Neutral Citation Number: [2025] EWHC 2190 (Fam)

Case No: FD25P00086

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/08/2025

Before :

VIKRAM SACHDEVA KC
SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

F

Applicant

- and –

(1) L
(2) S
(3) R
(4) T

Respondents

- -
- -

Jennifer Perrins (instructed by **Shepherd Harris & Co**) for the **Applicant**
The First Respondent in person
Frankie Shama (instructed by **The International Family Law Group**) for the **Second Respondent**
Naomi Wiseman (instructed by **TV Edwards Solicitors LLP**) for the **Third Respondent**
Lina Khanom (instructed by **CAFCASS Legal**) for the **Fourth Respondent (through his Children's Guardian)**

Hearing dates: 10 – 11 July 2025

- -

Approved Judgment

This judgment was handed down remotely at 9pm on 20 August 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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VIKRAM SACHDEVA KC

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

Vikram Sachdeva KC :

Introduction

1. This is an application dated 14 April 2025 by the father, F, for summary return of an 11-year-old child, T, to Zimbabwe under the Hague Convention on the Civil Aspects of Child Abduction 1980.

2. The mother, M, who is the First Respondent, concedes that T was habitually resident in Zimbabwe as of the date of the allegedly wrongful abduction in October 2022 and that the court with primary jurisdiction in respect of T is the Zimbabwe court.

3. The Second Respondent is a maternal aunt of T. The Third Respondent is the husband of the maternal aunt. The Fourth Respondent is the child, T, acting through his Children's Guardian, Ms. Callaghan.

4. The mother opposes return in reliance on the following defences:

    a. Article 3: rights of custody. She asserts that a Zimbabwe court order permitted her to take T out of the jurisdiction, and that F had only access rights, which do not amount to custody rights.

    b. Article 12: settlement. She asserts that T is settled in the environment of the United Kingdom, after over 2 years.

    c. Article 13(a): acquiescence. By his failure to pursue an application for return promptly, F acquiesced in T's removal.

    d. Article 13(b): grave risk of harm/intolerability. Return to Zimbabwe would expose T to a grave risk of harm/intolerability, because of the threats made to the mother and the fact she will not travel to Zimbabwe.

    e. Article 13(b): child's objections. T objects to returning to Zimbabwe.

f. Article 20: protection of human rights.

5. The father relies on the court's discretion within the Convention to return the child even if any of the defences succeed.

6. During the hearing the father also made an *ad hoc* application for the court to consider an application for summary return under the inherent jurisdiction.

7. I acknowledge the hard work, care and skill which has been deployed by the mother, counsel, and solicitors over the course of the hearing and in written submissions in the preparation and presentation of their respective cases. I do not intend any disrespect to the parties if I do not address every single point which has been made to me, but I have taken them all into account and what follows is my assessment of the issues important to the disposal of this claim.

Factual Background

8. The father and mother met in Zimbabwe in 2013 and commenced cohabitation. The father alleges that they had a customary marriage under Zimbabwean law; the mother denies this. T was born on 25 February 2014. In 2017 the parties separated. The father says that the customary marriage came to an end at this point.

9. The mother had custody of T and the father has frequent contact with him. Between 2019 and 2021 the mother worked in South Africa, and T was looked after by the father. The mother regained custody when she returned in 2021.

10. On 3 January 2022 the Magistrates Court in a city in Zimbabwe was required to decide an application by the mother for custody of T. Observing that in the case of young children custody was usually given to the mother, and noting that the father was now

married and living with his wife and other son, it held that it was in T's best interests for custody to be awarded to the mother, with the father to be granted access to the child. It made the following Order:

> "1. Custody is hereby awarded to the applicant.
>
> 2. The respondent shall have access to [T] every alternate weekend every alternate public holiday and one half of each school holiday."

11. On 6 August 2022 the mother visited the local District Registry and re-registered T's name as a Shona name, changed his date of birth, and omits mention of the father on the second notice of birth form.

12. On 20 October 2022 the father had contact with T.

13. In the next few days (between 20 and 24 October 2022) the mother took T and travelled to the United Kingdom with him, going to stay with her sister, S, and her husband, R.

14. The father was telephoned on 24 October 2022 by T's headmaster, who sought reasons why T had been taken out of school, and informed the father that the maternal grandmother had returned T's books to the school stating that he will not be returning.

15. The father says he did not hear anything about them until 2024 when he received a voice note of T from the mother, in which T had an English accent. The father then discovered that one of the mother's sisters, S, was living in England. In November 2024 the father ascertains the address of S and R, and the father's brother visits them.

16. On 18 February 2025 the father travelled to England and visited the address of S and R. He saw T looking out of a window. The mother's telephone number was provided, and a meeting was arranged. On 21 February 2025 the father met with the mother and

T. On 22 February 2025 the father drove the mother to work and came back with T, who spent the next two nights with him at his hotel.

17. On 24 February 2025 the father and T attended the Zimbabwean embassy to make arrangements to take him back to Zimbabwe. However, the mother did not attend, and she told T's school that he had been kidnapped by the father. The school called the police, who removed T from the father's care.

18. On 14 April 2025 the father applied for a Return Order under the Hague Convention.

19. On 1 May 2025 the father made a without notice application for a Location Order which was granted by Harrison J and was executed the following day.

20. The mother was personally served with the application on 7 May 2025.

21. A directions hearing took place on 13 May 2025 before the President of the Family Division at which the Second and Third Respondents were joined.

22. A second directions hearing took place on 29 May 2025 before Mr. Justice Trowell.

23. A third directions hearing took place on 11 June 2025 before HHJ Vavrecka, sitting as a Deputy High Court Judge, at which T was joined as a party with the CAFCASS High Court team to appoint a Guardian to represent him. Permission was granted to the parties to instruct a single joint expert on Zimbabwean law to consider the positions of the mother and father.

24. The substantive hearing took place on 10 and 11 July 2025, with witness statements from the parties and oral evidence from the mother and father and from the Guardian and the single joint expert. There were further written submissions received on 14, 17, 21 and 24 July 2025.

Legal Framework

The relevant Articles of the Hague Convention

25. The Hague Convention states as follows:

> "CHAPTER I – SCOPE OF THE CONVENTION
>
> …
>
> Article 3
>
> The removal or the retention of a child is to be considered wrongful where –
>
> a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.
>
> …
>
> Article 5
>
> For the purposes of this Convention –
>
> a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
>
> b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.
>
> …
>
> CHAPTER III – RETURN OF CHILDREN
>
> Article 8
>
> Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

…

The application may be accompanied or supplemented by –

…

f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

…

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination."

26. The defence of settlement is addressed as follows:

"Article 12

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

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the

preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment…"

27. The defence of acquiescence has the following requirements:

"Article 13

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

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

28. The defence of a grave risk of harm is defined in Article 13(b) as follows:

"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."

29. The defence of child's objections within Article 13 is as follows:

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

30. The following statement of principle applies to all Article 13 defences:

"In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

31. Article 20 states as follows:

"Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

Policy of the 1980 Hague Convention

32. The objectives of the 1980 Hague Convention are expressed within its preambles and initial articles. preamble declares that the signatory states are "Firmly convinced that the interests of children are of paramount importance in matters relating to their custody" and "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." Article 1 states the objectives of the Convention, which are as follows:

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

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

33. One of the ways in which the Convention is intended to secure its objectives is by deterring would-be abductors from wrongfully removing or retaining children.

34. In *Re D (a child) (abduction: rights of custody)* [2006] UKHL 51, [2007] 1 AC 619, [2007] 1 All ER 783, [2007] 1 FLR 961, Baroness Hale described the operation of the 1980 Hague Convention at §48 of her speech, as follows:

"The whole object of the Convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to

> the place which is properly their "home", but also so that any dispute about where they should live in the future can be decided in the courts of their home country, according to the laws of their home country and in accordance with the evidence which will mostly be there rather than in the country to which they have been removed…"

Article 3 Rights of custody:

35. In *Re M (Abduction: Acquiescence)* [1996] 1 FLR 315 the couple met in 1988, the mother became pregnant in 1989 and that year the parties married in Greece. The child was born on 23 April 1990 but they couple then separated on 7 December 1990. On 17 February 1992 the mother applied for a provisional order for custody and maintenance for the child. The father did not appear and was not represented, and the Greek court made findings and an order committing the child's physical custody to her on a provisional basis. On 28 July 1993 she left Greece without any notice to the father of her intention to do so. He quickly discovered her flight and her whereabouts and telephone calls followed during which she made it clear that she had no intention of returning. The father issued proceedings for the child's summary return on 19 October 1994. Under a month later, on 9 November 1994, a *decree nisi* was pronounced in England, the mother's petition for divorce not being defended.

36. Thorpe J (as he then was) identified the main issue as whether or not the mother's action on 30 June 1993 amounted to a wrongful removal of the child contrary to Article 3. The other defences (of settlement under Article 12, acquiescence under Article 13(a), and of a grave risk of physical or psychological harm under Article 13(b)) did not strictly arise unless that issue was determined in the father's favour.

37. The judge found that whether removal had been wrongful turned on whether the mother's exclusive rights and duties to the care of the person defined by Article 1518 of the Greek

Civil Code as including the determination of his place of residence extended to the selection of a place of residence outside the jurisdiction of the Greek court. Having received both written and oral evidence from two experts in Greek law, the judge held that the onus was on the father to prove that the removal had been wrongful according to Greek law, and he had failed to discharge that burden, for the point was as yet undecided in Greek law, the authorities relied upon by the father's expert pre-dating the entry into force of Article 1518.

38. In *Hunter v Murrow* [2005] EWCA Civ 976 [2005] 2 FLR 1119, a 4-year-old child was removed from New Zealand to London by his mother without his father's knowledge or consent. Both parents were New Zealand citizens. Their son was conceived during a relationship which ended in March 2000. He was born on 22 November 2000. The father continued to have regular contact with his son by agreement until just before 21 September 2004, when the mother flew to England with her son. Two days later the mother rang the father and told him of their whereabouts. The following month she advised the father that she may continue living in London and was seeking employment. On 29 October 2004 the father made an application in New Zealand for the return of his son under the Hague Convention. On 15 November 2004 an originating summons was issued in London seeking a return order under the Hague Convention.

39. On 16 December 2024 by consent a request was made via the Claimant to the New Zealand court pursuant to Article 15 to the New Zealand court for a determination of (i) his rights in relation to the child and (ii) whether the removal had been wrongful within the meaning of Articles 3 and 5. The New Zealand court found that the father did have rights of custody, even though his access did not extend to overnight care of the child,

his regular access was a defined and committed relationship which constituted substantial intermittent possession and care of the child.

40. Thorpe LJ stated that the crux of the case was that New Zealand had rejected the approach in England and Wales and was ready to categorise simple contact arrangements as constituting "rights of custody": para 22. His Lordship went on to opine that the Article 15 declaration was not binding on the requesting authority or the courts of that country but was no more than persuasive. The courts of the requesting state will accept as much or as little of the judgment as they choose: para 27. In determining whether or not the father exercised rights of custody immediately prior to his son's removal the court applied not English law but the English perception of the autonomous law of the Hague Convention: para 29.

41. Dyson LJ (as he then was) stated that there were two relevant questions (paras 46 – 7):

    i) To establish what rights, if any, the applicant had under the law of the State in which the child was habitually resident immediately before his or her removal or retention. ("the domestic law question"). This question is determined in accordance with the domestic law of that state, and involves deciding what rights are recognised by that law, not how those rights are characterised.

    ii) Whether those rights are properly to be characterised as "rights of custody" within the meaning of Articles 3 and 5(b) of the Hague Convention. This is a matter of international law and depends on the application of the autonomous meaning of the phrase "rights of custody". Where an application is made in the courts of England and Wales, the autonomous meaning is determined in accordance with English law.

42. Dyson LJ stated (at paras 49 – 50) that in many cases the domestic question is satisfactorily resolved on the basis of expert evidence, or in reliance on a certificate or affidavit under Article 8(f) emanating from a Central Authority or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State; or by taking notice directly of the law of, and judicial or administrative decisions, formally recognised or not in the state of habitual residence of the child, without recourse to the specific procedures for the proof of that law or the recognition of foreign decisions which would otherwise be applicable: see Article 14. But it can also be resolved by a determination pursuant to Article 15: a request for a determination that the removal was wrongful within the meaning of Article 3 can include a request for a determination of the domestic rights (if any) of the applicant in relation to the child. The decision of a court of competent jurisdiction is obviously more authoritative on the domestic law question than the opinion of an expert.

43. Dyson LJ went on to point out (at para 57) that the English approach to the interpretation of rights of custody and rights of access has been to emphasise the difference between them, citing *Re W; Re B (Child Abduction: Unmarried Father)* [1998] 2 FLR 146 per Hale LJ:

> "Thus a deliberate distinction is drawn between rights of custody and rights of access… Rights of custody are protected under Art 12 by the remedy of speedy return to the country where the children were habitually resident before they were removed. Rights of access are protected under Art 21 by remedies to organise and secure their effective exercise in the country where the children are now living."

44. Lloyd LJ agreed that the father's right were, at the highest, simple contact arrangements. He explained this conclusion by reference to two principles: (1) where a father had contact rights but was also entitled to a veto over the removal of the child from the

jurisdiction, except for short periods, had rights of custody, in Hague Convention terms, because the right of veto amounted to a right to determine the residence of the child: *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654 (2) if the applicant has only the right to be informed about proposals for removal that does not amount to a right of custody: *Re V-B (Abduction: Custody Rights)* [1999] 2 FLR 192.

45. *In Re D (Abduction: Rights of Custody)* [2006] UKHL 51 [2007] 1 FLR 961 a one year old child remained with the mother after divorce. When the child was 4 years old the mother removed the child from Romania to England without the father's knowledge or consent. The father sought the child's return under the Hague Convention. A request for determination of whether removal had been wrongful was sought by the English court from the Romanian Court. The Romanian Court ruled that the removal had not been wrongful, because the father's rights had not amounted to rights of custody. Joint custody had ended on divorce, and thereafter the parent awarded custody on divorce (in this case the mother) exercised parental rights and fulfilled parental duties, while the parent without custody had a right to personal contact with the child, and to watch over, but not to direct, the child's upbringing. None of the rights granted to the non-custodial parent on divorce involved a right of veto or to decide the child's place of residence.

46. Baroness Hale held that a "right of veto" (the right to object to a child's removal from the jurisdiction) – amounts to "rights of custody" within Article 3, but a potential right of veto (for instance a right to go to court and obtain an order) does not. To hold otherwise would remove the distinction between rights of custody and rights of access: paras 37 – 8.

47. The Applicant relies on an opinion dated 20 June 2025 from the Ministry of Justice, Legal and Parliamentary Affairs, and Articles 8(f) and 14 of the Hague Convention. The

opinion notes that the mother had been granted custody and the father access rights by court order, asserts as a matter of domestic law:

i) The protection provided under the Hague Convention is not limited to individuals who have physical custody at the time of removal, but extends to all parties who possess rights and responsibilities towards the child as per the municipal laws of the court in the child's habitual residence. The critical factor is whether the non-custodial parent maintains the right to be consulted regarding the child's welfare, which amongst other factors, includes decisions about relocating the child outside the jurisdiction of habitual residence: *Kumalo v Kumalo* [2004] ZWHHC 65 https://zimlii.org/akn/zw/judgment/zwhhc/2004/65/eng@2004-03-01 .

ii) Though the court order does not regulate the removal of the child from Zimbabwe, it has been held that the removal or retention of a child is wrongful if it breaches custodial or access rights under Zimbabwean law, and that the non-transporting parent must be consulted before removal, even absent joint custody: *Peacock v Steyn* [2010] ZWBHC 81 https://zimlii.org/akn/zw/judgment/zwbhc/2010/81/eng@2010-08-04 .

48. The mother relied on the written and oral evidence of the single joint expert in Zimbabwe law, Mr. Davison Kanokanga, a registered legal practitioner and solicitor of the High Court of Zimbabwe, and senior and founding partner of Kanokanga & Partners. Mr. Kanokanga provided an initial report dated 18 June 2025 and then responded to questions posed by the father in an additional report dated 3 July 2025, and gave answers to questions agreed by the parties and amended by the court on 11 July 2025. He also gave brief oral evidence on 11 July 2025.

49. Mr. Kanokanga pointed out that neither case relied upon by the Ministry of Justice supported the proposition that access rights gave the right to consultation before taking the child out of the jurisdiction.

50. In *Kumalo v Kumalo* the parents remained married, and enjoyed joint custody and guardianship over their children. Omitted from the Ministry of Justice's opinion were the words which followed the reference to the right of consultation:

> "In our law, both parents of children born to a marriage have the right to determine the place of residence of the children of the marriage. Thus, the consent of each parent has to be sought before the children leave the jurisdiction and it is only when consent has been unreasonable [sic] withheld that leave of this court, as upper guardian of all minors, is sought."

51. In *Peacock v Steyn* the parents were unmarried but it was found as a matter of fact that they had entered into an agreement to share custody, with the applicant father taking them to South Africa to enrol them in boarding school there, only returning to Zimbabwe for holidays. It was held that the respondent could not unilaterally vary or terminate that arrangement. It did not matter that, under Zimbabwe law, the father of a child born outside marriage had no inherent right over such child. The father was already enjoying rights of custody, and the retention of the children was wrongful under Article 3 of the Convention. Nor did the judgment provide any support for the proposition that access rights alone would give a parent the right to be consulted before removal, failing which removal or retention would be wrongful in Zimbabwe law. The case did not concern access rights alone, and no such statement was made in the judgment.

52. Mr. Kanokanga stated that the father had been granted access rights while the mother had custody rights. Further:

i) There is no specific legislation in Zimbabwe that deals with consent to a child's departure or removal from the country.

ii) The common law gives the custodial parent the right and duty to regulate the life of the child and to choose and establish his or her residence.

iii) There is no rule that, without the consent of the other parent, the custodian parent cannot remove the child from the jurisdiction of the court, unless the court had provided expressly or by implication that the child be kept within the jurisdiction: *Makuni v Makuni* 2001 (1) ZLR 189 (H). In that case Gowora J stated as follows:

> "It is trite that the custodian parent has the right to have the minor child with him or her and to establish the residence of the minor. There is no general rule that, without the consent of the other spouse or the leave of the court, the custodian parent cannot remove the child out of the jurisdiction of the court, nor that on access being awarded to the other spouse, the child's removal out of the jurisdiction of the court is not, save with such consent or leave, permitted, unless there is an explicit statement of what constitutes reasonable access in the circumstances."

Later in the same case the following quote was approved:

> "The position is different where the court provides… expressly or by implication, that the child must be kept within the jurisdiction of the court."

iv) The mother did not require the father's permission to take the child to live in another jurisdiction.

v) She would have required that consent had the father been a joint custodian or the court order specifically said so.

vi) If the non-custodian parent is against the custodian parent's intention to relocate with a child, the onus is on them to go to court with an application for an interdict on the basis that the relocation is not in the child's best interests.

53. Mr. Kanokanga maintained this position in oral evidence.

54. He also stated that the laws of Zimbabwe stated that a parent who is entitled to access has a duty and right to follow his/her children at his/her expense, and that a custodian parent is not entitled to place impediments in the way of the non-custodian parent's access rights. He relied upon the case of *Samudzimu v Ngwenya* (2008) 2 ZLR 228 (H). That case was a dispute over interim custody where the parties had agreed a consent order which permitted the mother to move herself elsewhere within Zimbabwe as long as it did not impede the father's rights of access to the children. That allegation was not found proved on the facts. There was no statement that, failing such an express clause in an order, one is implied. There was no such clause precluding the placing of impediments in the way of access in this case, so this argument is not relevant here.

55. In summary, pursuant to the court order, the father had express rights of access, not express rights of custody. Where there was a difference between the parties was whether Zimbabwean law nevertheless gave the father a right to consultation before T was removed from the jurisdiction.

56. Turning to the two relevant questions, what rights did the father have in Zimbabwean law? It is common ground that he had rights of access only, while the mother had the custody of T. It was not suggested that there was any legislative basis for giving parents with rights of access the power to prevent the child from leaving the jurisdiction. The remaining dispute pertained to the common law of Zimbabwe. Insofar as they differ, I prefer the view of the single joint expert, Mr. Kanokanga, to the opinion provided by the Ministry of Justice, for the case law cited by the former was authority for the propositions advanced, unlike that cited by the Ministry of Justice, as set out above. Thus, even as a matter of Zimbabwean law, the father does not give a right to be consulted before the T could be taken out of the jurisdiction.

57. Thus, this application does not fall within Article 3, on the first question alone.

58. The second question is whether those rights are properly to be characterised as "rights of custody" within the meaning of Articles 3 and 5(b) of the Hague Convention. This is a matter of international law and depends on the application of the autonomous meaning of the phrase "rights of custody". As a matter of Hague Convention law, there is a clear distinction made between rights of custody and rights of access within Article 5.

59. My conclusion is that the rights enjoyed by the father do not constitute "rights of custody" within the Hague Convention. I am bound by *Hunter v Murrow* which emphasised the powerful domestic jurisprudence distinguishing between rights of access and rights of custody (see paras 47 – 8, *supra*). Further, I do not construe the father's rights as extending to a power of veto against the child leaving the jurisdiction of Zimbabwe. There is no express requirement in the order granting the parents their rights to ensure that T remains in the jurisdiction, nor is there any implicit requirement in Hague Convention jurisprudence to do so.

60. Following *Re D*, the father's rights do not amount to rights of custody.

61. Accordingly, this application must fail.

62. Although not strictly necessary, I will now briefly consider the other defences relied upon by the mother, on the assumption that the father can satisfy Article 3.

Settlement

63. Since it is over a year from the date of allegedly wrongful removal from the date of commencement of Hague Convention proceedings here, so the second paragraph of Article 12 is engaged. Ignoring the fact that Article 3 has not been satisfied, the court shall order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

64. In *Re N (Minors) (Abduction)* [1991] FLR 413, 417 – 8 Bracewell J stated as follows:

> "The second question which has arisen is: 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**. Purchas LJ in *In re S (A Minor) (Abduction)* [1991] 2 FLR 1 did advert to article 12 at p 35 of the judgment and he said: 'If in those circumstances it is demonstrated that the child has settled, there is no longer an obligation to return the child forthwith, but subject to the overall discretion of article 18 the court may or may not order such a return.' He then returned to a 'long-term settled position' required under the article, and that is wholly consistent with the approach of the President

> in *M v M* and at first instance in *In re S*. **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. What factors does the new environment encompass? 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 in so far as it impinges on the new surroundings. Every case must depend on its own peculiar facts ..." (emphasis added)

65. In *Cannon v Cannon* [2004] EWCA Civ 1330 [2005] 1 WLR 32 the Court of Appeal rejected the notion that settlement had only a physical element, and found that there is a discretion within the Convention to return even where settlement is proved. Thorpe LJ approved the excerpt above from *Re N* and concluded that each case turned on its facts:

> "53. …A broad and purposive construction of what amounts to "settled in its new environment" will properly reflect the facts of each case…"

66. As to the effect of concealment, it is an important factor, whose effect will vary, depending on the nature of the concealment, and the impact of concealment on settlement:

> "52. In his skeleton argument for the hearing below [counsel] 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.**

54. **Concealment or subterfuge in themselves have many guises and degrees of turpitude. Abduction is itself a wrongful act, in that it breaches rights of custody, but the degree of wrong will vary from case to case**. Furthermore abduction may also be a criminal offence in the jurisdiction where it occurred. The abductor may have been prosecuted, convicted, and even sentenced in absentia. There may be an international arrest warrant passed to Interpol to execute either in respect of a conviction and sentence. The abductor may have entered the jurisdiction of flight without right of entry or special leave. The abductor may therefore be, or may rapidly become, an illegal immigrant.

55. At this point I would draw a parallel between an assertion that a child has become settled in a new environment and our case law regarding the acquisition of habitual residence. There is obvious common ground between proving that a child is settled in a new environment and proving the acquisition of an habitual residence in a new environment. The decision of Sir George Baker P in *Puttick v. Attorney General* [1980] Fam 1 clearly establishes that a fugitive from foreign justice will not acquire habitual residence in this jurisdiction simply by reliance on a temporal period during which the claimant has outwitted authority.

56. This brings me to the second factor namely **the impact of concealment or subterfuge on an assertion of settlement within the new environment. The fugitive from justice is always alert for any sign that the pursuers are closing in and equally in a state of mental and physical readiness to move on before the approaching arrest**.

57. This consideration amongst others compels me to differ from the opinion of the Full Court in Australia rejecting the previous acknowledgment that there were two constituent elements of settlement, namely a physical element and an emotional element. **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 [counsel's] proposition holds good.**
>
> 58. There will often be a tension between the degree of the abductor's turpitude and the extent to which the twelve-month period has been exceeded. Obviously **the present case illustrates the possibility that the considerable turpitude of the mother's conduct will be outweighed by the quality of the false environment and the years of history that it has achieved**. It is of course an injustice to the deprived father that the longer the deprivation extends the less his prospects of achieving a return. The other side of the same coin is that the longer the mother persists in her deceit the more likely she is to hold her advantage. Not only does she increase her chances of resisting an application for a return order but she also complicates the process of reintroducing the father into the child's life and reduces the prospects of ever restoring the relationship that might have been between father and daughter but for the lost years."

67. Thorpe LJ summarised his conclusions as follows:

> "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**." (emphasis added)

68. In *Re C (Child Abduction: Settlement)* [2006] EWHC 1229 (Fam) [2006] 2 FLR 797 Sir Mark Potter P stated the following at [55]:

> "…**the fact that a child or teenager is 'unsettled' in her own emotional or psychological state, does not, in my view demonstrate she is not well settled** for

> the purposes of the Hague Convention in the place she resides, has an established family life, and intends to remain…" (emphasis added)

69. Thus, in that case a history of trouble, from persistent bullying and a number of emotional disturbances, did not prevent the court from finding that the child was settled.

70. In *F and M v N* [2008] EWHC 1525 (Fam) [2008] 2 FLR 1270 Black J, as she then was, cautioned against "an unduly technical approach to the question of settlement, or indeed acquiescence" (at [66]). Her Ladyship also pointed out that the statements of principle in *Cannon v Cannon* comparing settlement with acquisition of habitual residence had to take account of the subsequent House of Lords case in *Mark v Mark* [2005] UKHL 42 [2006] 1 AC 98 which made clear that habitual residence *can* in some circumstances be established where the residence in question is not lawful (although the legality of the residence may be relevant to whether the residence was habitual). Baroness Hale contrasted the situation of someone who was on the fun after a deportation order or removal directions with that of a person who remains here living an ordinary life despite having no permission to be here. That M's whereabouts with N remained unknown to F for a considerable period of time, M having clearly indicated to F within a short time of leaving Poland that she did not wish to be found, and not having volunteered where she was but being readily discoverable when proceedings were commended, did not prevent Black J finding that N was settled in England.

71. Severance of a pre-existing parental relationship is very relevant but not determinative: *AX v CY* [2020] EWHC 1599 (Fam) per Robert Peel QC (as he then was) at para 27.

72. In *Re G and B (Children) (Abduction: Settlement: Grave Risk: Ukraine)* [2025] EWHC 795 (Fam) Harrison J stated the following in relation to *Cannon v Cannon*:

"45. Mr Evans relies upon *Cannon* to submit that there are, in reality, not two constituents to the concept of settlement (as suggested in *Re N, Re C* and other authorities) but three: physical, emotional and psychological. I accept, to some degree, this submission, but **it is important also to emphasise that, identifying the different aspects of being settled, Thorpe LJ in *Cannon* plainly was not intending to create a quasi-statutory test whereby each limb has separately to be satisfied before the Article 12 exception can be established;** counsel on both sides accepted this. **In many cases, there will be a considerable overlap between the emotional and psychological elements of settlement (and possibly also the physical element). In some cases, bearing in mind the summary nature of the proceedings and the probable absence of any expert evidence, the psychological aspects of settlement may be difficult to discern.**

46. Black J (as she then was) warned against taking '*an unduly technical approach*' to the issue of settlement in *F v M and N (Abduction: Acquiescence: Settlement)* [2008] EWHC 1525 (Fam), [2008] 2 FLR 1270. This was a case where the child, aged 4 at the time, had been in the primary care of the father when she was unilaterally removed from nursery and then from Poland by the mother. **F did not learn about the removal for some time and nearly two years had elapsed before he issued Hague Convention proceedings in England**. By this time the child was aged 6. **Orders for contact were made in the proceedings, but the contact was beset with difficulties. This '*troubled*' relationship did not prevent Black J from reaching the conclusion that the child was '*very well settled*' in England**.

47. It is also worth remembering that *Cannon* was an extreme case where, as Mr Evans put it, the child in question had gone through a '*Day of the Jackal*-type' experience whereby in order to remain hidden from her father she had been required to assume the identity of a dead child. Singer J, at first instance, commented that '*[in] terms, therefore, of the degree of parental determination displayed to follow through the abduction and to sever the child's relationship with her father, this case is at the extreme end of the range*.' **Psychological factors loomed large, but even in extreme circumstances such as these, Thorpe LJ did not determine that settlement built upon concealment and deceit**

> **could *never* be achieved; merely that the issue had to be looked at critically**." (emphasis added)

73. As to the overall approach to settlement, Harrison J stated as follows:

> "50. In common with Williams J in *AH v CD* [2018] EWHC 1643 and Robert Peel QC (as he then was) in *AX v CY (Article 12 Settlement)* [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 (as demonstrated, for example, by Black J's decision in *F v M and N*).** 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.*" (emphasis added)

74. As to the relevant date on which settlement is judged, there is much authority both for the date of commencement of proceedings, on the basis that any further delay should not affect the outcome (eg *Re N (supra)*); alternatively there is some authority that it should be the date of the hearing, because the court should have the best evidence possible on the issue (eg *E v L (Abduction: Settlement)* [2022] 1 FLR 1285). Nothing in this case turns on the difference between the two dates, as the father concedes, so I will assume that the relevant date is the date of commencement of proceedings.

75. On balance, taking a holistic view of the facts, I consider that the arguments in favour of settlement are stronger than those against.

76. There is clearly a persuasive case for finding that T is not settled in England. His mother removed him from Zimbabwe having changed his name and date of birth and also removing the father's name on his birth certificate. She did not inform the father where she was going, still less did she give him contact details, or permit contact with T, until he arrived in England seeking out T. She says she asked her lawyers to send the father a letter stating she had moved to South Africa, which was not true. Whilst the case is not as extreme as in *Cannon v Cannon*, there has been a substantial element of concealment in the case, and a suspension of the father's relationship with T from 20 October 2022 to 21 February 2025. T does not live full time with the mother, but lives instead with his aunt and uncle and their children, with the mother (who works in a different town) coming to live with T when she is not working. There is a plan for T to move in with his mother and her partner (who T has not met) in another town which will involve a significant change of environment.

77. The Guardian, who is a highly experienced practitioner with over two decades of service, has provided a helpful and detailed report setting out the balancing exercise she has carried out. Her conclusion is that he is not fully settled, but is partially settled, because emotional/psychological settlement has not been possible in circumstances where he has not had a home with either parent, being denied a relationship with his father, half siblings and paternal extended family in Zimbabwe, being removed from his environment of familiarity where he was born and had lived all his life, and being provided with a new name and date of birth, which would be unsettling for anyone.

78. On the other hand, given the significant length of time that has passed, including from November 2024 (when the father contacted Waltham Forest Children's Services) to 14 April 2025 (when proceedings were commenced), T has been living with his uncle and

aunt, with frequent visits from his mother when not working, and has settled into the environment in England on both a physical and psychological level, despite the points made against emotional settlement. He is well integrated into the community, and is doing well at school. When asked, he is quite clear that he wishes to stay in England, not just because he thinks it will help him follow his passion of becoming a professional footballer (as the CAFCASS report asserts) but also because he thinks it is "better". Although he has not been living full time with his mother, it is settlement in the environment in England that matters, rather than settlement with a particular person. There was one incident in which the Third Respondent is alleged to have acted aggressively towards the mother and tried to grab her, causing T to be unsettled, but T is satisfied that that will not happen again, and there is no evidence that it has recurred. There was also an allegation made to the social worker of another incident in which the uncle is said to have hit T on the head and smacked with a belt; that is denied by the Third Respondent, has not been repeated by T, and T has said that he did not think that the Third Respondent would lose his temper again. As the President said in *Re C* "the fact that a child or teenager is 'unsettled' in her own emotional or psychological state does not demonstrate she is not well settled for the purposes of the Hague Convention in the place she resides."

79. It remains undeniable that there has been significant concealment. The departure was clandestine, and the nature of the concealment has been deliberate, with a change of identity for T. The mother's conduct falls short of being a fugitive from justice, but has involved intentional avoidance of contact with the father for years. However the reason the father was able to trace T was because the mother sent him a voice note from T and he was able to discern an English accent. Further, the effect of the concealment on settlement has been less significant than might have been expected. There has also been

a long period of time when the father's relationship with T has been severed. However, on the facts of this case my judgment is that T has nevertheless become well-settled in England, both physically and psychologically.

Acquiescence

80. In *Re H (Minors) (Abduction: Acquiescence)* [1998] AC 72, 90D – G Lord Browne-Wilkinson stated as follows:

> "**Summary**
>
> To bring these strands together, in my view the applicable principles are as follows. (1) For the purposes of article 13 of the Convention, **the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind.** As Neill L.J. said in *In re S. (Minors) (Abduction: Acquiescence)* [1994] 1 F.L.R. 819, 838: "the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact." (2) **The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent**. (3) The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law. (4) There is only one exception. **Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return**, justice requires that the wronged parent be held to have acquiesced." (emphasis added)

81. In my judgment this defence is not made out. The father is clear that he did not know where T had been taken to, and when he did find out he made efforts to return him. The

mother says that the father's lawyers were sent two letters from the mother's lawyers, one before she left which she was unable to produce, and a further letter dated 23 October 2022 which stated as follows:

> "We wish to inform you that our client has informed us that she and the child have relocated to South Africa. She has not communicated her new address to us.
>
> Please advise your client accordingly so that he does not try to collect the child from [a specified location]."

82. There are two copies of the letter in the bundle, one unmarked, and the other appearing to bear a stamp from the father's lawyers with a date of 25 October 2022l; that version of the letter has been copied to the clerk of the court. The mother said both copies had been sent to her by her lawyers. However, the father's lawyers have sent a letter dated 27 June 2025 stating that "there was no communication which was made to us to the effect that the minor child was moving from Zimbabwe. Any purported communication to that effect is fraudulent…"

83. Accordingly, I find that the father's lawyers did not receive a letter dated 22 October 2022 from the mother's lawyers stating that the mother and T had moved to Zimbabwe.

84. The father's version of events is that he first knew about T leaving when the headmaster of his school telephoned him on 24 October 2022 and at that point he did not know where the mother and T had gone. He notified the police, asked the mother's parents, and searched on various social medial platforms, to no avail. It was only after the father had begged the mother's parents for news of T that the mother sent him a voice note with T, from which he detected a UK accent and surmised that he must be in the United Kingdom. He then saw a post on social media showing one of the mother's sisters as living in England. In November 2024 he made an enquiry of Waltham Forest Children's

Services. He then visited England on 18 February 2025, and having failed to get T back to Zimbabwe, commenced these proceedings on 14 April 2025.

85. The father did say that on the few occasions he was telephoned by the mother, it was from a South African phone, so he assumed that she and T were in South Africa. It is not clear when those telephone calls took place. He made no effort to contact the South African authorities to trace them both. While that might have formed the basis for a persuasive argument in favour of acquiescence, depending on the total duration that the father had knowledge of their location. However, the father maintains that he continued to seek out the mother and T in Zimbabwe, and I do not infer that the father's subjective intentions were that he was not seeking to assert a right to T's summary return.

86. In my judgement, it therefore cannot be inferred that the father's subjective state of mind is that he has acquiesced to a wrongful removal of T. It is not plausible to find that the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return.

87. I therefore find that the acquiescence defence fails.

Grave Risk

88. The law in respect of grave risk of harm or intolerability pursuant to Article 13(b) was considered by the Supreme Court in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27 [2012] 1 AC 144.

89. The law was summarised by MacDonald J in *E v D* [2022] EWHC 1216 (Fam) at [29] as follows:

"i) There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.

ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.

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

iv) The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'. **'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'**.
v) Art 13(b) **looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place** to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child's immediate future because the need for protection may persist.

vi) Where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation

would become intolerable, in principle, such anxieties can found the defence under Art 13(b)."

90. In *Re A (Children) (Abduction: Article 13(b))* [2021] EWCA Civ 939 [2021] 4 WLR 99 Moylan LJ stated as follows:

> "94 In the Guide to Good Practice, at para 40, it is suggested that **the court should first "consider whether the assertions are of such a nature and of sufficient detail and substance, that they could constitute a grave risk"** before then determining, if they could, whether the grave risk exception is established by reference to all circumstances of the case. **In analysing whether the allegations are of sufficient detail and substance, the judge will have to consider whether, to adopt what Black LJ said in In re K, "the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an article 13(b) risk**". In making this determination, and to explain what I meant in *In re C*, I would endorse what MacDonald J said in *Uhd v McKay* [2019] EWHC 1239 (Fam); [2019] 2 FLR 1159, para 7, namely that "**the assumptions made by the court with respect to the *maximum level of risk* must be reasoned and reasonable assumptions**" (my emphasis). **If they are not "reasoned and reasonable", I would suggest that the court can confidently discount the possibility that they give rise to an article 13(b) risk.**
>
> 95 But, I repeat, a judge must be careful when undertaking this exercise because of the limitations created by it being invariably based only on an assessment of the written material. A judge should not, for example, discount allegations of physical or emotional abuse merely because he or she has doubts as to their validity or cogency…
>
> 96 If the judge concludes that the allegations would potentially establish the existence of a grave risk within the scope of article 13(b), then, as set out in *In re E*, at para 36, the court must "ask how the child can be protected against the risk". This is a broad analysis because, for example, the situation faced by the child on returning to their home state might be different because the parents will be living apart. But, the court must carefully consider whether and how the risk can be

addressed or sufficiently ameliorated so that the child will not be exposed to a grave risk within the scope of article 13(b). And, to repeat what was said in *In re E*, at para 52: "The clearer the need for protection, the more effective the measures will have to be.""

91. In relation to the ability of protective measures to meet the reasonably assumed level of risk, MacDonald J stated the following in *E v D* (supra):

"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."

92. The mother alleges in her written evidence that the father "badmouthed" her and portrayed her as a bad mother in an attempt to bring about parental alienation (first statement), and that he was deeply controlling and emotionally abusive. She raised concerns with the Guardian regarding verbal and emotional abuse towards her and controlling behaviour both in Zimbabwe and during his recent visit to the UK. She also alleges that the father does not value education and that T's overall welfare and education would suffer were he to be returned to Zimbabwe. There was also an audio recording of the father submitted by the mother, without a transcript of what was said, but it was not possible to make any inferences from that recording which were relevant to this defence. The mother asserts that if T were to be returned, she would not return. I accept that to be true.

93. In my view the defence is not made out. The mother's complaints, on proper analysis, are not serious or consistent enough to satisfy the test. Further, the fact that the mother would likely not return is insufficient to tip the balance in favour of the test succeeding, for the father could still look after T, and the Zimbabwe court could consider suitable contact in light of the mother's refusal to enter Zimbabwe, including visiting the mother in England during the holidays. Taken at its highest, the evidence is not capable of amounting to a grave risk that T's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation.

Child's objections

94. The leading case on this exception is *In re M (Children) (Abduction: Child's Objections)* [2015] EWCA Civ 26 [2016] Fam 1. There are two stages, whether the child's objections are made out, and the discretionary stage. The main principles are as follows:

(i) The gateway stage should be confined to:

> "a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his/her views" (para 69).

(ii) The child's views must be sufficiently strong as to amount to an objection rather than a mere preference:

> "…the child's views have to amount to objections before they can give rise to an article 13 exception… Anything less than an objection will therefore not do. This idea has sometimes been expressed by contrasting "objections" with "preferences"." (para 38).

(iii) The objections must be to returning to the country of habitual residence, as opposed to returning to a particular person/to particular circumstances in that country (although there may sometimes be difficulty in separating out the two) (para 42).

(iv) The child's views are not determinative of the application or even presumptively so; they are but one of the factors to be considered at the discretion stage. The court's discretion at the second stage is at large; there is no requirement of exceptionality, and the court is entitled to take into account the various aspects of Convention policy which gave the court discretion in the first place, and wider consideration of the child's rights and welfare (para 63).

95. T is aged 11 and has the degree of maturity commensurate with his age according to the Guardian. I find that he has attained an age and degree of maturity at which it is appropriate to take account of his views.

96. T has expressed the clear view that he does not wish to go to Zimbabwe, and wishes to stay in England, both because it is better in England, and because his football career is more likely to succeed in England. According to the Guardian, although T wishes to remain in England and does not want to return to Zimbabwe, when asked what it might be like to return to Zimbabwe to live with his father, his response was "*I don't want to go. I would feel sad if I had to go and I don't know if mum would go. If I had to live with dad, it would be good, but I would be worried about school and not having the chance to become a footballer".* The Guardian asked T if he thinks he would be able to talk to his dad about how he feels about him not wanting to return to Zimbabwe. He replied, *'yes, he would be disappointed, I think moving to Leicester will be good'.*

97. I find that T's desire not to return to Zimbabwe is clearly a preference rather than an objection, in keeping with the Guardian's assessment, and for that reason this defence fails.

Article 20

98. The mother argues, pursuant to Article 20, that it would be a breach of Article 8 of the European Convention on Human Rights to return T to Zimbabwe.

99. The obvious problem with that submission is that Article 20 has not been incorporated into domestic law by the United Kingdom, not being contained in Schedule 1 of the Child Abduction and Custody Act 1985. This exception therefore fails on that basis alone.

100. The court is a public authority within s6(3)(a) Human Rights Act 1998 and is therefore bound by s6(1), which states that "[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right".

101. However, there is nothing on the evidence that I can ascertain, that had I thought it appropriate to return T to Zimbabwe under the Hague Convention, which would give rise to a breach of T's Article 8 rights. Further, if the Hague Convention is properly applied, it is most unlikely that there will be any breach of Article 8 or other Convention rights unless other factors supervene: *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27 [2012] AC 144 at [52].

Discretion

102. If the court's discretion arises it is to be exercised in accordance with the principles set out in *In re M and another (Children) (Abduction: Rights of Custody)* [2007] UKHL 55 [2008] 1 AC 1288. In that case Baroness Hale stated as follows:

> "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 That, it seems to me, is the furthest one should go in seeking to put a gloss on the simple terms of the Convention…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." (emphasis added)

103. Baroness Hale then made specific comment as to the exercise of the general discretion in settlement cases:

> "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**." (emphasis added)

104. In this case, assuming removal to have been wrongful and the settlement defence to be established, given the length of time that has passed since the removal, the context of a settlement case and T's level of integration into an English environment, the resumed relationship he now has with his father and the uncertain prospects for a continuing relationship with his mother should he return to Zimbabwe, I decline to exercise my discretion to return T to Zimbabwe.

The Inherent Jurisdiction

105. An *ad hoc* oral application was made by the father during the hearing for consideration of a return under the inherent jurisdiction. The court has power to order summary return under the inherent jurisdiction: *In re NY (A Child)* [2019] UKSC 49 [2020] AC 665.

106. I received written submissions on the question whether the court should entertain this *ad hoc* application. The Supreme Court in *In re NY (A Child)* at [55] – [64] listed the issues

which should be considered before making a decision on summary return under the inherent jurisdiction.

107. My conclusion is that it should not: the evidence necessary for the court to make the findings required to reach a conclusion are simply not present, including the conditions he would be living in both places and the comparative advantages and disadvantages, including the potential for the maintenance of T's relationship with the other parent (and in particular, the means by which the relationship with the mother can be maintained, given that she does not appear likely to be returning to Zimbabwe, even if T did). Further, given that there is an imminent move of residence and school planned for T in September, it would be more appropriate for an assessment to be performed after the move rather than a few weeks before it. Lastly, although there is a useful CAFCASS report addressing settlement and within that, T's wishes and feelings regarding residence, there is no CAFCASS report considering all of the welfare implications of a move to Zimbabwe, and one would be highly desirable.

108. For those reasons I decline to deal with the father's inherent jurisdiction application at this point. He can make an application in the normal way once the necessary evidence is prepared, if so advised.

Costs

109. Currently the costs of the single joint expert are to be shared equally, but with provision for this order to be reconsidered at the final hearing. CAFCASS has applied to be released from the obligation to contribute to the costs of the single joint expert, on the basis that the order appointing the single joint expert was made before the case was allocated to CAFCASS. No party has objected to this variation and I am content to grant it.

Conclusion

110. For the reasons stated above, I dismiss this application.