's Convention application.

13. Because of what next follows, the Originating Summons was withdrawn at a stage when the only evidence filed in relation to it was the affidavit of the father's solicitor dated 12 January 2007. The summons identified a wrongful retention date of 5 November 2006 which was the date of the mother's return ticket to London booked by the father under the original holiday arrangement. However, the affidavit made clear that, before that date, the mother had told the father that she was re-scheduling her return date because of her mother's ill-health and thereafter set out a short history much as I have described it above. No alternative date for alleged wrongful retention was identified, but the matter was put on the basis of the mother's failure to comply with requests subsequently made by the father to return to Calgary, culminating in the mother's application for an interim residence order at the beginning of January 2007.

14. On 13 January 2007, in a telephone conversation to which I refer in more detail below, the father suggested, and by e-mail of 17 January 2007 the mother agreed to, an attempted reconciliation and that the father should come to England for that purpose.

15. On 29 January 2007 , following three meetings between the parties (to which I shall refer in more detail below), a consent order was made by Coleridge J which recited inter alia that it was made:
"Upon the basis that the father does not:

(i) Acquiesce in the alleged wrongful retention of the said child by the mother,

(ii) And that he does not agree that the habitual residence should be changed to England and Wales.

And Upon the basis that the habitual residence of the said child is Canada,

And Upon the mother agreeing an undertaking to the court to withdraw and not pursue the current divorce proceedings and any current proceedings for permission to remove the child from Canada,

And Upon the basis that the parties are currently attempting to reconcile.

And Upon the basis that parties do not intend whilst they are attempting to reconcile to bring any further proceedings in Canada in respect of the child …"

16. The operative part of the Order provided:
"1. The Originating Summons dated 12 January 2007 pursuant to the Hague Convention 1980 and the inherent jurisdiction is withdrawn.

2. Permission is given to the mother to withdraw the proceedings issued by her pursuant to the Children Act 1989 …

3. The [directions] Order of 12 January 2007 is hereby discharged.

4. The passports and travel documents for the child should be held by the mother's solicitors Messrs Manches to the order of the court or alternatively with the agreement of both parties in writing

5. There should be no order of the court as to costs …"

The attempt at reconciliation:

17. On 30 January 2007, in pursuit of their attempted reconciliation, the parties moved into a rented flat together in Ilford leased to the father for a six month period. However the reconciliation had no time to develop, because the father's uncle and cousins also stayed at the flat and after only 6 days the father left on 5 February 2007 in order to go to Canada for a couple of weeks to attend to a variety of matters in anticipation of his staying in England until after Y was born. However, his absence extended to two months and the mother, discouraged and feeling unwell, moved back with X to her parents' home and remained there till 9 April 2007 when the father returned to England. The parties resumed living together in the Ilford flat, but the attempted reconciliation was short-lived.

18. So far as the attempted reconciliation is concerned, it is the father's case that in January, prior to his withdrawal of the first Convention proceedings, he and the mother expressly agreed that the mother would remain in England for the birth of Y but that, following the mother's recovery from that birth, the family would return to Canada afterwards, he agreeing to ask for six months unpaid leave from his job to enable him to spend the time in England. Meanwhile he returned to Canada on 5 February 2007 to put his affairs in order during his planned absence. E-mail exchanges exhibited by him show that during his stay in Canada the parties communicated in affectionate terms anticipating a return to Canada after Y's birth. They were also discussing financial concerns. Thus on 4 March 2007 the mother referred to a need for her National Insurance money so that she could claim for things "while I'm here"; and on 7 March 2007 expressed concern that "we have huge debt and no income coming in even though right now I need to be here in England." On 9 March 2007 the father referred to a line of credit to "finance our extended time in London before we come back home." And on 1 April 2007 he expressed reluctance to buy anything in England "while we are there for the next few months".

19. It is the mother's case there was never an agreement that she would return to Canada. The agreement was that she would remain in England until X was born and the father would come to live in England with the mother in an attempt at reconciliation, he expressing willingness to live with her in England in order to save the marriage. However the matter was left open as to where they would live once reconciled. Whilst, during the husband's absence, she corresponded with him in terms that anticipated there might be a return to Canada after the birth of X, she never agreed to it. She was hurt and concerned that the father was staying away so long rather than living with her in an effort to reconcile and to settle their future as he had agreed. Her desire to live in England with the support of her family persisted.

20. On 9 April 2007 the father eventually returned to England and the parties resumed living together in their flat in Ilford. However relations deteriorated, the reconciliation broke down, and the mother left the flat with X to return to her parents' home on 18 May 2007 with Y's birth imminent.

21. On 24 May 2007 Y was born, but the parents remained living apart, contact being arranged between the parties in relation to both of the children. Arguments and difficulties quickly developed over contact and currently persist.

22. On 28 June 2007 the father issued an application for defined interim contact and District Judge Roberts listed the application for a conciliation appointment on 9 July 2007. At paragraph 64 of his affidavit in support of his application the father stated that he would be issuing an application for a return order in fresh Convention proceedings. On that day a consent order was made for the father to have contact with both children and on 10 July 2007 the mother issued an application for residence and a prohibitive steps order. On 27 July 2007, at a hearing before District Judge Waller an order was made recording that the father intended to issue a new Originating Summons under the Child Abduction and Custody Act 1985 and directed that the applications under the Children Act be transferred to the High Court to be heard at the same time as the Convention application.

23. The relevant evidence in the Children Act proceedings (on which the parties also rely) consists of the father's affidavit of 28 June 2007, the mother's undated statement in reply, and a further statement by the father dated 16 August 2007. Most of the evidence is directed to the circumstances of the final break-up and difficulties between the father and mother, and in particular the mother's sisters and extended family who plainly became hostile to the father. However, in dealing with the background, at paragraphs 5 to 12 and 13, of the father's affidavit of 28 June 2007 the father set out his position (a) that the reason why the first Convention proceedings were withdrawn was that the mother insisted upon it as the price of the attempted reconciliation (b) that he withdrew the proceedings against the advice of his lawyer and on the understanding that, if he did so and if the mother refused to return to Canada after the birth of the second child 'one of my children [X] would have a habitual residence in Canada and our new born child will be habitually resident in England' and (c) that he made arrangements with his employers for a period of extended unpaid leave of six months up to the end of August 2007 on the basis there would be sufficient time for the mother to have her baby and for her and the baby to become fit enough to return home to Canada.

The Second Convention Proceedings

24. The father's second Originating Summons was issued on 23 August 2007 and on that day directions were given, including a direction that the mother file a defence by 7 September 2007. The mother requested further particulars of the Originating Summons which were duly provided on 12 September 2007.

25. In response to that request, a series of alternative dates was pleaded for the wrongful retention relied on. In relation to X the first date given was 5 November 2006 (the date relied on in the first Originating Summons when the mother was due back in Canada after her visit to England but failed to return). Alternatively the date was put as 18 May 2007 when the mother left the temporary family home in England taking X with her. Alternatively the date was put at 24 May and 5 June, being the dates of letters written by the mother's solicitors in terms which it is said indicated her refusal to return the child to Canada, the final alternative being 10 July 2007, the date of the mother's reply to the father's Children Act application in which she indicated that she refused to return X to Canada.

26. So far as Y was concerned, the date of wrongful retention was put on the alternative basis of the same solicitors' letters of 24 May and 5 June 2007 and the mother's reply of 10 July 2007.

27. The evidence in the second Convention proceedings now before me is in the following form. In a brief first affidavit the husband refers to the first proceedings, stating that they were withdrawn because the mother told him that she wished to reconcile their relationship, but only on the condition that he would withdraw the first proceedings and that he acceded to the request to save the relationship. He then refers and relies on his affidavit sworn on 28 June 2007 in the Children Act proceedings in which he stated the position I have already set out at paragraph 23 above and goes on to assert his belief that he was deceived by the mother into a situation whereby she would remain in England in order to have their second child and then resist a return to Canada. Finally he states that he understands the situation with Y is "more complicated" as she was born in England and has never been to Canada, but asserts that this predicament is as a result of the mother's manipulation.

28. The mother's affidavit in answer dated 1 October 2007 is a very lengthy and substantial document, dealing in some detail with the history of the marriage and painting a picture of the father as a self-righteous and emotional bully, who was dismissive of the wife's unhappiness and the problems developing in their marriage and who would assert that, such problems as there were, were because of the mother's inadequacies as a wife and person. This had induced in her by October 2006 when she came to England a sense of isolation, despondency, depression, and emotional detachment, lacking as she did any family support network in Canada. As to her position in December when she failed to return to Canada at the end of her extended holiday, she states at paragraph 28 of her affidavit:

"I had decided in December 2006 that I wanted to remain living in England and that I would not return to live in Canada. I have not changed my position in that regard since then. I was aware that I needed the permission of the Canadian Court for the plaintiff's consent for X to remain living in England. The plaintiff approached me very quickly after he had issued his application for X's return to Canada to ask that we reconcile. I agreed and the proceedings that he had issued were withdrawn. I did not at that time or any time since agree that I would return to live in Canada. Had our reconciliation been successful we may have gone to live in Canada again. It was certainly something that I would have been willing to consider had the reconciliation been successful.

Certainly I was aware that in the event of a successful reconciliation it was something that the plaintiff would seek for us to do at some stage. The fact is that we never got so far as to consider any return to Canada as the reconciliation broke down very shortly after the plaintiff returned to England in April 2007 and indeed never really got off the ground because the plaintiff left England on 5 February 2007 and stayed away."

29. Having described again her feelings about living in Canada she observes at paragraph 40:
"I cannot return to live in Canada. It is impossible for me to do so. I cannot function in that country. I have profoundly unhappy experiences and I lived an unhappy isolated life in that country. I have no support network there whatsoever. I am simply not psychologically able to return to live in Canada. If I did so my health would severely suffer. The new application for X's return has caused me distress and turmoil. I could not contemplate the prospect of X or Y going to Canada out of my care, to do so would be intolerable for them. They are entirely dependent on me and they should remain in my primary care."

30. In contrast with the mother's position as quoted at paragraph 27 above, namely that of a "trial" reconciliation, the outcome of which would eventually determine whether and where the parties would live together, the husband's stated position, at paragraphs 60–65 of his second affidavit is as follows:
"63. … Because [the mother] told me that she was having such a difficult pregnancy and that she wanted the support of her family, I then suggested that I fly to England in order to be with her until the baby was born, after which we would return to Canada. I absolutely did make clear that we would return to Canada. [The mother] stated that she would reconcile with me and return to Canada if I withdrew proceedings. I agreed to do so and it was upon this basis that we took on rental property for six months in Ilford.

64. Our reconciliation did not take the form of a "trial" as [the mother] seems to suggest. It was an agreement that I would spend six months in England with [the mother] so that we could iron out our differences and then return to Canada after the baby's birth. I remember [the mother] and I met to discuss this agreement at the Ilford Exchange shopping centre in January 2007 … [The mother] was very quick to come to an agreement with me during that meeting.

65. Once installed in our flat in Ilford, [the mother] gave me numerous assurances that we would return together soon after the birth of our second child and we would stay no longer than the end of August. I never indicated to her that we would try to live in England for longer than the six-month unpaid leave that I had obtained from my employer."

In the light of this clash of evidence as to whether or not the wife agreed to return to Canada after the birth of Y and its bearing upon the issues raised as to a wrongful retention, acquiescence and habitual residence, counsel agreed and I accepted that it was appropriate for me to hear oral evidence upon the question.

31. In the course of that oral evidence it became clear that, following service of the mother's divorce petition and the immediate issue of the first Convention proceedings, the initiative for a reconciliation came from the father. This is apparent from the transcription of material passages from the telephone conversation referred to by me at paragraph 13 above, the conversation having been recorded by the mother's sister on a tape to which I have listened in chambers.

32. The father urged the mother that they put an end to their differences for the sake of their future as a family and before large sums were spent upon lawyers consuming what they had in the past worked together to save. He said that he would arrive on Monday 15 January and they could be together in England for whatever time the wife wanted, she enjoying the support of her family as well as himself. He said among other things:
"I'll make it so that we are together and I'll be in England for like whatever time you want and whenever you want to come to Canada, you come to Canada. You know and just we have to make it work … You can have your support system, you can have me as your … husband, I am your support system too. If you need that extra help, I'll accept it, and that's fine.

We … can't be apart … you know that we can't be apart and you living in your parent's house with everybody there, but if you feel comfortable there for now, that's fine. but we will make it so that may be we have got to buy a house in England or figure out something … I'm willing to stretch and figure out, leave my job, change things

to make you happy … we got to radically change everything and if you're happy in England for a good part of the time, I'm happy … and I'll make it so I'll go with you. And then at the same time you've got to say "my husband is willing to spend to try to find a business or do something in England, when I can spend sometime in Calgary too … I'm willing to change my whole lifestyle, everything.

I'm going to come Monday and I'll stay with you and we'll sort … like … whatever you want to do, you want to stay for longer, we'll figure that out. What we'll have to do … Coz I'm going to leave my job if you are going to stay in England, I'll come to England for a while. We'll have to sell some stuff and just so we have some resources and then we've got to figure what we'll do."

33. I have quoted from that conversation at length because, in her first affidavit in the proceedings the mother had briefly, but broadly accurately, summarised it as a telephone call in which the husband asked her to agree that they would put a stop to the proceedings, saying that he would come to England, they would figure things out and that he would not insist that she return to Canada but rather suggested that they rent a flat in England. In his affidavit in reply, unaware of the recording from which I have quoted, the husband had set out his version being that of an agreement by the wife to return to Canada: see paragraph 63 of his second affidavit, quoted by me in paragraph 30 above.

34. When the father arrived in England he stayed in a hotel. He did not wish to stay with the wife and her family because of her family's hostility to him, a position which the wife understood and with which she then sympathised. It is common ground that, between the father's arrival and the withdrawal of the first proceedings, there were three meetings between the father and mother. On the first occasion, they met at the Whiteley's shopping Mall in Queensway, the wife bringing X with her. Their evidence as to the detail of that meeting radically differed.

35. It was the father's evidence that the meeting was a loving reunion in which having spent time together at Whiteley's they went back to his hotel for two hours, X going to sleep and the parties then being intimate together before going to a dinner at 10:00pm at Khan's Restaurant. As he put it, the position was that they were fully reconciled and looking forward to the birth of their second child. He said it was agreed at that meeting that they would stay in the United Kingdom for a short period till after the baby was born and then return to Canada together as a family. They parted on loving terms.

36. The mother's evidence was very different. She said that she had made clear that she did not want to go back to the father's room but that he had made a fuss and said that he wanted to go because he was tired. She did not object further because she did not want a fuss; however she said that he was well aware that she did not wish to go. Once there the father said that he wanted to lie and play with X, the mother agreed and they lay on the hotel bed with X between them. The father kept trying to touch her intimately when she was not willing and X became upset. She insisted that intimacy did not occur; the father had tried to initiate it, but she would not agree. Having seen the parties give evidence I am quite satisfied that the mother's account is the true one. I reject the father's evidence that they were intimate or that there was on that occasion any agreement that they would return to Canada shortly after the baby was born. In fact, in cross-examination, the father stated that while they had discussed the possibilities of what would happen upon reconciliation, and when there might be a return to Canada, no agreement was reached.

37. The mother said that, following that meeting, with efforts at reconciliation proceeding, she was surprised and upset to receive a letter from the husband's solicitors on 22 January 2007 to the effect that he was in fact continuing with his application. The mother stated in her affidavit, and the father did not contradict, that the parties spoke and the father explained that his lawyers were not following his instructions and were trying to persuade him to continue with his application and that he would again instruct them that he would withdraw.

38. The parties next met in a shopping mall at the Ilford Exchange shopping centre: see the reference in paragraph 64 of the father's affidavit quoted at paragraph 30 above. The father said, and I do not doubt, that he had proposed a further meeting to try to finalise things in relation to the reconciliation. The mother came with X and, for moral support, brought her sister Navila who sat two or three tables away. He said they discussed the marriage and the future and how the mother felt about her pregnancy. He told her what he had done to improve the family home back in Calgary. He said he had agreed with his office that they would give him leave of

absence till August and that the mother was quick to agree the end of August as the date for her return following the birth of the baby. He said they discussed taking a flat and living together and the wife agreed.

39. Save in relation to her return to Canada, the mother's version differed less as to the detail than the tone of the meeting. She said that the husband arrived, or very soon became, angry, accusing her of taking his child away, such that the sister came over from her table, only to be told to go away by the husband. She said that they discussed at length the pregnancy, the differences between their families, and their possible reconciliation. The father wanted them to live in a rented flat away from her family and she agreed, but she did not agree that she would return to Canada. They would see how the reconciliation worked out and there was no decision as to where they would live long term. The father never asked for a deadline and she never agreed one.

40. Again I prefer the mother's evidence to that of the father, save in one respect. At one stage in her cross-examination, she stated that the father never mentioned the question of their return to Canada. I do not accept that was the case, or that from the manner of her reply she necessarily meant that answer. Bearing in mind the husband's overall desire to return to Canada and the arrangements he had made (his leave of absence for six months and the proposal that they take a flat for that period) I do not doubt that he made clear his position, or that (if he did not) the wife was nonetheless well aware of his desire and expectation, that they would return to Canada following Y's birth. The recurrent theme of the wife's evidence was not that the husband was prepared to live with her indefinitely in England, but simply that she never *agreed* to go to Canada. Her overall position was, as I find, truly represented by another answer which she gave in cross-examination, namely "as far as I was concerned, we had to work out our differences before anything would be decided."

41. The evidence as to what passed between the parties after that second meeting and prior to the consent order for the withdrawal of the first Convention proceedings is sparse. The father stated that, on 29 January, he agreed to withdraw the proceedings only on the basis of the mother's assurance of a return to Canada after Y was born. That I do not accept. What neither party made clear in evidence is how, following the second meeting I have described and a third meeting at Valentine's Park in Ilford, which apparently went well and to which the parties did not speak in detail, the terms of the consent order came to be agreed. The father asserts, that the mother was insistent in relation to the whole reconciliation process that the Convention proceedings should be withdrawn and I do not doubt from her overall evidence that the mother regarded the continuation of the proceedings as inconsistent with the father's declared desire for a reconciliation. Equally, bearing in mind the father's profession is that of a lawyer and that his ultimate desire and intention was that the parties should return to live, in Canada, I have no doubt that at the time of the consent order, the advice of his solicitors and his own intention was that, despite his agreement to withdraw the proceedings, his position in respect of X should be recorded and preserved so far as possible against the event that the reconciliation broke down.

42. On 24 January 2007 the father's solicitors wrote:
"We have instructions from our client for the Hague Convention proceedings to be withdrawn, as your client has indicated to our client he wishes to reconcile. <u>They propose to remain in this jurisdiction for a short while, when your client will return to Canada with our client</u> .

We should place on record that our client has not acquiesced or consented that his daughter remain in this jurisdiction but we understand that your client has made it quite clear a reconciliation can not be considered whilst the Hague Convention proceedings are still effective. Our client has taken your client's word on trust." (Emphasis added)

43. There was then a telephone call between the solicitors, following which a further letter was written by the father's solicitors which conspicuously omitted the passage I have emphasised above. I readily infer that it was omitted because the mother's solicitors would have made clear that there was no agreement to that effect. Furthermore, by letter dictated 26 January 2007 but dated 29 January 2007 the mother's solicitors wrote:
"… My client has given careful consideration to your client's wish to reconcile and his assurance that he is willing to do what it takes to save their relationship and keep their family together. She hopes that their efforts to reconcile will be successful and considers that it is helpful that your client has acknowledged that for the sake of the health of herself and the unborn baby, she should be able to have the baby by Caesarean Section in England where she has the support of her family."

No doubt it was on the position as left in the correspondence that the husband was advised of the difficulty he would face in respect of Y if the reconciliation was not successful (See paragraph 23(b) above).

44. In sum therefore, I reject the father's evidence that the mother ever agreed she would return to live in Canada. At the same time, however, she never said she would not. Common sense supports her evidence, which in any event I accept, that, following the birth of Y, the long-term living arrangements were to depend upon the success or otherwise of the reconciliation to be attempted between them and that in any event the wife should give birth to Y in England where the support of her family was available. At the same time, I am satisfied, that, when the proceedings were withdrawn, the mother was aware that the father hoped that the family would return to Canada and he was seeking through his lawyers to reserve his position in relation to X's retention for the purpose of future proceedings if the attempted reconciliation failed.

45. So far as the progress of that attempted reconciliation was concerned, it was, as already indicated, unsuccessful. Having heard and seen the mother, I reject the father's assertion that, at the time of the consent order, her motives were cynical or insincere and I am satisfied that she genuinely intended at that stage that the parties would be reconciled and decide their long-term future living arrangements after the birth of Y, the husband having made clear his willingness to live in England if necessary to save the marriage (see paragraph 32 above). The mother withdrew her divorce proceedings in Canada as anticipated in the consent order.

46. The first week in the flat at Ilford was a relative but limited success from the point of view of the relationship of the father and mother, because as already indicated, his relatives were staying, and after a few days the father departed for Canada and stayed there for substantially longer than anticipated, attending to his affairs and, in part, the affairs of his extended family. By the time of his return some two months later in April 2007, the circumstances were not auspicious. The mother was depressed and unwell with her pregnancy; according to her, the husband had stayed away too long and, when he returned, he was emotional, bullying, and insensitive to her condition. Furthermore, it is clear that her family were taking her part in her differences with her husband. The father, on the other hand, says that he was considerate and understanding, but that the mother was by then under the influence of her family, particularly her elder sisters who were hostile to him and exercised a dominating and subversive influence over the mother during the delicate stage of her pregnancy and, following the birth, were obstructive and restrictive of his contact with Y. As already indicated at paragraph 23 above, most of the evidence immediately concerned with those matters is contained in the affidavit and statements in the Children Act proceedings. Because of its length, and the many issues raised which are not susceptible of resolution in Convention proceedings, I do not propose to refer to it further.

47. The parties have made their submissions under the following headings: Wrongful retention, acquiescence, habitual residence, and intolerable situation. In the light of the evidence as recited or referred to above I now turn to consider the position under each such heading in relation to X.

The Issues: X

Wrongful Retention

48. For the purposes of the Convention, retention is an event which occurs on a specific occasion rather than enjoying its usual and wider connotation of a continuous state of affairs. It occurs when a child who has previously been for a limited period of time outside the state of its habitual residence is not returned to that state on the expiry of that limited period: Re H , *Re S (Minors) (Abduction: Custody Rights) [1991] 2 AC 476* at 499–500. The retention is rendered wrongful where it is in breach of rights of custody attributed to a person, either jointly or alone under the law of the state in which the child was habitually resident immediately before the removal or retention (see Article 3 of the Convention) and at the time of the retention those rights were actually being exercised or would have been so exercised but for the retention (see Article 3(b)). Article 3(b) is construed widely to mean that the custodial parent must at the time of the retention be maintaining the stance and attitude of such a parent, rather than requiring that he or she must be continuing to exercise the day to day care and control, as in a case where the custodial parent has consented to a period of staying access with a non-custodial parent (see Re H , Re S at 500–501) or, as here, has consented to the temporary removal of a child by the other custodial parent to another jurisdiction for a particular period.

49. In this case, it is not in issue, that at the time of the wrongful retention alleged, the father enjoyed custodial rights under Canadian law in November/ December 2006 in respect of X.

50. Retention by a parent may take a variety of forms, including not only acts of physical restraint or refusal in response to a request, but also court orders obtained on the initiative of the retaining parent which have the

effect of frustrating the child's return to the jurisdiction of its habitual residence.

51. In this case, in the first (withdrawn) Convention proceedings and, by repetition in the second proceedings, the date of the wrongful retention is put at 5 November 2006, the original date for the mother's return from holiday. However, on the evidence before me, it appears at least likely, as the mother asserts that her November return date was re-scheduled to early December with the agreement of the father. Again, at the point when the mother was advised not to travel in December 2006, and thereafter prior to Christmas, it is not clear how far the father pressed his requests that the mother return, as opposed to reluctantly accepting her continued presence in England. What is clear, however, is that (a) the mother asserts that by December 2006 she had in fact formed an intention to stay in England and (b) she went on staying with her family over Christmas with the result that the husband insisted on her and X's return by 9 January 2007, stating that on that date he would personally come over to collect them.

52. In these circumstances, whatever the uncertainties as is earlier position, the mother's wrongful retention of X crystallised at the point when, in the face of that deadline for her return, she made her *ex parte* application for a residence and prohibited steps order in respect of X, which was served on the father on 8 January 2007 at the same time as the mother's divorce petition. In her affidavit in support of that application, the mother made clear that, in the absence of the father's agreement, she recognised that X's home was in Canada and that she required the permission of the Canadian court to remove X from the jurisdiction to live in England. I am therefore clear that, whatever may have been the situation before, a wrongful retention for the purposes of the Convention occurred on that date. Albeit in the father's first Convention application the date was put as early as November, the affidavit of the father's solicitor made plain that the series of subsequent events was also relied on and that position is maintained in the current proceedings.

Acquiescence

53. It is Mr Scott-Manderson's submission that, pursuant to Article 13(a) of the Convention, the court is not bound to order the return of X to Canada because the father subsequently acquiesced in her retention by withdrawing the first Originating Summons. He submits that, by such withdrawal, the father abandoned his Hague Convention application for X's summary return, and that the effect of that order constituted a final conclusion of the issues raised in his application, just as if they had been adjudicated against him. He submits that, had the father wished to reserve his position while a reconciliation was pursued, the proper method of proceeding would have been shortly to adjourn the application to so as to keep the proceedings for summary return alive, while allowing discussion, mediation or conciliation, to be tried, preferably by referring the parties to the services of Reunite, as sometimes occurs when the court considers such reconciliation may be possible.

54. Mr Scott QC for the father, on the other hand, submits that the position is straightforward. He submits that the order (which he emphasises was a consent order) speaks for itself and that its particular form was plainly arrived at to enable an attempted reconciliation to take place while the father preserved his position that the mother's original retention of X was wrongful, should that reconciliation fail. In this respect he relies upon the speech of Lord Browne-Wilkinson in *Re H and Others (Minors) (Abduction: Acquiescence) [1998] AC 72* . Whilst Mr Scott acknowledges the position is an unusual one, namely a withdrawal of proceedings, followed later by fresh proceedings in which the original matters of complaint are reasserted, he submits that no question of *res judicata* or estoppel arises and, that in the light of the wording of the consent order the suggestion of acquiescence on the part of the father is unsustainable.

55. It is common ground that the question of acquiescence falls to be considered in accordance with the principles expounded in Re H at pp881–884, in which Lord Browne-Wilkinson rejected the view that English concepts of acquiescence, which require that the words or actions of the relevant actor are objectively construed, are appropriate to the proper construction and application of Article 13 of the Convention. At p.884, Lord Browne-Wilkinson summarised the applicable principles thus:

"(1) For the purposes of Art 13 of the Convention, the question whether the wronged parent has 'acquiesced' in the removal or retention of the child depends upon his actual state of mind. As Neill LJ said in Re S (Minors) 'the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact'

(2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.

(3) The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law.

(4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."

56. In relation to the exception in paragraph 4 of that summary it is to be noted that the words or actions of the wronged parent must "clearly and unequivocally" show that he no longer asserts a right to the summary return of the child. In this connection, it is also pertinent to note an earlier passage in Re H (at p.882–3) in relation to the situation which arises when the wronged parent seeks to effect a reconciliation.
"Once it is established that the question of acquiescence depends upon the subjective intentions of the wronged parent, it is clear that the question is a pure question of fact to be determined by the trial judge on the, perhaps limited, material before him.

… In reaching conclusions of fact, judges always, and rightly, pay more attention to outward conduct than to possibly self-serving evidence of undisclosed intentions. But in so doing the judge is finding the actual facts. He can infer the actual subjective intention from the outward visible acts from the wronged parent. That is quite a different matter from imputing to the wronged parent an intention that he did not, in fact, possess.

Although each case will depend on its own circumstances, I would suggest that judges should be slow to infer an intention to acquiesce from attempts by the wronged parent to affect a reconciliation or to reach an agreed voluntary return of the abducted child. The Convention places weight on the desirability of negotiating a voluntary return of the child: See Art 7(c) and Art 10 … Attempts to produce a resolution of problems by negotiation or through religious or other advisors do not, to my mind, normally concede an intention to accept the status quo if those attempts fail. 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 findings as to the state of mind of the wronged parent" (emphasis added)

57. Applying those principles to the facts of this case, and in particular to the submissions of Mr Scott-Manderson QC on the effect of the consent order, I find myself unable to make a finding of acquiescence by the father.
58. First, I reject Mr Scott-Manderson's submission, so far as he persisted in it, that the withdrawal of the first Convention proceedings amounted in law to the equivalent of an adjudication, or otherwise to a species of waiver, election or estoppel which prevented the taking of fresh Convention proceedings if the planned attempt at reconciliation (set out as the basis for the order) proved abortive. There was no adjudication of any kind upon the issues raised or intended to be raised in those proceedings and it does not appear to me that, on ordinary principles of English law, any estoppel or waiver could be made out.
59. I have no evidence as to the discussions between the lawyers prior to the making of the consent order; only the correspondence leading up to it. From the point of view of the father's lawyers, who were plainly concerned to protect his position, they would no doubt have preferred to preserve the existence of the first Convention proceedings pending the attempted reconciliation. However, I am satisfied that the wife required withdrawal of the Convention proceedings as a demonstration of good faith in relation to the proposed reconciliation and, for the husband to refuse to withdraw might have proved fatal to the attempt at reconciliation.
60. Whether or not that is so, however, as I have made clear in my findings, I do not consider that at the time of the making of the consent order (expressly upon the basis that the parties were currently attempting to reconcile) the father was subjectively acquiescing to the earlier wrongful retention of X (again as expressly stated in the order). Nor, whatever the mother's beliefs or hopes as to the father's intentions was she under any illusion in that respect. Her pressing concern, as made clear by the content and manner of her oral evidence before me, was an assurance, which she stated her own lawyers gave her at court, that there was nothing in the order which required her or X to return to Canada. At the same time, she did not suggest, nor could her lawyers have told her in the light of the recitals in the order, that the father was withdrawing his Convention proceedings for other than the purpose of the proposed reconciliation. No doubt, as the mother also stated, her intentions to pursue a reconciliation at that stage were also genuine. However, I do not accept, nor did she state, that she was led to believe that, if the attempted reconciliation broke down, the husband might not again seek X's summary return to Canada.
61. In those circumstances, the exception provided for in paragraph 4 of Re H as quoted above, does not apply

and there is no good basis on which to find that the father acquiesced in the retention of X in January 2007.

62. Nor do I consider that by his subsequent conduct the father can at any stage be regarded as having so acquiesced. During his period of absence in Canada in February, March and early April 2007 he had no reason to suppose that the mother was intending never to return to Canada in the light of the e-mail exchanges to which I have referred in paragraph 18 above. He had by that time agreed, as part of the proposed reconciliation package, that the mother should in any event stay in England with the support of her family until after she had given birth to her new baby and for him to abide by the terms of that agreement could hardly be said to amount to an action which clearly and unequivocally showed to the mother, or led her to believe, that he would not assert his right to the summary return of X if the mother refused to return with her, once she had recovered from the birth of the new baby. When the attempted reconciliation unequivocally broke down on 18 May 2007 when the mother quit the flat just before the birth, nothing said or done by the husband indicated acquiescence and when, following the birth, he felt obliged to issue an application for defined contact, he stated in his affidavit of 28 June 2007 that he would also be issuing an application for a return order in fresh Convention proceedings. That intention was recorded in a court order on 27 July 2007 and four weeks later the second Originating Summons was issued on 23 August 2007. I do not consider that anything occurring during that sequence of events could be said to establish acquiescence by the father.

Habitual Residence

63. Building upon his submission that the father could not rely on alleged retention prior to the withdrawal of the first Originating Summons, Mr Scott-Manderson QC submitted that X's continued presence after the making of the consent order could not be wrongful as there had never been any agreement that she should be returned to Canada, the father thereafter not insisting on any date for her return. However, for the reasons I have already given, I do not consider that, in the current proceedings, the father is precluded from relying on the mother's wrongful retention of X prior to the withdrawal of the Originating Summons.

64. Nor do I consider that importance attaches to the fact that the father has failed to prove the date of the wrongful retention was 7 November 2006 as pleaded, I having found that 8 January 2007 is the appropriate date. In a case such as this, where the evidence may be confused or uncertain as to the state of agreement between two spouses as to the period for which one of them should be at liberty to take or retain a child abroad, the task of the court in establishing the date of the wrongful retention does not depend on the state of the pleading, but on the substance of the matter as it appears to the court after proper analysis of the evidence.

65. In this case, analysis establishes the wrongful retention of X as at 8 January 2007 i.e. prior to the first proceedings, and such wrongful retention survives the withdrawal of the first proceedings. That being so, 8 January 2007 is the date at which it is necessary to consider whether X was habitually resident in Canada for the purposes of Convention proceedings in England.

66. To that question, there can be only one answer, namely that she was so resident, given that the parties, properly represented and advised, expressly so stated and agreed in the recital to the consent order. Thus, the question whether or not the answer might be different if the date of X's wrongful retention were postponed to 18 May 2007 or the alternative dates particularised in response to the mother's request for particulars does not require consideration.

Intolerable Situation

67. This is one of those unhappy cases, frequently encountered within this jurisdiction, in which the court is confronted, not with the effective kidnapping and removal abroad of a child from the custody of the primary carer, (the mischief which the Convention was originally concerned to remedy), but with the removal or retention of a child by a primary carer who, in a state of depression or desperation at her position in an unhappy marriage outside her country of origin, "goes home to mother" in order to enjoy the support and sympathy of her own extended family, taking with her the child or children of the marriage. That position, sad as it frequently appears, and sad as it is in this case, is one in respect of which the jurisprudence of the Convention is nonetheless clear and largely uncompromising. It does not require or permit the court in this country to apply ordinary welfare considerations in respect of its decision whether or not to make and order for return, but sets a higher threshold: See in particular *TB v JB (Abduction: Grave Risk of Harm) [2001] 2 FLR 515* per Hale LJ at paras [39]–[44]; Arden LJ at para [64–]–[71] and Laws LJ at [109]–112].

68. As I observed in S v B (Abduction: Human Rights) [2005] EWHC 733 (Fam), [2005] 2 FLR 878 at para [51] "… 13(b) sets a high threshold, as the authorities have repeatedly made clear; as Mr Turner observed at one point, it can be harsh in its operation. However tempted the court may be to temper the effect of the Convention on the basis of the broad welfare interests of the abducting parent and child as they appear in the summary snapshot before the court, it must restrain that inclination, ceding any decision in that regard to the court of the country of habitual residence: see the observations of Wall LJ in *Re J (Abduction: Child's Objections to Return) [2004] EWCA Civ 428, [2004] 2 FLR 64* at [93]. Only where a case of grave risk is established on the basis of

cogent evidence should it do otherwise. While the mother's psychological and emotional health are plainly matters of concern in this case, … the cogency of the evidence summarised at paras [16]–[20] above is not such that it enables me to find a grave risk of danger to the psychological health of X".

69. In this case, the mother, whom I have seen give evidence in court is obviously in a state of anxiety and depression (at this point I use the word 'depression' as a layman and not a clinician) at the prospect of a return to Canada should the court order the return of either of her children. I have already quoted her short summation of her feelings at paragraph 29 above and, on the evidence of her appearance before me, those feelings have in no way abated. Nonetheless, I remind myself that the "intolerable situation" upon which I must focus is that of X and not the mother. That being so, the key questions to which I have regard in relation to whether an order for return of X would place her in an intolerable situation, are first, the extent to which the mother's condition may affect her parenting skills and, if they are not affected to a serious degree, whether there is a grave risk that they would nonetheless so deteriorate on a return to Canada as to imperil the safety, or seriously impair the welfare, of X pending a welfare-based decision of the Canadian court.
70. In this respect I have before me reports from two psychiatrists. The first is that of Dr Sharma who saw the mother and reported on her condition on 28 December 2006 when she was contemplated filing a case in the Canadian court seeking permission to allow X to stay with her in the United Kingdom until after the birth of Y. Having briefly described her position and recorded her pre-morbid personality as "a stable pre-morbid level of social and occupational functioning with stable and positive personality traits", the diagnosis was stated to be one of "adjustment disorder with predominant disturbance of other emotions (currently in partial remission)". Beneath that diagnosis it was stated that she:
"Presented with psychological distress and mainly having the features of anxiety. The ongoing relationship difficulties and the continuing unpleasantness of the circumstances appear to be a primary and causal factor for her current mental state. She feels safe and secure in the present place where she is feeling supported by her family members. She has not presented with features of depression or any impairment in her social functioning or her coping mechanisms.

The ongoing stress of relationship issues and her pregnancy is making her vulnerable to emotional distress and the presence and support from her family crucial in minimising the impact of these stresses. The support from her family appears to have improved her psychological distress.

It is recommended that she remains in the UK with her family where she feels more secure, particularly during this vulnerable period of her pregnancy. It is also important for her to continue receiving such a support for her complete recovery."

71. The second report is that of Dr Win dated 31 August 2007, made in response to a request from the mother's solicitors "to comment on diagnosis, prognosis, [the mother's] ability to parent and care for her two young children in reference to whether or not the children should be sent to Canada, and the effect and consequences for [the mother] of an order that she should return to Canada".
72. Dr Win's report was based on two interviews with the mother on 3 May 2007 (i.e. three weeks before the birth of Y) and 5 July 2007 (i.e. six weeks after). The mother is described on the second occasion as having been unhappy about the abuse the father had shown to her family on contact visits, especially in front of their children, such as swearing at her sister. She was said to be unable to sleep properly with lack of appetite, having to force herself to eat and drink because of stress of the oncoming court case, and being low in mood, though with no psychotic symptoms or ideation of self-harm or harm to others. She was also taking medication on the advice of her GP which she was advised to continue. She was described as presenting "with feelings of apprehension and tension caused by her anticipating the possible dangers from the husband and his family as well when she returns to Canada" and as suffering from "insomnia, loss of energy and ability to concentrate and also feelings of guilt of not being able to protect her children." The diagnosis was that of "generalised anxiety disorder with depressive symptoms".
73. In relation to the prognosis, the following is stated:
"7. The prognosis depends on the treatment of the condition and resolving the conflict (with her husband) which is the main cause of her mental problems. She should have good progress if she is compliant with the medication. Her condition is exacerbated by ongoing relationship problems with her husband and his family as well as the stress of the thoughts of facing in court ….

8. With regards to her ability to parent and care I do not see any obvious reason that she could not do so …

9. As to the effect and consequences for [the mother] of any order that her children should return to Canada, in my professional opinion it would be detrimental to her mental health. Also, she needs a good network of support which I feel is well provided by her family here. I have discussed this with my Consultant Dr El-Fadl, and he feels that in such cases the primary concern is the welfare of the children. It appears from the brief interviews with her that she seems to have good general health and the symptoms occur with the encounter with her husband. In this regard I found no indication of limitation to her parenting."

74. By way of supplement to that report, on 5 September 2007 the mother's solicitors wrote to Dr Win observing:
"We previously requested your professional view as to the effect and consequences for [the mother] for an order that her children should return to Canada. If the children were ordered to go to Canada, as referred to in our initial letter, [the mother] would feel compelled to accompany them. Your report does not specifically deal with that latter point.

We should be very grateful if you would address that and give your medical opinion as [the mother's] treating therapeutic psychiatrist as to the specific consequences of her mental health and any consequential effect on her ability to parent these children if she were to return to Canada with the children."

It is important to note that in a follow-up letter dated 27 September 2007, the mother's solicitors stated:
"As to the prospect of her return to Canada the court cannot of course order that the mother returns to Canada. However, it is a fact that given the vulnerable age of her two children that it is likely that she would feel compelled to accompany them were such an order to be made in respect of them."

75. On 4 October 2007 Dr Win gave his opinion as follows:
"… if [the mother] is compelled to accompany her children to Canada, considering the information she has given regarding the circumstances in Canada and her vulnerability, in my professional opinion it would be detrimental to her mental health, as she would also be losing the support provided by her family here.

If her mental state declines from the current state, the ability to parent her children will be impaired also."

No detailed or reasoned opinion is proffered; nor is the degree of impairment assessed or elaborated.
76. It is Mr Scott's case that the nature and level of the mother's anxiety and symptoms are by no means unusual in cases of this kind. He forcefully points out that Article 13(b) is concerned with risk to the child and not (save indirectly) with the impact on the abducting parent, who almost inevitably will view a return with apprehension and may well experience distress, discomfort and hardship as a result of an order for return. However, recognising the fragile state of the mother, the father, through Mr Scott, offers to give appropriate undertakings to allow the mother on return to Canada to be in sole possession with the children of the family home at Dalhousie Drive and that neither he nor his family will visit her there save at her invitation or in accordance with the order of a Canadian court. She may thus avoid being confronted with the pressures which in prospect are causing her so much anxiety. Furthermore, it seems to me appropriate, and I proceed upon the basis, that the husband will similarly recognise by undertaking the right of the mother, (subject to any subsequent order of the Canadian court), to be supported in the home by any member of her own extended family who may be free to accompany or follow her to Canada and, if such support is not available, to employ domestic help lest the burdens of looking after X on her own prove too much for her on her own in her present state.
77. In considering the effect of the psychiatric evidence, I start, as did Dr Win, upon the assumption that, if I order the return of X to Canada, the mother will feel herself compelled to accompany her and that, in doing so, she will also take Y who is only six months old and dependent upon her love and care. Her solicitors so stated in their letter to Dr Win and, while the mother was not prepared openly to commit herself to this course in the proceedings before me, I do not doubt it to be the position. She is plainly a loving mother, whose devotion and parenting skills as the primary carer are not seriously in question.
78. I also proceed upon the basis that the parties will take immediate steps to bring the matter before the court in Calgary for a decision to be reached on the basis of a full welfare investigation as to the future arrangements for the children. To this end, I have already made inquiries of Justice Andrea Moen, the Justice of the Court of Queen's Bench in Alberta designated as the contact for Alberta in Hague Convention matters and I have been assured by her that, on application by either party, arrangements can be made for a speedy hearing in Calgary,

with a view to a full welfare enquiry which will no doubt include consideration of the psychological state of the mother if obliged to remain in Canada, an exercise which is neither practicable nor appropriate in these summary proceedings. Finally, I proceed on the assumption that the father is prepared to offer undertakings on the lines already canvassed.

79. In these circumstances, I am unable to find that there is a grave risk of an intolerable situation so far as X is concerned should I make an order for her return. She is only two and a half years old and her primary needs at that age are for close and loving physical care. She is unlikely to be operating at a level of perception which will result in intolerable empathetic distress simply as a result of continuing low mood on the part of the mother. Furthermore, I do not consider the report of Dr Win is sufficient to establish that, provided the mother continues with any prescribed medication for her low moods, there is a grave risk that her mental health will reach such a level of anxiety or depression that she becomes unable to provide her children with proper care, either on her own or with the assistance or support I have mentioned, should that prove necessary. In those circumstances, I do not find the defence of "intolerable situation" established and it follows that, subject to appropriate undertakings from the father on the lines above stated, I must make an order for X's return.

The Issues: Y

Wrongful retention/ habitual residence

80. Mr Scott-Manderson QC for the mother has rightly emphasised the need to approach separately the consideration of Y's position and that of X for obvious reasons. Leaving aside the defence of 'intolerable situation', X's position has turned upon her wrongful retention prior to the first Convention proceedings and the question whether, as I have held, that wrongful retention 'survived' the withdrawal of those proceedings. Y, on the other hand, was not born at that time, nor was her position touched upon in the consent order for withdrawal. She was, as I have held, the subject of an agreement between the parties that the mother would remain in England until after she was born, but was not subject to any agreement as to whether or, if so, when she might go to Canada if the reconciliation attempt between the parties was a failure. It was implicit in that agreement, and explicit in the evidence of the husband (see paragraph 23 above), that the father recognised the position that, if the contemplated reconciliation did not come about, if Y was born in England she might be regarded as habitually resident here.

81. It was Mr Scott-Manderson's submission at the outset that the father's assertion in the second Convention proceedings that prior to the consent order the wife had agreed, and subsequently she had confirmed, that she would return to Canada with the children was an ex-post facto construct on which to hang the assertion of wrongful retention of Y following her birth. It was to resolve that question that I heard the oral evidence of the parties and, on the basis of the findings I have made, I consider Mr Scott Manderson to have been correct.

82. So far as any wrongful retention is concerned, it seems clear to me that, having expressly consented to the mother remaining in England until a period of at least three weeks after the birth of Y, (and hence to Y's residence in England in the mother's care for at least that period,) it cannot lie in the mouth of the father to assert a wrongful retention of Y before expiry of that period in the absence of some clear anticipatory indication by the mother to that effect. I am clear that was indeed the understanding of the father and his solicitors at the time when, immediately following the birth of Y, difficulties over contact developed and the father resorted to the English court; the identification of the mother's solicitors letters of 24 May 2007 and 5 June 2007 as indicating a wrongful refusal to return Y to Canada are an unsuccessful effort by the pleader to establish a wrongful retention where none can be demonstrated.

83. The first letter was no more than a letter following the departure of the mother to her parents' home, asserting difficulties in the marriage, the mother's ill-health and proposals for the father to have contact with X and to visit the mother in hospital at the time of the birth. It said nothing as to the future. The second letter was in response to a letter dated 1 June 2007 from the father's solicitors in which they only spoke of 'restoring' the Hague Convention proceeding *in respect of X* and gave notice that, if their proposals for contact made in the letter were not met they would make application for a direct contact order. In respect of Y the letter was restricted to a proposal for the father to have contact on a daily basis between 9:30am and 12 noon. Neither in the letter of 1 June, nor the response of 5 June, was the question of Y's 'return' to Canada, or indeed her susceptibility to Hague Convention proceedings, broached or suggested.

84. The first suggestion by the father that Y might be susceptible to an order under the Convention is at best ambiguous. In the last paragraphs of his affidavit of 28 June 2007, sworn in support of his application for a defined contact order, the father asserted that the mother had 'engineered a situation whereby she would probably succeed in a court hearing that will not separate siblings … whose habitual residence is in England and the other is in Canada' He stated that he looked to the court to put this right and that he would be issuing an application for a return order under the Hague Convention . However, he did not make clear in that context whether he was suggesting his Convention application would relate to X alone or to both children.

85. The final date particularised by the father as constituting a wrongful retention for the purpose of the Convention is 10 July 2007 when it is said that, in reply to the father's Children Act application, the mother indicated that she refused to return either child to Canada. In fact, the mother specifically declined to deal with any putative Convention application to be issued by the father, confining herself to the question of contact as sought by the father. However, at the end of the affidavit she made clear her position that contact with the children should remain as and where it was until both children were older and, on 17 July 2007 she issued her own application for an interim residence order and a prohibited steps order. In those circumstances, it seems to me that, *subject* to establishment of the other requirements of the Convention, the first point at which wrongful retention in respect of Y could be said to be established is 10 July 2007.
86. It is Mr Scott Manderson's principal submission that the other requirements of the Convention cannot be established because, as at the time of her birth and thereafter, Y was not habitually resident in Canada.
87. Mr Scott-Manderson begins by pointing out that Y has only ever physically lived in England and has never lived elsewhere. In this respect he relies upon the observations of Lord Justice Millett in *Re M (Abduction: Habitual Residence) [1996] 1 FLR 887* and endorsed by Thorpe LJ in *Al Habtoor v Fotheringham [2001] EWCA Civ 186, [2001] 1 FLR 951* at para [41]:
"While it is not necessary for a person to remain continuously present in a particular country in order for him to retain residence there, *it is not possible for a person to acquire residence in one country while remaining throughout physically present in another"* (emphasis added).

This passage was cited by myself in Re A (Wardship: Habitual Residence) [2006] EWHC 3338 (Fam), [2007] 1FLR 1589 at para 33 when I stated:
"It is not possible for a person (including a child) to acquire residence in one country while remaining physically present in another."

88. Mr Scott QC on the other hand relies upon the decision of Charles J in B v H (Habitual Residence: Wardship) , in which he held the fact that a baby is born abroad in country X to a couple who are habitually resident in country Y does not of itself found a conclusion that the child is not habitually resident in country Y, given that, on the birth of that child, it is incapable of acquiring an habitual residence for reasons of its own volition, but ordinarily assumes immediately the habitual residence of the parents. In that case the parties had a common habitual residence, as is usual, and I find no fault with the reasoning of Charles J on the facts before him. To the extent therefore that the observations relied on by Mr Scott-Manderson appear to assert a universal rule, it appears to me that they require some exception to be recognised in the case of new born children. However, I would also observe that, as pointed out by Hedley J *W & B v H (Child Abduction: Surrogacy) [2002] 1 FLR 1008* at paras [21]–[23] and repeated by him in *Re F (Abduction: Unborn Child) [2007] 1FLR 627* at para [12], while it is generally true to say, that at birth the child assumes the habitual residence of its parents, it is a question of fact to be determined in each case whether that is so. Furthermore, that statement of the position, which assumes the habitual residence of the parents to be the same, is not addressed to the position where, at the time of the birth, the parents are habitually resident in different countries.
89. The position in B v H was one where the child was only born abroad because, although habitually resident in England, the mother was an unwilling presence in Bangladesh at the time of the birth, being unable to leave the country; that is a position quite distinct from this case, where the mother remained in England by agreement of the parties for the purpose of having her child. More significantly, in considering the position generally, Charles J made clear that he was not dealing with a case where the mother had changed her habitual residence during her pregnancy, which as Mr Scott-Manderson submits, is the position in this case.
90. Y was born on 24 May 2007. At that time, the mother had been in England for some seven months. Whatever her long-term intentions, and whatever uncertainty may have existed at the outset, as from the withdrawal of proceedings in respect of X in January 2007, the mother was living in England with the consent of the father, both intending that she should do so until a few weeks after Y was born and that meanwhile they would attempt to reconcile. In those circumstances, submits Mr Scott-Manderson, the parties may properly be described from that time as sharing a fixed and settled purpose to that effect.
91. In this connection I am mindful of the observation of Lord Scarman in *Akbar Ali v Brent London Borough Council [1983] 2 AC 309* at 343G in which he said:
"'Ordinarily resident' refers to a man's abode in a particular place or country which he had adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, *whether of short or of long duration* ." (emphasis added)

It is of course the case that the term 'ordinarily resident' there considered equates, so far as our jurisprudence

is concerned, with the term 'habitually resident' as used in the Convention. The ingredients of each, and the various factors to which the court should have regard, were comprehensively dealt with in the speeches of Lord Brandon of Oakbrook in *Re J (A Minor)(Abduction: Custody Rights) [1990] 2 AC 562* at 578 and of Lord Slynn of Hadley in *Nessa v Chief Adjudication Officer [1999] 2 FLR 1116* at 1121 D–F.

92. In this context it is also appropriate to refer to the review of the relevant authorities by Munby J in Re R (Abduction: Habitual Residence) [2003] EWHC 1968 (Fam), [2004] 1 FLR 216 at paras [33]–[43]. In the case of Re R the facts were different in a variety of respects. The parties had moved to Germany from England for six months for the purposes of the father's job. They had not retained their previous home in England, but had put their possessions into storage to await their return. Furthermore, there was no suggestion that the parties had different views about what was to happen at the end of the six month period, which was anticipated to be the maximum period of his essentially temporary posting. However, I do not consider that to be a critical distinction for the purposes of this case. As observed by Munby J at paragraph 43, in relation to earlier decisions suggesting that one cannot acquire an habitual residence in a foreign country unless one has a settled intention not to return to the country from which one has departed:

"There may be cases where on a proper analysis of the applicable facts it will not be possible to demonstrate the acquisition of habitual residence in country B an absent finding in particular circumstances of a settled intention not to return to country A … If and insofar, however, as either of those cases is to be read as endorsing a proposition of law, namely, that one cannot acquire habitual residence in country B absent a settled intention not to return to country A, then in my respectful judgment such observations are not merely unfounded in principle, they are contrary to the binding authorities which I have mentioned."

93. In this case, as in Re R , so far as their residence in England was concerned, it cannot be said that the parties had a settled intention not to return to Canada. The position was open. However, the parties intended in January that the wife would remain in England to have their second child and that the father would take six months leave of absence from his work, establishing a home for six months in this country during which the parties would seek to reconcile. That is what happened. Although the house in Dalhousie Drive, Calgary, was retained by the father, he made arrangements for its occupation by relatives pending the ultimate return of the parties to Canada for which he hoped, but to which the mother would not commit, and made arrangements to live in England with the mother for six months. In so doing, the father was acting pursuant to an agreement (i.e. a shared settled purpose) that the wife should live in England until several weeks after the birth of their second child and that during the interim they would seek a reconciliation. Thereafter the mother continued living in England for that settled purpose, albeit it was a purpose of short duration with the future left open thereafter.

94. In the event, the father did not himself take up immediate residence in England, but, after one week, absented himself in Canada, rather than pursuing the reconciliation, until his return in April. In those circumstances, I am not prepared to say that he himself became habitually resident in England. However, as from the time of the consent order, the settled purpose of the mother, agreed with the father, was at all times to remain in England until after the birth of her child before there would be any question of a return to Canada. That was an appreciable period of time and, in my view, she acquired an habitual residence in England during that period.

95. That being so, the position in relation to Y is as follows. At birth she was by prior agreement in the physical care of her mother in England, where so remained, following discharge of mother and child from hospital to the home of her family.

96. I have not been referred to any authority which could be said to govern the circumstances of this case directly. Mr Scott submits that such authority is to be found in the decision of Black J in *Re N (Abduction: Habitual Residence) [2000] 2 FLR 899* in which she considered a situation where a married couple had moved from England to Spain and were living there, together with their children, in circumstances where the father had become habitually resident in Spain, (having the intention to remain), whereas the mother had retained her habitual residence in England (having no such intention). The mother departed Spain for England with the children and the father commenced Convention proceedings. Black J held that, as one of two parents with joint parental responsibility, the father could not change the habitual residence of the children unilaterally; it could only be changed if the parents had a common intention to do so. Hence the children did not lose their original habitual residence in England by reason of the father's unilateral change.

97. In so deciding, Black J applied the observations of Lord Donaldson MR in the *Court of Appeal in C v S (A Minor)(Abduction) [1990] 2 FLR 442* at 449 to the effect that:

"… In the ordinary case of a married couple, in my judgment, it would not be possible for one parent unilaterally to terminate the habitual residence of the child by removing the child from the jurisdiction wrongfully and in breach of the other parent's rights."

98. That reasoning was extended and applied by Charles J to the position of an unborn child in B v H at para [144]. However, as I have already observed, Charles J made clear that it might well not apply in a situation where the mother changed her habitual residence during pregnancy (see para [103]).

99. It remains the position, as the authorities generally make clear, that habitual residence is not defined and is an issue of fact to be decided in all the circumstances of the case by reference to the intentions and actions of the parents of the child the subject of the proceedings.

100. It is clear that a child will take on the habitual residence of its mother if it is in her care and she enjoys *sole* parental responsibility and/ or custody rights. It is also clear that, in the ordinary way, if the parents are *both* habitually resident in a particular country, at birth the child will acquire that habitual residence. However, it is an open question what is the position where at the time of the child's birth the parties are habitually resident in different places. Certainly no hard and fast rule is possible and the matter must depend on the circumstances of the individual case.

101. In this case, it seems to me that, given the acquisition by the mother of habitual residence in England before the date of Y's birth, and the earlier acceptance by the father that, following the birth, Y should be within the care of the mother in England pending any agreement on a return to Canada, Y acquired upon her birth her mother's habitual residence in England for that first period of her young life.

102. In essence therefore, the application of the father in respect of Y is not an application to return a child wrongfully retained from the jurisdiction in which she was habitually resident, but an application to send to Canada a child who during her short life to date has been resident only in England and Wales pursuant to parental agreement.

Inherent Jurisdiction

103. That being so, although the alternative application of the father under the inherent jurisdiction is framed as an order for 'summary return', as would be appropriate under the Convention, it is in fact an application to order Y to Canada into the sole care of the father, should the mother refuse to return to Canada with X. As I have already indicated I do not believe, that will be the case. If I am right, there will be no need to resolve the father's application under the inherent jurisdiction. If I am wrong, I am not, without a full welfare enquiry, prepared to make any order which might have the unhappy effect of 'splitting up' these two young children between the parents. Such an enquiry would inter alia require an up to date and detailed report upon the mother's state of mind and likely future mental health and parenting abilities.

104. On the mother's return to Canada with both children, as I anticipate, it will be appropriate for their welfare to be considered together by the Canadian Court, which will apply similar principles to those applicable in this court and which the mother was earlier content to invoke when filing her petition for divorce and instructing her Canadian lawyer to make an application for leave to remove X to England, before the focus of proceedings moved to this country.