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Case No: CA-2025-001871

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Mr Nicholas Allen KC sitting as a Deputy High Court Judge
FD25P00114

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 November 2025

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE BAKER
and
LORD JUSTICE BIRSS

B (CHILD ABDUCTION: SETTLEMENT)

Anita Guha KC and Graham Crosthwaite (instructed by **Dawson Cornwell**) for the
Appellant
Teertha Gupta KC, Olivia Gaunt and Josephine Moreton (instructed by **Hanne and Co**) for
the **Respondent**

Hearing date : 3 September 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 4 November 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE BAKER :

1. This appeal involves the interpretation and application of Articles 12 and 13(b) of the Hague Child Abduction Convention 1980, incorporated into the law of the United Kingdom by the Child Abduction and Custody Act 1980. The principal focus of the argument before us concerned the second paragraph of Article 12 – the “settlement” defence.

The Law

The Convention

2. The relevant provisions of the Convention are as follows.
3. The Preamble to the Convention states:

“The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions.”

4. Article 1 sets out the objects of the Convention:

“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.”

5. Article 3 provides, so far as relevant:

“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.

....”

6. Article 12 provides, so far as relevant:

“(1) 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.

(2) 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....”

7. Article 13(b) provides:

“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 ... (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.”

Explanatory report

8. Next I cite passages from the Explanatory Report to the 1980 Convention by Elisa Perez-Vera to which we were referred in the course of argument.

9. At paragraphs 16-17, Prof Perez-Vera made the following observations about the objects of the Convention:

“16. The Convention's objects, which appear in Article 1, can be summarized as follows: since one factor characteristic of the situations under consideration consists in the fact that the abductor claims that his action has been rendered lawful by the competent authorities of the State of refuge, one effective way of deterring him would be to deprive his actions of any practical or juridical consequences. The Convention, in order to bring this about, places at the head of its objectives the restoration of the status quo, by means of 'the prompt return of children wrongfully removed to or retained in any Contracting State'....

17. Besides, although the object stated in sub-paragraph 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' appears to stand by itself, its teleological connection with the 'return of the child' object is no less evident. In reality, it can be regarded as one single object considered at two different times; whilst the prompt return of the child answers to the desire to re-establish a situation unilaterally and forcibly altered by the abductor, effective respect for rights of custody and of access belongs on the preventive level, in so far as it must lead to the disappearance of one of the most frequent causes of child abductions."

10. At paragraphs 20 to 26, Prof Perez-Vera considered the "importance attached to the interest of the child". Her observations included the following:

"23. ... the dispositive part of the Convention contains no explicit reference to the interests of the child to the extent of their qualifying the Convention's stated object, which is to secure the prompt return of children who have been wrongfully removed or retained. However, its silence on this point ought not to lead one to the conclusion that the Convention ignores the social paradigm which declares the necessity of considering the interests of children in regulating all the problems which concern them. On the contrary, right from the start the signatory States declare themselves to be 'firmly convinced that the interests of children are of paramount importance in matters relating to their custody'; it is precisely because of this conviction that they drew up the Convention, 'desiring to protect children internationally from the harmful effects of their wrongful removal or retention'.

24. These two paragraphs in the preamble reflect quite clearly the philosophy of the Convention in this regard. It can be defined as follows: the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests. Now, the right not to be removed or retained in the name of more or less arguable rights concerning its person is one of the most objective examples of what constitutes the interests of the child....

25. It is thus legitimate to assert that the two objects of the Convention — the one preventive, the other designed to secure the immediate reintegration of the child into its habitual environment — both correspond to a specific idea of what constitutes the 'best interests of the child'. However, even when viewing from this perspective, it has to be admitted that the removal of the child can sometimes be justified by objective reasons which have to do either with its person, or with the environment with which it is most closely connected. Therefore

the Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained. For the most part, these exceptions are only concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area.”

11. With regard to Article 12, Prof Preez-Vera said:

“107. In the first paragraph, the article brings a unique solution to bear upon the problem of determining the period during which the authorities concerned must order the return of the child forthwith. The problem is an important one since, in so far as the return of the child is regarded as being in its interests, it is clear that after a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it — something which is outside the scope of the Convention. Now, the difficulties encountered in any attempt to state this test of 'integration of the child' as an objective rule resulted in a time-limit being fixed which, although perhaps arbitrary, nevertheless proved to be the 'least bad' answer to the concerns which were voiced in this regard.

...

109. The second paragraph answered to the need, felt strongly throughout the preliminary proceedings, to lessen the consequences which would flow from the adoption of an inflexible time-limit beyond which the provisions of the Convention could not be invoked. The solution finally adopted plainly extends the Convention's scope by maintaining indefinitely a real obligation to return the child. In any event, it cannot be denied that such an obligation disappears whenever it can be shown that 'the child is now settled in its new environment'. The provision does not state how this fact is to be proved, but it would seem logical to regard such a task as falling upon the abductor or upon the person who opposes the return of the child, whilst at the same time preserving the contingent discretionary power of internal authorities in this regard. In any case, the proof or verification of a child's establishment in a new environment opens up the possibility of longer proceedings than those envisaged in the first paragraph. Finally, and as much for these reasons as for the fact that the return will, in the very nature of things, always occur much later than one year after the abduction, the Convention does not speak in this context of return 'forthwith' but merely of return.”

12. The second paragraph of Article 12 has been considered in a number of earlier cases. The starting point is the judgment of Bracewell J in *Re N (Minors) (Abduction)* [1991] 1 FLR 413. At page 417-8, she posed the central question:

“what is the degree of settlement which has to be demonstrated? There is some force, I find, in the argument that legal presumptions reflect the norm, and the presumption under the Convention is that children should be returned unless the mother can establish the degree of settlement which is more than mere adjustment to surroundings. I find that word should be given its ordinary natural meaning, and that the word ‘settled’ in this context has two constituents. First, it involves a physical element of relating to, being established in, a community and an environment. Secondly, I find that it has an emotional constituent denoting security and stability.”

As to the meaning of the phrase “new environment”, Bracewell J continued:

“The word ‘new’ is significant, and in my judgment it must encompass place, home, school, people, friends, activities and opportunities, but not, per se, the relationship with the mother, which has always existed in a close, loving attachment. That can only be relevant insofar as it impinges on the new surroundings.”

13. In this Court in *Cannon v Cannon* [2004] EWCA Civ 1330, [2005] 1 FLR 169, Thorpe LJ analysed the defence in these terms:

“50. There must be at least three categories of case in which the passage of more than twelve months between the wrongful removal or retention and the issue of proceedings occurs. First there are the cases demonstrating, for whatever reason, a delayed reaction, short of acquiescence, on the part of the left behind parent. In that category of case the court must weigh whether or not the child is settled and whether nevertheless to order return having regard to all the circumstances, including the extent of the plaintiff’s delay and his explanation for delay. On the other side of the case there may be no misconduct on the part of the defendant beside the wrongful removal or retention itself.

51. In other cases concealment or other subterfuge on the part of the abductor may have caused or contributed to the period of delay that triggers Article 12(2). In those cases I would not support a tolling rule that the period gained by concealment should be disregarded and therefore subtracted from the total period of delay in order to ascertain whether or not the twelve-month mark has been exceeded. That seems to me to be too crude an approach which risks to produce results that offend what is still the pursuit of a realistic Convention outcome.

52. In his skeleton argument for the hearing below Mr Nicholls offered this conclusion:

‘Each case should be considered on its own facts, but it will be very difficult indeed for a parent who has hidden a child away to demonstrate that it is settled in its new environment and thus overcome the real obligation to order a return.’

53. I would support that conclusion. A broad and purposive construction of what amounts to "settled in its new environment" will properly reflect the facts of each case, including the very important factor of concealment or subterfuge that has caused or contributed to the asserted delay. There are two factors that I wish to emphasise. One relates to the nature of the concealment. The other relates to the impact of concealment on settlement.

...

57. To consider only the physical element is to ignore the emotional and psychological elements which in combination comprise the whole child. A very young child must take its emotional and psychological state in large measure from that of the sole carer. An older child will be consciously or unconsciously enmeshed in the sole carer's web of deceit and subterfuge. It is in those senses that Mr Nicholls' proposition holds good.

...

59. The third category of case might be termed manipulative delay, by which I mean conduct on the part of the defendant which has the intention and effect of delaying the issue of proceedings over the twelve-month limit. An instance is the Canadian case of *Lozinska v. Bielwaski* [1998] 56 OTC 59. In ordering the return of the child the court held that the father had engineered the delay in the proceedings in order to invoke Article 12(2). The court accordingly ruled he could not take advantage of the delay he had created. In this category of case the rejection of the defence comes closer to the application of a principle of disregard than to arriving at the same result by a broad and purposive construction of the asserted settlement....

...

61. ... I would unhesitatingly uphold the well-recognised construction of the concept of settlement in Article 12(2): it is not enough to regard only the physical characteristics of settlement. Equal regard must be paid to the emotional and psychological elements. In cases of concealment and subterfuge the burden of demonstrating the necessary elements of

emotional and psychological settlement is much increased. The judges in the Family Division should not apply a rigid rule of disregard but they should look critically at any alleged settlement that is built on concealment and deceit especially if the defendant is a fugitive from criminal justice.”

14. To what extent does it have to be shown that the child’s settlement in the new environment is “permanent”? In *Re S (A Minor) (Abduction)* [1991] 2 FLR 1, Purchas LJ (at page 24C) indicated that what had to be demonstrated was “a long-term settled position in the environment”. In *Re N (Minors) (Abduction)* at page 418B-C, Bracewell J, having cited Purchas LJ’s words, observed:

“The phrase 'long-term' was not defined, but I find that it is the opposite of 'transient'; it requires a demonstration by a projection into the future, that the present position imports stability when looking at the future, and is permanent in so far as anything in life can be said to be permanent.”

The first part of this sentence – “long-term ... the opposite of transient” – has been fully endorsed and followed in subsequent cases. The last words of this observation – “permanent, insofar as anything in life can be said to be permanent” – have received academic criticism as “going too far” – see Dicey, Morris and Collins “The Conflict of Laws”, 16th edition, para 20-117 and Lowe, Everall and Nicholls “International Movement of Children”, 2nd edition, para 22.22. In more recent cases, judges at first instance have held that the fact that the immigration position of the mother and child in this country was uncertain did not prevent the child having acquired the necessary degree of settlement under Article 12(2) – see *Re C (Child Abduction: Settlement)* [2006] EWHC 1229 (Fam), [2006] 2 FLR 797 (Sir Mark Potter P) and *Re E (Abduction: Intolerable Situation)* [2008] EWHC 2112 (Fam), [2009] 2 FLR 485 (Moylan J).

15. In *F v M and N (Abduction: Acquiescence: Settlement)* [2008] EWHC 1525 [2008] 2 FLR 1270, Black J (at paragraph 66) gave this warning:

“Plainly one must have proper regard to the authorities as they have interpreted Article 12 but I would resist the development of an unduly technical approach to the question of settlement, or indeed acquiescence. The Hague Convention is designed to establish procedures to ensure the prompt return of children to their State of habitual residence and our courts have geared themselves to providing a speedy resolution of Hague disputes. Whilst I appreciate that it is no longer possible in settlement cases to return a child almost as soon as he or she has arrived here wrongfully, prompt resolution of the child's future is still required. The more complexity and sophistication that attaches to the Articles of the Convention, the longer it takes courts to determine cases and the more appeals there are likely to be”.

16. Some years later, as Black LJ, she reiterated this view in a case about the child’s objections defence in *Re M and others (Children)* [2015] EWCA Civ 26 [2016] Fam 1, expressing concern about the “many technical and sophisticated legal arguments”

which had been generated about the interpretation of the Convention and observing (at paragraph 13) that “technicality of this sort gets in the way of the objectives of the Convention”.

17. In *Re B (A Child)* [2018] EWHC 1643 (Fam) at paragraph 41, Williams J summarised the principles relating to the settlement defence under Article 12 established by previous cases in the following terms:

“(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 (i.e. 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.”

At paragraph 42, he added:

“...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.”

And at para 57(3)(c):

“In the same way that habitual residence does not require complete integration or permanence so settlement does not necessarily require that the child is fully settled or views their situation as permanent.”

18. Most recently, Harrison J in *Re G and B (Children) (Abduction: Settlement: Grave Risk: Ukraine)* [2025] EWHC 795 (Fam) said (at para 50):

“In common with Williams J in *Re B (A Child)* [2018] EWHC 1643 (Fam) and Robert Peel QC (as he then was) in *AX v CY (Article 12 Settlement)* [2020] EWHC 1599 (Fam) [2020] 2 FLR 1257, I consider that the question of settlement should be considered 'holistically', not in stages. The court must take into account all of the relevant circumstances bearing in mind that within the confines of a summary process the picture is likely to be incomplete. Information about the child's circumstances prior to an abduction can be relevant to the issue. The court's primary focus is on the question of whether settlement has been achieved '*in a new environment*' as opposed to with the abducting parent. Concealment and deceit are highly relevant to the issue, but not determinative. The severance of a pre-existing parental relationship is also very relevant, but again not determinative ... The court must consider whether the child has become established in a new environment on a permanent or long-term, as opposed to transient, basis: *Re N*.”

19. The question as to whether a child who has been found to be settled within her new environment within the meaning of Article 12 may nonetheless be returned in the exercise of the court's discretion under the Convention was resolved by the House of Lords in *Re M (Zimbabwe)* [2007] UKHL 55. Baroness Hale of Richmond, with whom the majority of the other members of the House agreed, said at paragraph 31:

“I have reached the conclusion, not without considerable hesitation, that article 12 does envisage that a settled child might nevertheless be returned within the Convention procedures. The words "shall...unless" leave the matter open. It would be consistent with all the other exceptions to the rule of return. It would avoid the separate and perhaps unfunded need for proceedings in the unusual event that summary return would be appropriate in a settlement case. It recognises the flexibility in the concept of settlement, which may arise in a

wide variety of circumstances and to very different degrees. It acknowledges that late application may be the result of active concealment of where the child has gone. It leaves the court with all options open.”

20. As to the considerations relevant to the exercise of the discretion, Baroness Hale observed:

“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

44. 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.

...

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.”

Article 13(b) – case law

21. Article 13(b) has been extensively analysed by the Supreme Court and by this Court in a number of cases. For present purposes, it is sufficient to refer to my summary of the principles to be derived from the earlier cases in *Re IG (A Child) (Child abduction: Habitual Residence: Article 13(b))* [2021] EWCA Civ 1123, (at paragraph 47):

“(1) The terms of Article 13(b) are by their very nature restricted in their scope. The defence has a high threshold, demonstrated by the use of the words "grave" and "intolerable".

(2) The focus is on the child. The issue is the risk to the child in the event of his or her return.

(3) The separation of the child from the abducting parent can establish the required grave risk.

(4) When the allegations on which the abducting parent relies to establish grave risk are disputed, the court should first establish whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then establish how the child can be protected from the risk.

(5) In assessing these matters, the court must be mindful of the limitations involved in the summary nature of the Hague process. It will rarely be appropriate to hear oral evidence of the allegations made under Article 13(b) and so neither the allegations nor their rebuttal are usually tested in cross-examination.

(6) That does not mean, however, that no evaluative assessment of the allegations should be undertaken by the court. The court must examine in concrete terms the situation in which the child would be on return. In analysing whether the allegations are of sufficient detail and substance to give rise to the grave risk, the judge will have to consider whether the evidence enables him or her confidently to discount the possibility that they do.

(7) If the judge concludes that the allegations would potentially establish the existence of an Article 13(b) risk, he or she must then carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to the risk.

(8) In many cases, sufficient protection will be afforded by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting State to protect him once he is there.

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

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

22. The use of undertakings and protective measures to address the identified risks has been further considered by this Court in a number of cases. For present purposes, it is sufficient to refer to the summary of the principles derived from the earlier cases by MacDonald J in *E v D (Return Order)* [2022] EWHC 1216 (Fam) at paragraph 32:

"i) The court must examine in concrete terms the situation that would face a child on a return being ordered. If the court considers that it has insufficient information to answer these questions, it should adjourn the hearing to enable more detailed evidence to be obtained.

ii) In deciding what weight can be placed on undertakings as a protective measure, the court has to take into account the extent to which they are likely to be effective both in terms of compliance and in terms of the consequences, including remedies, in the absence of compliance.

iii) The issue is the effectiveness of the undertaking in question as a protective measure, which issue is not confined solely to the enforceability of the undertaking.

iv) There is a need for caution when relying on undertakings as a protective measure and there should not be a too ready acceptance of undertakings which are not enforceable in the courts of the requesting State.

v) There is a distinction to be drawn between the practical arrangements for the child's return and measures designed or relied on to protect the children from an Art 13(b) risk. The efficacy of the latter will need to be addressed with care.

vi) The more weight placed by the court on the protective nature of the measures in question when determining the application, the greater the scrutiny required in respect of their efficacy."

23. At paragraph 33, MacDonald J added:

"With respect to undertakings, what is therefore required is not simply an indication of what undertakings are offered by the left behind parent as protective measures, but sufficient evidence as to extent to which those undertakings will be

effective in providing the protection they are offered up to provide.”

Summary of background

24. The subject of these proceedings is a girl, B, now aged rising 4. Her father is a Portuguese national, aged 44. Her mother is a British national, aged 34. They met in Portugal in July 2018. In 2019, the mother moved to Portugal and started living with the father.
25. On 18 December 2021, the mother gave birth to B. According to the mother, however, by that stage her relationship with the father was in difficulties as a result of the father’s coercive conduct towards her.
26. In September 2022, when B was aged 9 months, the mother brought her to this country to visit her family in this country. It is common ground that it was agreed that the mother and B would remain here for about a month, although no date for their return was fixed. On 3 October 2022, the mother informed the father that she had decided to remain in this country with B for a longer period. It has not been contested in these proceedings that, at the date of the mother’s retention of B in this country, the child was habitually resident in Portugal and that the retention was in breach of the father’s rights of custody and thus wrongful under Article 3 of the Hague Child Abduction Convention.
27. Initially, the mother and B lived in a rented property next door to friends. In June 2023, they moved to a longer-term rental property in this country, where they are still living.
28. Over the next two years after B was retained in this country, the parties conducted extensive discussions and negotiations about the child’s future, including two processes of mediation. The father did not take any proceedings for the summary return of B to Portugal.
29. The father visited this country on a number of occasions, and had unrestricted contact with B. The mother and B also visited Portugal on several occasions, on one occasion staying for three months.
30. On 15 October 2024, the mother signed an agreement setting out future care arrangements on the basis of B returning to live in Portugal from January 2025. On 13 November 2024, this agreement was lodged with the Portuguese court with a request it be converted into an order. In December 2024, however, the mother withdrew from the agreement and started proceedings in the local family court in this country seeking a child arrangements order under s.8 of the Children Act 1989 that B would live with her. It was her proposal that she and B would spend four months each year living in Portugal. Her application was listed for a FHDRA in March 2025.
31. On 14 February 2025, the father received notice from the Portuguese court that the mother had withdrawn from the agreement reached in the previous October. On 13 March 2025, nearly two and a half years after B was wrongfully retained in this country, the father filed an application under the Hague Child Abduction Convention seeking B’s summary return to Portugal.

32. At a case management hearing, the proceedings under the Children Act were stayed pending determination of the child abduction claim. Directions were given for a report by an officer of the Cafcass High Court team as to whether B was settled in this country. At a further hearing, the mother was granted permission to instruct an expert in Portuguese immigration law and a psychologist, in each case on a single joint expert basis.
33. In her Answer filed on 14 April 2025, the mother indicated that she was intending to rely on three defences to the father's application for summary return – settlement under Article 12, acquiescence under Article 13(a), and grave risk of harm under Article 13(b). Subsequently, however, she informed the court that the defence of acquiescence would not be pursued.
34. The written evidence before the judge consisted of (a) two statements each from the parties, (b) an immigration report, and responses to supplemental questions posed by the parties, prepared by the SJE in immigration law, Mr João Perry da Câmara, (c) a psychological report about the mother, prepared by Mr Alexander Marshall, and (d) the Cafcass report from Ms Daisy Veitch of the High Court team.
35. The advice given by Mr Perry da Camara included the following observations:
 - (a) After the expiry of the mother's Portuguese residence permit on 30 June 2025, the grant of a further permit would be "not automatic but discretionary", depending on the immigration authority's assessment of circumstances.
 - (b) While the average timeframe for issuing residence permits was between six and twelve months, delays may occur and in practice some procedures have taken up to two to three years, which "may leave the applicant in a prolonged period of legal uncertainty".
 - (c) "The absence of proof of income may negatively affect the application" although, "in cases involving family reunification with a Portuguese minor, the child's best interests may prevail and exemptions or alternative documentation may be accepted."
 - (d) "The mother will not be able to travel freely between Portugal and [this country] without a valid visa or residence permit."
 - (e) Access to state benefits "is generally conditional upon the individual holding a valid residence permit or, at the very least, having proof of a duly submitted and accepted residence application".
 - (f) "The right to work is only formally recognised once the residence permit has been issued."
36. On the issue of settlement, Ms Veitch reached the following conclusion:

"52. Determining defences in Hague Convention proceedings, is a matter of fact to be established by the trial judge. The court may be assisted by the factors identified observed during my assessment, some of which point towards B being somewhat settled in [this country]. She has spent a notable amount of time

living in her current home and neighbourhood and is part of a local community of friends and neighbours. She has access to healthcare and has started attending nursery, albeit very recently. There is a pattern to daily life to which she has become accustomed, which includes spending time with her maternal family and the involvement of her father in her life, despite the distance he lives from B.

53. Comparatively, what B has been told by her parents about what to expect from her future is contested, but to my mind is instrumental in establishing the extent to which she is emotionally and psychologically settled in this country. If B has been led to believe that she would be returning to Portugal, it is difficult to imagine that she has been able to consider her current home a permanent one until very recently.”

37. In addition, the court was provided with an email from the Cafcass officer reporting that social services had received a referral from B’s GP as a result of recent statements made by B which might have indicated that she had been sexually abused by her father. Those allegations were denied by the father and not pursued by social services, nor relied on by the mother at the hearing. The judge therefore did not take them into account when reaching his decision.
38. At the hearing on 5 and 6 June 2025, the issues, as summarised by the judge in paragraph 31 of his judgment, were:
 - “(a) whether B is now settled in her new environment in accordance with Article 12;
 - (b) whether a return order would expose B to a grave risk of physical or psychological harm or otherwise place her in an intolerable situation contrary to Article 13(b). I am asked to consider a range of possible protective measures; and
 - (c) if either or both of the ‘exceptions’ or ‘defences’ are established whether I should exercise my discretion to order a return.”
39. Oral evidence at the hearing was given only by the immigration law expert. A note of his evidence was agreed for the purposes of this appeal. Two points of relevance arise from the note. First, in cross-examination on behalf of the mother, he agreed that the standard criteria for granting a residence permit included six months of continuous residence immediately prior to the application and that there may be difficulties in persuading the authority to exercise their discretion to waive this requirement in the mother’s case. Secondly, asked on behalf of the father whether he was optimistic about the mother being granted a fresh permit, in the event of an order by the English court for summary return, as the child was a Portuguese national and with the father offering financial support, he replied “‘optimistic’ [is] difficult because it is a question of evaluation. By nature I am always pessimistic”

40. At the conclusion of the hearing at first instance, judgment was reserved. A draft judgment was then circulated to the parties and formally handed down on 4 July. By the order made at a hearing on that day, the judge ordered the mother to return B to Portugal by 18 July 2025, and made a series of ancillary orders to facilitate the return. The return order was made on the basis of protective measures set out in a series of undertakings appended as an annex to the order.
41. On 11 July, an application to the judge for permission to appeal was refused, but the order was stayed until 14 days after the filing of the notice of appeal to this Court. That notice was filed on 30 July and on 8 August Moylan LJ granted permission to appeal and stayed the return order pending determination of the appeal.

The judgment

42. The judge started his judgment by summarising the factual background (paragraphs 1 to 18). He referred to the recent allegations and explained his reasons for disregarding them (paragraphs 19 to 25). He explained the circumstances in which only the immigration expert had given oral evidence (paragraphs 26 to 28). At paragraph 29-30 he made the following observations:

“29. The facts of this case are unusual. F has travelled to this country on 33 occasions since December 2022 to spend time with B. M has also travelled back to Portugal with B on six occasions, the longest period of time being for three and a half months from 6 December 2023 until 1 March 2024 with a further extended period in Portugal from 28 September 2024 until 9 November 2024. B has homes with both parties in both countries. On Mr. Gupta and Ms. Gaunt’s analysis M has spent approximately 39% of her life in Portugal.

30. It is no doubt as a result of this travel between the two countries that it is common ground that B has a close relationship with both of her parents. I was particularly struck by the following references in the Cafcass Report:

‘[24] ... I did not observe any tension or vigilance from [B] towards her parents during the handover. This suggests that she is used to calm and civil exchanges and does not feel anxious about being in both parents’ presence. This is in sharp contrast to many children of separated parents who are frequently uneasy and fearful about interactions between their parents.

[25] ... She presents as a child who has her parents’ emotional permission to enjoy the time she spends with the other, as well as to share any worries about this. This suggests that [B’s] parents each positively promote her relationship with the other.”

43. The judge summarised the issues as set out above before turning to Article 12. He considered the conflicting authorities on whether “now” in Article 12(2) meant the

date of the issue of the proceedings or that of the final hearing. He expressed a view as to which interpretation he preferred before saying that it was academic on the facts of this case because, as both parties accepted, it made no difference to the outcome of the case before him. In passing, I record that neither party has suggested that this issue falls to be decided on this appeal. He then cited a number of authorities, including Williams J's summary of the applicable principles in *AH v CD* quoted above. At paragraphs 50 to 52, he summarised the parties' submissions on Article 12.

44. At paragraphs 54 to 70, the judge then set out his analysis of the Article 12 issue. As this lies at the heart of the appeal, it is necessary to quote his reasoning in some detail:

“54. I agree with Mr. Gupta and Ms. Gaunt when they say in their Position Statement at paragraph 19 that Ms. Veitch's Cafcass Report is balanced and leaves the question open for the court. I further agree that the report does not lean towards a conclusion that B is settled, only going as far as to say at paragraph 41 that there are factors which support that B [emphasis added by judge] ‘is *becoming* physically settled’ in this country – living in the same house for 23 months and regarding it as her home, knowing her neighbours and having become part of the local community, being familiar with the local area, having developed a close friendship with a particular local child and living near her maternal family - and at paragraph 53 that ‘some’ factors ‘point towards [B] being somewhat settled in [this country]’.

55. In my judgment B is not settled in this jurisdiction. In reaching this conclusion I agree with Ms. Veitch at paragraph 53 of her report that “what [B] has been told by her parents about what to expect from her future is contested, but to my mind is instrumental in establishing the extent to which she is emotionally and psychologically settled in [this country]. If [B] has been led to believe that she would be returning to Portugal, it is difficult to imagine that she has been able to consider her current home a permanent one until very recently”.

56. There is no doubt that M had not communicated to F an unequivocal intention permanently to reside in this jurisdiction with B until recently. This is clear from:

(a) the two lengthy periods of mediation between the parties between December 2022 and March/May 2023 and between August 2023 and December 2023/January 2024. Mediation would not have taken place if M had informed F of an intention permanently to reside in the jurisdiction as otherwise F would have issued proceedings earlier ...

(b) the many WhatsApp messages and emails sent by M to F between October 2022 These record M repeatedly informing F she had no intention of staying in this country

long-term and/or that she and B would be moving back to Portugal; and

(c) the written agreement signed by both parties on 15th October 2024, reached after several months of discussion and negotiation, and which stated B would return to live in Portugal from January 2025.

57. On F's behalf it is said what M said to F is also likely to be what was understood by B to be the case. I consider the position is more nuanced than this....

58. ...B has either (i) received a consistent message from both parents that she may (if not will) be returning to Portugal in which case she will understand her current situation is or may be a temporary one; or (ii) she has received different messages from each of her parents, in which case she is likely to feel a sense of confusion. Either way, B has not received a clear and consistent message that this country is and will be her permanent home. I agree that B will therefore feel 'in limbo' and in my view cannot as a consequence have a sense of physical, psychological and emotional settlement here (as distinct from her feeling settled with M)....

59. In this context I accept F's evidence at paragraph 5 of his Statement of 2nd May 2025 that B has said to him "when am I going to Portugal?" ...

60. B's young age is also a relevant factor in this analysis: she is not in full-time education and is not of an age to have established close ties with anyone but her parents. As set out above it is common ground that her young age means that she will derive her sense of emotional and psychological settlement from her relationship with her parents more than from any particular location. Further, as Ms. Veitch stated at paragraph 15 of her report, B "has yet to establish friendships at nursery."

61. I also conclude a lack of settlement in this country will have been compounded by B's six visits to Portugal (one of which was three and a half months long) and visiting F's home in Portugal....

62. As was submitted on F's behalf, the factors which would in theory point towards B being settled in this jurisdiction are that she has resided in the same property for 23 months, has developed some connections within the community and is living close to members of her maternal family. This does not constitute the requisite physical integration and stability for the purposes of Article 12, particularly when there are also properties in Portugal which B considers to be home, and has many friendships and family there with whom she has a close

connection and has maintained a relationship with physically when in Portugal and remotely when in this country.

63. I also conclude from M's WhatsApp messages and her emails to F that she herself had not considered remaining in this jurisdiction to be a long-term stable arrangement until relatively recently. I am satisfied that given the length of time over which these messages were sent they were genuine. I accept it is likely that B will have picked up on M's lack of settlement. In any event it cannot be that B has become settled when M is not.

64. Ms. Guha submitted orally that from the time M arrived in this country she "knew in her heart she wanted to stay". F does not believe this and I conclude it was not the case. However, as Mr. Gupta submitted if M was being deliberately clandestine and/or deceitful she should not be able to benefit from the same.

65. I also conclude the agreement signed in October 2024 reflected M's genuine intentions at that time

66. I am satisfied that even though M may not be fluent in Portuguese she understood the material provisions of the agreement

67. I am fortified in my conclusion that M's intentions were genuine by the fact that she rented a property in Portugal in October 2024 and what she thereafter said to F about it. In my view securing this property was M giving effect to the parties' negotiated agreement....

68. It is relevant when considering the property that M has rented in Portugal and her now apparent criticisms of it that, as described by the Cafcass Officer at paragraph 28 of her reportThere are therefore at least some similarities between the two properties.

69. Having reached this conclusion I do not need to resolve the factual dispute as to whether M has now moved most of her and B's belongings to her Portuguese property. F states she has relying inter alia on a photograph dated (I believe) 31st October 2024 which he states shows M having towed a caravan to Portugal containing her belongings. M states the caravan contained only what she needed for that trip and she left no belongings she had brought from this country there and all that is now in the property is what M left behind when she left Portugal in 2022 and what was then put into storage.

70. For completeness I should record that in reaching my conclusion on settlement I accept (as was said on M's behalf)

that when she acknowledged to Ms. Veitch (as recorded at paragraph 49 of her report) that she ‘didn’t intend for this to become our home,’ and that relocating to [this country] was ‘never meant to be permanent’ this was not (as F said) a “concession” by M but was a reference to her initial intentions only.”

45. After reaching that conclusion, the judge proceeded to consider whether, had he concluded that B was settled in this country, he would have nonetheless exercised his discretion to order her return to Portugal. He cited several passages from reported authorities, including Baroness Hale’s observations in paragraphs 43-44 and 47 of *Re M (Zimbabwe)*. He then set out the arguments advanced on either side on this issue.
46. On the father’s side, these included that:
 - (a) it was common ground that B benefits greatly from her relationship with F which was said to be “key to furthering her welfare and to her sense of stability”; that it would “not be feasible for F to continue to travel to this jurisdiction as frequently as he has done so far for an indefinite period”; that therefore the “inevitability of the court refusing to return B to Portugal will be that her relationship with F suffers significantly, which cannot be in her best interests” and that, in contrast, “if B is returned to Portugal, M will return with her, and she will be able to enjoy a full and meaningful relationship with both parents”;
 - (b) that B will be “well able to adapt to life back in Portugal”; and
 - (c) that “although it is accepted that Convention policy arguments usually carry less weight in cases where a child or children are settled, in the circumstances of this case, Convention policy should militate in favour of a return to Portugal. This is not a case of a parent who has simply waited and has only sought B’s return after two and a half years of her being here. Quite the opposite; F sought B’s return immediately, as soon as she was wrongfully retained. F has continued to seek B’s return since then, but has tried to do so amicably and via non-court means. Crucially, he was also continuously reassured until very recently that M would return to Portugal, and believed that until M reneged on the parties’ agreement. The steps taken by F are entirely understandable and reasonable, and that is the only reason why proceedings were not issued sooner. There is (or should be) a policy interest in acknowledging parents who seek to resolve matters without resorting to the court immediately. This is an entirely different situation to a parent who has only just raised an issue after two and a half years, and therefore this case is distinguishable to the reported cases where the court has refused a return where settlement has been established.”
47. On the mother’s side, it was argued that:
 - (a) in circumstances where B has spent almost the entirety of her life living in this country and F delayed in bringing his remedy pursuant to the Hague Convention for two and a half years facilitating B’s settlement, it is axiomatic that the court should exercise its discretion to refuse an order for summary return in circumstances where M and B will face a myriad of obstacles and hardship in seeking to reintegrate into a stable and secure lifestyle in Portugal;

(b) if allowed to remain in this country, M would be able to recover from the stress she has suffered; B and her mother have established firm roots and a thriving and fulfilling life here;

(c) “in exceptional circumstances in a Hague case, B has benefited from regular and highly frequent visits from F. She has also been able to regularly visit him and the extended paternal family in Portugal since moving to this country. F’s suggestion that he will not be able to maintain the same frequency of travel appears self-serving and should not be accepted at face value.”

48. The judge then considered the evidence about the mother’s immigration status in Portugal and concluded (at paragraph 80):

“although I acknowledge the grant of a permit is discretionary I am satisfied that on balance M will be able to formalise her right of residence in Portugal. I therefore do not consider that this issue weighs with any great significance in the balance.”

He then considered the evidence about the mother’s mental health, and concluded:

“while a return may have a cumulative impact on M’s wellbeing, there is no clear evidence that it would have such a detrimental impact on B and in particular M’s ability to parent her, especially when compared to the very significant impact on B of not being able to enjoy such regular time with F. I therefore do not consider that this evidence weighs significantly in the balance.”

49. The judge then (at paragraph 84) referred to what he described as “a separate policy point that arises on the facts of this case”, namely the fact that “the parties were engaged in mediation as to if (not simply when) B should return to Portugal”. He held:

“a party should be allowed to enter mediation and/or use other forms of non-court dispute resolution without fear that the time taken in seeking to resolve matters outside of court may be used against them (whether as part of the defence of settlement or otherwise) should resolution in a non-court forum not ultimately be achieved and court proceedings thereafter issued. It would be contrary to the court’s “duty” pursuant to FPR 2010 Part 3 to consider non-court dispute resolution and likewise contrary to the overriding objective pursuant to FPR Part 1 to deal with cases “justly” if a court acceded to a submission made by a respondent to an application for summary return that the merits of a settlement defence and/or the arguments in relation to the non-exercise of the discretion were strengthened because court proceedings were not issued earlier when this was because the parties were engaged in non-court dispute resolution.”

50. The judge added that he accepted the Cafcass officer's observation that the fact that B had not yet attended a nursery for a significant period meant she was better placed to adapt to a further change in circumstances and that she would, "to a great extent, adapt and settle to a change in circumstances, provided she was in the mother's care". He then set out his conclusion on the exercise of his discretion in these terms:

"87. I accept that as stated in *Re M (Zimbabwe)* the further away one gets from a speedy return envisaged by the Convention, the less weighty its objectives are.

88. However, taking all the foregoing into account, and my view that it is inherently unlikely to be feasible for F to be able to continue to travel to this jurisdiction as frequently as he has done so far for an indefinite period, if I had reached the conclusion that B was settled in this country, then on the (very) unusual facts of this case – and which include that (i) it is common ground that B benefits greatly from her relationship with F; and (ii) she already has a home in Portugal with both of her parents - I would have exercised my discretion to order her return to Portugal"

51. The judge then turned to the Article 13(b) defence. Between paragraphs 89 and 101, he cited extensively from the case law, including the passages from *Re IG* and *E v D (Return Order)* quoted above. He recorded that the mother had raised concerns in respect of domestic abuse, housing, her immigration position and the effect on her mental health, which he considered in turn, adding that he was conscious of the "need to evaluate their cumulative effect". On the issue of domestic abuse, he summarised the mother's allegations, acknowledged their seriousness but concluded that, even taken at their highest, they did not constitute a grave risk that the child would be exposed to harm or placed in an intolerable situation if she were returned. He accepted the submission made on the father's behalf that the allegations were "mostly situational to the parties' relationship". He also took into account certain statements made by the mother which contradicted her assertion of intolerability and "the parties' frequent communications, interactions and handovers without issue". He considered the housing position, noting that the mother had rental accommodation in Portugal, and immigration, referring to his earlier conclusion at paragraph 80 quoted above. As to the mother's mental health, he concluded that, at most, the evidence suggested that a return to Portugal "would have a negative effect on M's wellbeing" and "[did] not support a conclusion that there is a risk of a significant deterioration in M's mental health on a return, or of M becoming so psychologically disabled so as to mean that she would not be emotionally and physically available to B." He also concluded that, considering the allegations as a whole, "their cumulative effect does not constitute a grave risk of harm to B or otherwise place her in an intolerable situation."
52. In the alternative, he held that, if he was wrong reaching that conclusion, he would be satisfied that the protective measures offered by the father were sufficient to mitigate the harm. He noted undertakings offered by the father in his statement and additional undertakings proposed by the father during the hearing. He indicated that he would accept these undertakings, with additional amendments set out at paragraph 116 of the judgment. As recorded in the order made following the hearing, the undertakings were as follows:

- “(i) Not to support or instigate any criminal or civil proceedings for the punishment of the respondent arising out of the removal of the child from country and the subsequent retention of the child in England and Wales;
- (ii) Not to use or threaten abuse against the respondent, nor encourage anyone else to use or threaten abuse against the respondent;
- (iii) Not to attend at the airport when the respondent and the child land in Portugal;
- (iv) Not to remove the child from the respondent’s care, save for the purpose of any agreed contact between the parties or ordered by the Portuguese court;
- (v) To pay for economy tickets for the respondent and the child to return to Portugal (to include one hold-luggage suitcase each);
- (vi) Commencing on 15 July 2025, to pay €800 to the respondent per month as financial support, to be paid in monthly instalments directly to the respondent’s bank account, for a maximum period of 1 year or until the respondent obtains a residence permit for Portugal, whichever is sooner;
- (vii) In the event that the respondent confirms that she wishes to reside in the property of the applicant’s cousin ... (instead of the property she is currently renting ...), the applicant shall fund the same for a maximum period of 1 year or until the respondent obtains a residence permit for Portugal, whichever is sooner, and to make payment of the deposit and the first month’s rent prior to the respondent’s return to Portugal;
- (viii) To provide the respondent with a car for a maximum period of 1 year or until the respondent obtains a residence permit for Portugal, whichever is sooner. The applicant will make necessary arrangements for the car to be waiting for the respondent on the date of the arrival in Portugal;
- (ix) Not to enforce the bill sent to the respondent in 2024 of c. €3,500 nor seek to offset any/all of the same against the sums owed for maintenance and accommodation;
- (x) To meet the costs (if any) of the respondent’s legal representation in respect of her application for a residence permit in Portugal, up to a maximum of €3,000, and to pay those costs directly to the lawyer. The applicant will make such payments as necessary prior to 30 June 2025;
- (xi) To apply for a court welfare hearing in respect of the child as soon as possible after her return;
- (xii) Not to attend the respondent’s place of residence without prior agreement;
- (xiii) To contribute towards any nursery fees in relation to any nursery that the applicant and respondent agree on; and
- (xiv) To fund health insurance for the respondent and the child for 1 year with the premium paid directly to the provider, with the respondent to provide proof of that policy having been taken out and funded before the child’s return.”

53. The judge recorded that it was said on the mother's behalf that it was significant that there was no evidence as to the extent to which the Portuguese court would enforce these undertakings or make mirror orders reflecting the undertakings. He observed, however, (paragraph 121):

"I am satisfied that this is a case where F can be trusted as he is mindful of the need for B to have the benefit of a safe and secure environment and of the importance of M having the same in order to be able to meet B's needs."

He added (at paragraph 122):

"My acceptance of F's undertakings (which constitute 'measures' for the purpose of Article 23 of the Hague Convention 1996 and are therefore recognisable by operation of law in Portugal) will therefore be sufficient protection. I am satisfied on the facts of this case that this satisfies the need for the protective measures to be effective (which is not confined solely to the issue of enforceability)."

On that basis, he concluded that his acceptance of the undertakings provided sufficient protection and that it was unnecessary for the undertakings to be reflected in an order of the Portuguese court prior to the child's return.

The appeal

54. The mother puts forward five grounds of appeal:

- (1) The judge misdirected himself in the application of the legal principles governing the Article 12 defence of settlement to the facts of this case. His finding that the child is not settled in this jurisdiction is wrong.
- (2) His decision to exercise his discretion to order a summary return is not rationally supportable.
- (3) He misconstrued the expert evidence in respect of the mother's immigration position in his approach to both defences in the following respects:
 - (a) he arrived at an irrational conclusion that the court could be satisfied on balance that the mother will be able to formalise her right of residence in Portugal; and/or
 - (b) he failed to weigh in the balance the impact upon the child and her primary carer of the likely protracted delay in a decision being made upon the regularisation of the mother's immigration status.
- (4) He erred in his analysis of the Article 13(b) defence in:
 - (a) his determination that the abuse allegations made by the mother against the father with respect to domestic abuse and/or sexual abuse do not meet the threshold of Article 13(b);

- (b) his assessment of the cumulative aspects of the mother's case; and
- (c) failing to evaluate the impact upon the child and her primary carer of the father's refusal to allow the child to visit her family and social network in this country for a minimum period of 1 year if ordered to return to Portugal.

(5) He adopted a flawed approach in his evaluation of the efficacy and effectiveness of the father's proposed undertakings and failed to ensure that the undertakings would be enforceable in Portugal prior to a return to ameliorate the Article 13(b) risk of harm.

55. The principal focus of the argument at the appeal hearing was on the judge's treatment of the Article 12 defence, which lies behind grounds 1, 2 and, to a minor extent, 3. I shall consider the submissions on that issue before turning to consider, more briefly, his treatment of the Article 13(b) defence, which lies behind the other grounds.

Article 12 - submissions

56. On behalf of the mother, Ms Anita Guha KC leading Mr Graham Crosthwaite accepted that the judge had identified the correct legal principles but submitted that he had misapplied them in adopting a flawed and overtechnical approach. She emphasised that the fundamental aim of the Convention was to rectify harm caused to the child by her wrongful removal and re-establish the status quo as expeditiously as possible so that disputes about the future care and welfare of the child can be resolved by the courts in that jurisdiction.

57. She identified a number of core features in her client's case to which, she submitted, the judge attached insufficient weight. In particular he had failed to take into account the extensive detail about the child's life in this country, set out over five pages of the mother's statement. These included the fact that B has been living in this jurisdiction since September 2022 and in her current home for over two years; that she frequently spends time with her maternal family who live 15 minutes away from their home and are able to provide regular support with childcare; that she has attended a playgroup, forest school and two nurseries in this country, enjoys various extra-curricular activities, and has made a number of friends here; that she has been registered at a doctor's surgery here since early 2023. Ms Guha submitted that taken together these facts demonstrate that B is physically settled in this country where she has been living with her mother since September 2022. Ms Guha submitted that the judge had given insufficient attention to the extensive evidence about the child's settled life here and had instead focused excessively on the details of the communications passing between the parties. In doing so, he had adopted an "unduly technical approach to the question of settlement", contrary to the approach proposed by Black J in *F v M and N*.

58. Ms Guha further relied on the frequent contact which B has enjoyed with her father, both in this country and in Portugal. The father has visited her here on a monthly basis, on occasions staying for a week or longer while working remotely. The mother's representatives have calculated that the father has visited and stayed in this country on thirty-three occasions since September 2022. He visited the new home in this country and gave his approval before the mother and B moved in. Since

September 2022, B has visited Portugal on six occasions. When visiting Portugal, she has maintained a relationship with her paternal family. At the end of each visit, she has left Portugal with her mother without the father making any attempt to prevent her leaving. At other times, there has been regular indirect contact between father and daughter via a video link. As a result, B has been able to maintain a close and loving relationship with her father and his family. Ms Guha submitted that the fact that she continued to retain her links with her father and paternal family in Portugal through planned holidays is a factor that assisted, rather than hindered, her settlement in this country.

59. Under ground 2, concerning the exercise of the discretion to return in the event that the Article 12 defence was established, Ms Guha understandably relied on the dicta of Baroness Hale in *Re M (Zimbabwe)* at paragraph 47. The one-year time frame of the Article 12 gateway had been far exceeded. Applying the principle that the focus of the exercise of the discretion must be the child's welfare, Ms Guha submitted that the evidence showed that B is thriving in her home, social and family environment in this country and would suffer adversely if obliged to return to a precarious and uncertain existence in Portugal where her primary carer has no secure immigration status, independent accommodation, right to work, income or solid support network. There was no credible or cogent evidence over and above the father's bare assertion to indicate that he would not continue to travel to this country on a regular basis and no evidence to suggest that the mother would not continue to take B back to Portugal to spend time with her father and paternal family. The psychological evidence indicated that the stressors of a return to Portugal would impact adversely upon the mother's symptoms of depression and wellbeing and coping skills which will inevitably compromise the quality and consistency of care that she has been able to afford B whilst they have been living in this country. This was, said Ms Guha, a paradigm case where the only conclusion reasonably open to the court is that the child will suffer more harm if she is exposed to the upheaval of leaving her home and life in this country to return to a precarious and uncertain existence in Portugal.
60. Ms Guha further argued, under ground 3, that the judge's evaluation of the expert evidence as to the mother's immigration status had been flawed and that this had impinged on his exercise of the discretion to return under Article 12.
61. In responding to the appeal, Mr Teertha Gupta KC, leading Ms Olivia Gaunt, understandably relied on the well-established principle that there are only limited circumstances in which an appellate court can interfere with a trial judge's evaluation, citing the observations of Lord Reed, in the context of a child abduction case, in *Re R (Children) (Reunite International Child Abduction Centre intervening)* [2015] UKSC 35, at paragraph 18. The factual question as to whether a child is settled in this jurisdiction was for the trial judge. Mr Gupta submitted that the mother could only persuade this Court that the judge was wrong if she can satisfy the Court that he reached a conclusion which was not open to him. In this case, the judge carried out a detailed analysis of the evidence. His conclusion was open to him on the facts, having regard to, inter alia, the mother's intentions and lack of settlement and B's young age, which meant that she was not in full-time education and will have taken her cues, and derived her sense of emotional and psychological settlement, from her parents. Central to Mr Gupta's argument was his submission that parental intention is a relevant factor when considering settlement. The younger and more dependent the

child, the greater the importance to be attached to the parent's intention and psychological state, as acknowledged by Thorpe LJ in *Cannon v Cannon* at paragraph 57. B has travelled extensively between the two countries and the judge was entitled to consider that she would not be able to distinguish between one country and another. Mr Gupta submitted that, on the basis of the evidence, including Ms Veitch's report, it was plainly open to the judge to conclude that B was not settled in this jurisdiction.

62. On ground 2, Mr Gupta submitted that, if the Article 12 defence had been made out, the court's discretion nevertheless to order B's return was at large and the appeal can only succeed if the mother can show that the judge's exercise of the discretion was wrong or irrational. There were a number of competing factors which the judge considered. His decision that if the discretion arose he would exercise it by ordering B's return to Portugal was plainly open to him. In reaching that decision, he was entitled to take into account policy considerations. In particular, in this case, he was entitled to consider that the parties engaged in non-court dispute resolution prior to the father issuing his application. Mr Gupta submitted that this was only one factor in the judge's analysis and rejected the suggestion that the judge had concluded that Convention policy trumped welfare considerations. There were unusual features of this case compared to previous cases where settlement has been found. Here, the judge was entitled to decide on the facts, including that B already has a home in Portugal, that she benefits greatly from her relationship with the father and that it was unlikely to be feasible for him to continue to travel to this jurisdiction for an indefinite period, that the welfare and policy considerations together militated towards a return.
63. Mr Gupta accepted that, on the basis of case law both in our courts and in other jurisdictions (as illustrated by a helpful table of sixteen cases prepared by Ms Gaunt), once it has been found that a child was settled in her new environment under Article 12 the exercise of the discretion to return her to her country of habitual residence was, in Mr Gupta's phrase, as rare as hen's teeth. He argued, however, that this only emphasised the importance of the judicial evaluation of the gateway stage of the defence with which an appellate court should refrain from interfering.

Discussion and conclusion on Article 12

64. The judge carried out a detailed assessment of the evidence and submissions on all matters relevant to the Article 12 defence. In my view, however, his analysis and interpretation of Article 12 and the exercise of discretion was flawed in a number of respects and the conclusion at which he arrived was wrong, for several reasons.
65. The first object of the Convention in Article 1(a) is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. In such circumstances, the Convention authorises the courts of signatory States to order the child's summary return without carrying out a full investigation of the child's welfare interests. It is important to note that this is not an exception to the principle that the child's welfare is the paramount consideration in making decisions about her future care. On the contrary, as Professor Perez-Vera identified in the Explanatory Report, the objects of the Convention in Article 1 "correspond to a specific idea of what constitutes the 'best interests of a child'", which, as the Preamble demonstrates, the signatory States recognised as being of paramount importance. In those circumstances, the summary return of a child who has been wrongfully removed or retained is consistent with her welfare unless the abducting

parent establishes one or more of the defences under the Convention and the court in the requested State concludes that the child should not be returned. But where the child has not been returned promptly within a year of the abduction, and has settled in a new environment, the scope for the court to order her summary return without a full examination of her best interests will be extremely limited. That is entirely consistent with the policy of the Convention as reflected in its Preamble and substantive provisions.

66. I endorse the summary of the legal principles applicable to Article 12(2) set out in the judgment of Williams J in *Re B (A Child)* [2018] EWHC 1643 (Fam). The summary was cited by the judge and not challenged in argument before us. There is, however, one point of divergence on the authorities which calls for consideration here.
67. As noted above, in her discussion of Article 12 in *Re N*, which has been substantially followed by other judges, including by this Court in *Cannon v Cannon*, Bracewell J observed that establishing that a child was settled in her new environment required the abducting parent to demonstrate that the “present position imports stability when looking at the future, and is permanent in so far as anything in life can be said to be permanent”. In my view, though settlement plainly implies arrangements that are long-term rather than transient, it is, as the commentators cited above have observed, “going too far” to require the respondent to demonstrate that they are “permanent”. There is no good reason for introducing a requirement that the abducting parent must demonstrate that the family environment in which it is asserted the child is settled is a permanent one. My conclusion on this point is consistent with the approach taken in the first-instance cases cited at paragraph 14 above – *Re C* (Sir Mark Potter P) and *Re E* (Moylan J) – in which the court found the child to be settled in their new environment notwithstanding uncertainty as to their immigration position.
68. It follows that, in attaching weight (at para 56) to the fact that “M had not communicated to F an unequivocal intention permanently to reside in this jurisdiction with B until recently” and then concluding (para 58) that, because “B has not received a clear and consistent message that this country is and will be her permanent home” she “will therefore feel ‘in limbo’ and ... cannot as a consequence have a sense of physical, psychological and emotional settlement here”, the judge was applying too stringent a test.
69. The question to be answered under Article 12(2) is whether a child is settled in her new environment. “New environment” is a broad concept. As emphasised repeatedly in reported cases, it includes not just the physical but also the emotional and psychological. It encompasses, in Bracewell J’s words in *Re N*, “place, home, school, people, friends, activities and opportunities”. It also includes the time she spends with other family members, including the left-behind parent. Regular contact with the left-behind parent will be part of the child’s new environment.
70. Over the intervening period of nearly two and a half years between her retention in this country in October 2022 and the start of these proceedings in March 2025, B had lived for the majority of the time in this country, with several periods, some quite lengthy, in Portugal. She established roots in this country, going to nursery, making friends, spending much time with her extended maternal family. But importantly she also had frequent contact with her father and his family.

71. I consider the judge was wrong to conclude (at para 61) that “a lack of settlement in this country will have been compounded by B’s six visits to Portugal ... and visiting F’s home in Portugal”. On the contrary, the regular and extended visits to see her father in Portugal, coupled with his regular and frequent visits to see her in this country, were part of the new environment into which she was becoming settled. Equally he was wrong to conclude (at para 62) that the “requisite physical integration and stability for the purposes of Article 12” was lacking because “there are also properties in Portugal which B considers to be home, and has many friendships and family there with whom she has a close connection and has maintained a relationship with physically when in Portugal and remotely when in this country.”
72. In many, perhaps the majority, of cases where a period of such length has passed between the act of abduction and the start of the proceedings, the child has spent at least part of the time in a location of which the left behind parent is unaware, and/or with little if any contact taking place. This case is very different. At all times the father has known where B is living. He visited her here on many occasions. He was consulted about the choice of accommodation in this country. Far from keeping B away from her father and his family in Portugal, the mother has taken her back there on half a dozen occasions, sometimes staying for lengthy periods, and has facilitated regular and open contact. On those occasions, the father has taken no steps to prevent B and her mother coming and going freely.
73. As Williams J observed in *Re B*, concealment is likely to undermine settlement whereas living openly is likely to permit greater settlement. Here, the mother and B’s whereabouts were not concealed. They were fully known to the father. Although he did not approve of the new arrangements, and sought to change them through negotiation, he accommodated them in his day-to-day plans for the child. If, as Williams J rightly observed, the absence of a relationship with a left behind parent will be an important consideration in determining whether a child is settled, it must follow that the continuation of the relationship through regular or repeated contact is likely to make it more likely that settlement will be established. In this case, by the time of the hearing before the judge, the father had visited the UK on 33 occasions and had regular contact with B on every visit. The mother had taken B back to Portugal on six occasions without any attempt by the father to stop them leaving at the end of each visit. As Ms Guha submitted, in sorting out these arrangements the parties were able to work collaboratively and with a degree of harmony, and were able to shield their disagreements from the child who saw them working together. This is borne out by the child’s demeanour during handover between the parents, as described by the Cafcass officer and quoted in paragraph 30 of the judgment. It has not been contended that this amounted to acquiescence on the part of the father, but in my view it does establish a pattern of life which is consistent with a settled environment in the broadest sense. I accept Ms Guha’s submission that the fact that B continued to retain her links with her father and paternal family in Portugal is a factor that assisted, rather than hindered, her settlement in this country.
74. In those circumstances, the fact that her mother prevaricated and changed her mind about what to do on several occasions, and only formed a firm intention to live in this country a few months before the father issued these proceedings, did not prevent B becoming settled in her new environment by the date on which these proceedings were started. At various points, the mother had clearly considered returning to

Portugal, and in 2024 went as far as signing an agreement to do so. But by the time the proceedings were started, despite her previous prevarication and changes of mind, the mother had formed the clear intention of living in this country. The fact that the parties were conducting negotiations, and that at one point appeared to have agreed that the mother and B would return to Portugal, did not prevent B becoming settled in her current environment by March 2025. I accept Ms Guha's submission that that the judge focused excessively on the details of the communications passing between the parties and attached insufficient weight to the extensive evidence about the child's settled life in this country.

75. By March 2025, B had not merely adjusted to her present surroundings. Physically and psychologically, she was integrated into an environment which, if not permanent, was "long-term" rather than "transient". That environment, as described in detail in the mother's statement, included a home in this country where she attended nursery, took part in other activities, and established relationships in a wide social and family network which included contact with her father and paternal family. In all the circumstances, I find that the evidence demonstrated that B was settled in her new environment and that the judge's contrary conclusion was wrong.
76. Turning to the exercise of the discretion under Article 12, the factors limiting the scope of the discretion identified by Baroness Hale in *Re M (Zimbabwe)* were plainly relevant. By March 2025, this was manifestly not a "hot pursuit" case. The central object of the Convention after a child has been abducted, namely securing a swift return to the country of origin, was no longer possible. As a result, it could no longer be assumed that Portugal was the better forum for resolving the dispute between the child's parents as to how her long-term welfare needs should be met.
77. Standing back and looking at the circumstances faced by the judge, there was decisive force in the submissions on discretion made to him by Ms Guha. B had come to this country when only nine months old and was by the date of the hearing aged 3 ½. The father had known of her whereabouts at all times and delayed in bringing his remedy pursuant to the Hague Convention for two and a half years. Although the judge concluded on balance that the mother would be able to formalise her right of residence in Portugal, the expert evidence given by Mr Perry da Câmara, which the judge accepted, clearly showed that the process of securing her right to reside in Portugal would not be straightforward and would involve some delays and restrictions in the interim. On any view of the expert evidence, the outcome is far from certain and the process would take some time, during which the mother's right to work and claim benefits and, possibly, travel freely between the two countries would be restricted. It is inevitable that these uncertainties and difficulties would have an impact on the mother and therefore on the child's welfare. The judge was unduly dismissive of these difficulties when considering the exercise of the discretion. Similarly, although he concluded that there was not a risk of a significant deterioration in the mother's mental health if required to return to Portugal, he accepted that there would be a "cumulative" and "negative" effect on her wellbeing. He considered that these factors were outweighed by the father's assertion that he would be unable to visit this country as frequently in future as he had in the intervening two and a half years. But this was an evaluation which should have been carried out after a full and thorough welfare enquiry, not on the basis of assertions and very limited evidence as part of the summary process in abduction proceedings. It was

inappropriate and wrong in principle to order the return of the child without a full welfare analysis.

78. There is, in my view, a further error in the judge's analysis and exercise of the discretion. In exercising his discretion, the judge (at paragraph 84) attached weight to what he described as "a separate policy point" that "a party should be allowed to enter mediation and/or use other forms of non-court dispute resolution without fear that the time taken in seeking to resolve matters outside of court may be used against them." I do not agree with the judge's assertion that the merits of a settlement defence and/or the arguments in relation to the non-exercise of the discretion are not strengthened by a significant delay in issuing proceedings for the summary return if the parties were engaged in dispute resolution processes during that period. The fundamental principle of the Convention is the swift return of an abducted child to her country of habitual residence. Any significant delay is relevant to the exercise of the discretion to return under the Convention. The reasons why the left behind parent has refrained from issuing proceedings promptly are also relevant. It is of course right that the overriding objective and other provisions of the Family Procedure Rules encourage parties to resolve disputes without resorting to litigation. But the judge's assertion that a delay of over two years cannot as a matter of policy strengthen the arguments against the exercise of the discretion if the parties were engaged in non-court dispute resolution processes about the child's future care and welfare is inconsistent with the underlying principles of the Convention as explained above.
79. For those reasons, I would uphold the mother's appeal on grounds 1 and 2. I conclude that the judge was wrong to find that, at the date on which the proceedings were started, the child was not settled in her new environment and also wrong to conclude that, had he reached the contrary decision, he would nevertheless have exercised his discretion to order her summary return to Portugal.

Article 13(b)

80. It is fair to say that the focus of Ms Guha's appeal was principally on the Article 12 issue, rather than Article 13(b). In those circumstances, and in view of my conclusions on the Article 12 issues, the arguments under Article 13(b) can be taken more briefly.
81. Ms Guha submitted that the judge wrongly determined that the cumulative elements of the mother's defence did not cross the Article 13(b) threshold of harm. In particular, she argued that he was not entitled on the evidence to discount the mother's allegations of coercive and controlling behaviour in assuming that the allegations are "mostly situational to the parties' relationship". Ms Guha described this as a flawed and speculative opinion which had not been ventured by the Cafcass officer. It demonstrated a misunderstanding of this form of abuse, and the fact that the risk will subsist post-separation as long as there is an imbalance of power between the parties. The mother's statement clearly explained why she continued to be fearful and anxious of the father's controlling behaviours following their separation. Ms Guha submitted that the mother's case that she was still a victim of ongoing abuse was not undermined by the fact that at one stage she proposed dividing the time that she and B would live between this country and Portugal. She further contended that the judge's treatment of the psychological evidence, which established that a return to Portugal would have a negative effect on the mother's wellbeing, was insufficiently considered by the judge as part of the cumulative picture. She also argued that the judge had

failed to give due consideration to the impact on the mother of the restrictions which the father was seeking to impose on travel to this country in the first year after B was returned to Portugal.

82. Ms Guha further submitted, under ground 5, that judge's treatment of the father's proposed undertakings was flawed. In particular, given the context of a history of coercive control, she submitted that he was wrong to adopt the father's proposals about accommodation in a property owned by his family. As a minimum, he should have accepted the mother's case that the risk of domestic abuse could not be ameliorated unless the father provided her with funds for independent accommodation pending the resolution of her application for a residence permit given that the mother has no right to work or claim benefits during this period. Furthermore, in a case where there was no evidence that the undertakings offered to an English court by the father would be recognised or enforceable in Portugal, the court should have acceded to the mother's case that the order be registered in Portugal as a condition precedent to a return to ensure that there are no issues with enforceability. Ms Guha submitted that he took an unjustifiable leap of faith that he could rely solely upon the father's assurances in a case where such serious allegations of abuse were levelled against him. She cited the observations of Cobb J (as he then was) in *Re T (Abduction: Protective Measures: Agreement to Return)* [2023] EWCA Civ 1415 at paragraph 55 and in the 2023 Practice Guidance provided by the President of the Family Division at paragraph 3.11:

“There is a need for caution when relying on undertakings as a protective measure, and undertakings that are not enforceable in the courts of the requesting State should not be too readily accepted. There is a distinction to be drawn between the practical arrangements for the child's return and measures designed or relied on to protect the child. The efficacy of the latter will need to be addressed with care.”

83. I am unpersuaded by these submissions that there are grounds on which this Court could properly interfere with the judge's conclusions on the Article 13(b) defence. On this issue I accept the arguments put forward by Mr Gupta that the judge carefully and correctly applied the established legal principles to the facts and reached a conclusion that was plainly open to him on the totality of the evidence, including the extensive history of messages passing between the parties and the mother's various proposals put forward in discussions between 2022 and 2024 which envisaged her and B spending significant periods of time in Portugal. The judge explained carefully why the points raised by the mother, taken individually and collectively, were insufficient to cross the high hurdle imposed by Article 13(b). Furthermore, as Mr Gupta pointed out, the judge's acceptance of undertakings in this case was in line with the approach to protective measures advocated by this Court in previous authorities and other first instance cases, where both States are signatories to the 1996 Hague Convention. I agree with Mr Gupta that the judge properly held that the undertakings offered by the father amounted to measures pursuant to the 1996 Hague Convention, and are therefore recognisable by operation of law. He was therefore entitled to conclude that the undertakings did not need to be reflected in a Portuguese order prior to return.
84. I therefore reject the mother's grounds of appeal 4 and 5. For the reasons given above, however, I would allow the appeal on grounds 1 and 2 and set aside the judge's order

that B be summarily returned to Portugal.

LORD JUSTICE BIRSS

85. I agree.

LADY JUSTICE ASPLIN

86. I also agree.