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Case No: FD15P00448

Neutral Citation Number: [2016] EWHC 559 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2016

Before :

MRS JUSTICE PARKER, DBE

Between :

C Applicant
- and -
V Respondents

Hassan Khan (instructed by MSB Solicitors) for the **Applicant mother**
Dermot Main Thompson (instructed by Brethertons) for the **1st Respondent Father**
Ruth Kirby (instructed by Dawson Cornwell) for the **2nd Respondent LV**
Dermot Casey (instructed by CAFCASS) for the **3rd Respondent BV**

Hearing dates: 28 & 29 January 2016

Judgment

Mrs Justice Parker:

- a) This is a Hague wrongful retention case brought by a mother living in Spain against a father living in England. The defences are
 - b) child's objections
 - c) Article 13 (b).
2. The children are L, 14 when these proceedings commenced, now just 15, and B, 11.

The history

- 3. The parents moved to Spain in 2006 when the boys were 5 and 2. They separated in 2009 and the father returned to England, and at around the same time wrongfully removed the boys. They were returned to the mother's care in s 8 Children Act 1989 proceedings by order of Judge Wain at Northampton County Court who made a residence and return order, without the need for Hague Convention proceedings, and a contact order.
- 4. The mother remained in Spain with the boys whilst their father returned to the Midlands. Contact has not always been agreed and has been a source of tension. The father now has contact in school holidays.
- 5. The mother has been living with her husband S for five or six years. They were married last year. They have a daughter, MJ, aged 4, and the mother is pregnant with a fourth child due in April.
- 6. The father's case is that both boys have discussed problems with both S and their mother for some time with increasing unhappiness. He says that he only just managed to persuade the boys to return to England after Easter 2015. L has said that it had been decided to wait until B was older. He was 10, due to turn 11 in the summer.
- 7. He says that he had made many contacts with social services in Spain and in England, the NSPCC, and with the police and Interpol. He did not alert the mother, and she questions whether these reports were in fact made. I have not seen any documented evidence.
- 8. The father says that after many repeat discussions on the same topic during the school holidays commencing on 7 August 2015 he decided to retain the boys at the end of their summer visit. He was due to return them on 2 September by air, but instead he texted the mother on that day to say that the boys needed to be 'protected' and were 'adamant' that they wanted to stay and were not going to return but gave few details.
- 9. The father says that he was told by someone he knew of the organisation Reunite and after that contacted well-known international child law firm Dawson Cornwell for advice. The boys went to see the firm on 4 September 2015 before these proceedings were commenced or before they had been in any way heralded. Both

children had a long interview with Ms Wendy Ramus, formerly of the Official Solicitor's team when that was the body dealing with representation of children.

10. On 17 September 2015 the mother commenced return proceedings (originally under s 8 again in the Family Court at Northampton) and then under the Hague Convention on Civil Aspects of International Child Abduction 1980.
11. At a directions hearing on 18 September 2015 when the father was not represented, but his solicitors had been put on notice, and Ms Anne-Marie Hutchinson QC, head of the Family Department at Dawson Cornwell had filed a statement, the application for the children to be joined was adjourned. It was further adjourned at the next hearing when L attended court represented by solicitors and counsel. The Judge ordered a report by CAFCASS on joinder of both children, which was prepared by Miss Alicia Northcutt, then of CAFCASS High Court team. The children were formally joined on 14 October 2015, and Mrs Ramus was appointed as guardian for L and Ms Northcutt as guardian for B. Mrs Ramus told me in evidence that she was appointed guardian for L because that was his preference.
12. A final hearing on 17 and 18 November 2015 was adjourned because of the unavailability of a judge to hear this case.
13. I am sorry to have added to the delay in this case. The hearing overran its estimate with no time for judgment delivery, let alone preparation, due to
 - a) Requests for the original notes of meetings with the children, and time to consider what emerged
 - b) A late change in mother's case
 - c) The need for the children to be told about the changes and to seek their views
 - d) Detailed cross-examination and length and complexity of submissions
14. I have found this an exceptionally difficult case. I have revisited my conclusions on several occasions. I have now come to a firm final view.
15. At the hearing before me I was met with an application on behalf of L to attend the court hearing. The mother resisted this. Her case is that L has been far too exposed to these proceedings already and taken far too active part. I understood and understand her concerns. At the same time I was concerned that to exclude L from the proceedings might be to fuel his complaint that he was not being listened to. I was also concerned that he should have an accurate view of what transpired in court, and that he might gain a misunderstanding of the proceedings and process if he was only told what had happened.
16. I was also asked to meet L, which I did, with Mrs Ramus present. I told him that the purpose of the meeting was so he could tell me what he wanted, but what he told me could not be kept secret and that I needed to see him in the court with the tape on, as well as my clerk taking a note. I do not understand that the Court of

Appeal in **Re KP (a child) [2014] EWCA 554**, disapproved that process. Notes of the meetings have been circulated.

17. B had not asked to meet me.
18. At the hearing I was told that the mother and her husband had come to the reluctant conclusion that they will separate for the purposes of enabling the boys to return to Spain for their future to be decided. The mother also puts forward her sister J and her friend D as persons who could accommodate the boys whilst the Spanish court makes a decision, or whilst the mother has her new baby. I do not accept that they can be criticised for making this difficult decision so late.
19. This development required Ms Northcutt to make a journey to see B to discuss this development with him.

The role of independent guardians and CAFCASS

20. I was referred by Mr Khan to an article in Family Law '*Representation of Children in Hague Proceedings: A Welfare Perspective*' by Gill Honeyman (former member of CAFCASS legal, and John Mellor, Service Manager (and formerly a High Court team guardian), quoting a decision of **Baker J WF v FJ, BF and RF (Abduction: Child's Objections) [2010] EWHC 2909 (Fam.)**. This concurred with my sense of unease about bypassing CAFCASS in other cases.
21. There are obvious problems for solicitors to be the first port of call, even for an older child (although L was only 14 when first seen). As the authors comment, a solicitor can advise on competence, but not on the weight to be accorded to a child's wishes. There is a risk that a child or young person's account which is accepted at face value and without probing or challenge, and then put forward to the court (where again it is unchallenged) will become reinforced and embedded.
22. With all respect to Mrs Ramus, whom I have encountered on many occasions over the years, she is not trained in the way a CAFCASS officer is and, as she accepted clearly and more than once in her evidence, sees her role to be to convey a young person's instructions to the court without providing any kind of filter, or overview of best interests.
23. Also, Ms Northcutt, who I have encountered in another case and seems exceptionally helpful, conscientious, empathetic, and child focussed, was not in a position to or at least did not subject what B said to the kind of critical analysis enjoined by the authorities.

What the boys have said

24. A number of allegations have been made, some more serious than others. I note a degree of evolution since these proceedings began.
25. Mrs Ramus saw them separately. The interviews lasted many hours.

L: interview with Ms Ramus 4 September 2015 (recorded in Ms Hutchinson's statement),

- S ok for first two years but no longer gets on with him.
- S verbally abusive and picks on him.
- TV and DVD smashed. Punished by electrical equipment being taken away.
- S has a bad temper and shouts at him from close by and intimidates him.
- L spends time in room to avoid arguments which he hates as it is boring.
- S has now started to pick on B.
- Friends don't come round because parents won't drive them and S won't.
- Only allowed to speak to dad on Sundays so called his father on other times.
- Previously contact had been restricted.
- Does not get on with his mother as she has no interest in sport (he added 'or computers) on a later occasion.
- Once helped on S's stall in return for going out on a Saturday night (to me, he said to take him out) but S reneged on this.
- Began to feel bad about returning to Spain as summer holiday progressed and made decision as had wanted to do so for some time.
- There was a row in the car which L attributes to S but the mother said that he shouldn't have spoken like that. Wifi turned off as punishment.
- School work had suffered (the mother has said that L had planned with the father to fail a year to support case for remaining in England).
- Had had enough of Spain.
- Thought that his relationship with his mother would be worse if he went back.

B interview with Mrs Ramus 4 September 2015 (recorded in Ms Hutchinson's statement)

- He did not want to go back to Spain.
- He would return to Spain if his father took him and remained with him.

- S was really nice at first but started acting in a bad way and called him; fat' and L 'spotty'.
- Mother and S swear at him.
- S knocked over a box of papers on purpose and when B refused to pick them up he grabbed him by the arm and threw him down (this is the second time he had done this).
- Mother had once grabbed him by the neck and put him against a wall when he swore at her (reason for swearing not given).
- Doesn't speak to S now and doesn't get on with his mother and didn't speak to her for 2 days before they left Spain.
- She was nice and normal on his birthday when she telephoned.
- Their home in Spain is quite isolated and they rely on S to drive them (whereas L said he would not drive them – but this may not matter).
- If he had to go back would ruin his life.
- S is very aggressive and has threatened to put an uncle in a box and blow up the house of his mother's friend (this sounds as if it may be hearsay since it echoes what grandmother says, but it is not clear).
- S is very impatient and he's frightened of him.
- The mother and S don't really talk to him and MJ is treated better.
- Life is so much better in England. He has relatives and does normal family things. The father does not hit him or call him names (he did not allege that he or L had been hit in Spain) feels comfortable with his father.
- Both said mother supports S.

L statement 30 October 2015

- He has had a disagreement with an English cousin because he had passed on information (about cannabis use at a home where there was to be contact) which had been passed on by his mother to an aunt. He had thought this would be confidential in the proceedings. The cousin had berated him for this. I am unclear about what the result has been for family relations, save that since then he had not had contact or wanted to speak to his mother.
- S is 'not a nice person' and is 'rude'.
- Mother had only allowed contact in accordance with the Northampton order. He had had a row with the mother about calls which she had not permitted (Mother accepts this).

- S makes him stay at school to wait for football practice as he will not collect him and drive him back and there are no buses. He does not get home until 8 or 9 at night. S collected him but was cross if he was late.
- He was once made to stay in his room for two weeks as a punishment.
- Both he and B have been pushed during rows, on one occasion falling down some steps, but he did not tell his mother about that because she wouldn't believe him.
- He is frightened about what the mother or S will do to him if he goes back.
- Mother is always upset with him and always blames him for things.
- When things have 'calmed down a bit' would like to see the mother but does not want to see her in Spain for fear she will not return him. She has known for some time he does not want to live in Spain.
- Mother and S have a lot of cash and he is worried that S is mixed with drugs. There is a loaded cross bow at home.
- He wants to stay and will be starting school on 3 November.

Interviews with Ms Northcutt 9 October 2015 and 6 November 2015

- It is 'unfortunate' that there was an interview with solicitors before CAFCASS involvement.

Interview with L

- Problems had started in Spain last year. S had taken away his stuff and would not take him anywhere.
- Things had been smashed.
- Spain is too hot and he prefers the weather here.
- Could not recall any positive experiences with the mother.
- He had not thought about what he would do if B was returned without him.
- He wanted to stay here. Would be fine to return to Spain for a court to make a decision as long as not staying with the mother and S would prefer to be in the care of his father than other relatives.
- Would probably be prepared to return on his own – would prefer that a court here made a decision as to what was to happen.

Interview with B

- Wants to see his mother but only with someone else there (did not say why).
- The decision to stay in England had been made by the father and paternal grandmother.
- He has positive memories of living in Spain.
- When asked (as the first substantive question) what could have made his life better in Spain he said ‘seeing dad more often not just every four months, may have been happier if the mother had not married S, prefer it (in England) as his family is here.
- He described the incident (when he previously said that he had sworn at his mother), was made to sit in the bathroom at the shop, and his TV and play station were taken away as a punishment for three days.
- He had been called names, electrical equipment had been broken, L had to pick up cigarette butts on one occasion.
- He had been hit with a missile from a BB gun by S which he says was deliberate.
- He enjoys England and sharing a bedroom with L which he did not do before. L is protective of him.
- He only wants to have contact in England.

Interview B and Ms Northcutt during the hearing

26. Ms Northcutt told B that S would leave the family home. She did not tell him that this would be backed up by court order and that breach would be punishable. B responded

- He ‘didn’t trust them because he didn’t know whether S would come back’. Ms Northcutt told me in her evidence that that was the only reason he gave for not wanting to return.
- S has a crossbow that is basically a pellet gun and he would be ‘really scared’ if he shot him.
- He was not agreeable to return to Spain for a trial to take place.
- He was enjoying his English school and he didn’t want to go back for a trial period to a Spanish school and then have to change again.
- His English was improving (he is bilingual but has been educated in Spanish) so it would be better to stay here.
- He would stay in his room and if made to come back without L would run away, and would run away even if with L.

- He said he never saw his aunt J, then said that he used to see her once a month, then once a week, than that his mother had stopped seeing her. He would feel a bit awkward being with her since he never saw her.
 - He said that he barely knew mother's friend D, as he had only seen her once a month.
 - There had been a problem at school in England but only a little one.
 - If he went back he would run away because there S would be calling them names, whereas here there are friends, family and everything else.
27. Ms Northcutt described B as 'defiant' and 'uncooperative' during this conversation. He was defiant of the court. I consider this significant particularly in the light of the mother's concern about what she sees as L's response to influence.

L interview with Judge

28. L repeated his assertions about bullying, taking things away, picking on him and B, not being taken out; forcing him to do things he didn't want to do. He made no complaints of physical violence. He said that he had tried to explain to his mother that he wanted to be with his father, but she wouldn't listen. His complaint against his mother was that she had interfered with his contact to his father. At that point he became upset. I broke off the interview and resumed it at his request when he wanted to say to me was that he was concerned that there would be consequences from S if he returned because of what he and B had said. He described S as "aggressive and in your face when you say things about him"; "I'm sort of afraid of him". All the incidents he described were in the context of domestic life. He did not deal with the proposal that S would leave the home. I asked him no questions.
29. The decision in **Re KP** does not permit me to question L nor treat anything he said to me as evidence, and I do not do so. No party asked to hear evidence to corroborate what he said.
30. I was addressed by counsel for the father, L and B, on the basis that allegations were proven to be true, which of course they are not. This was not just on the basis that I must approach the Article 13(b) defence on the assumption that they were true, in order to consider protective measures.
31. I read the case law as requiring me to subject objections to a degree of analysis. This is not easy where there is no oral evidence, I have done my best to do so.

The father's case

32. The father supports the boys' accounts in his own statement and does not in any way query them. He adds:
- S is likely to be a drug dealer, because his half brother has been convicted of drugs offences.

- When L has not wanted to do things with the family he has been told that he has to in a physically threatening manner.
 - The children were scared of S but L has now started ‘standing up to’ S.
 - Both boys have been failing at school.
 - He expresses a concern that S will ‘hold it against them’ that they have made these assertions. The boys had not said this at the time he made this statement.
33. The mother comes from a family where some relationships are disrupted. Ms Kirby relied on this to assert that the mother has no reliable family support and to imply that the mother is an unstable individual. The father supports his statement by a letter from the maternal grandmother, living in England, who describes what she has been told including that the boys have said they are unhappy. She refers to their statements. She says that they are well and happy in England. She does not describe how they are in Spain. She says that she does not really know S but has been told by a relative that he had made a threatening comment about another relative. He has a bad reputation. She is very proud of her grandsons for being so open and honest. She feels that they will be unsafe and will be punished. She does not say why she had fallen out with the mother, her daughter. The boys are very close.
34. The mother explains the falling out as being because the mother insisted on taking the boys to see her half-brother who has disabilities and is violent.

The mother’s case

35. The mother believes that this retention has been long in the planning but that she has been kept deliberately ignorant. Since the retention she has been obstructed from speaking to the children and not all contact has taken place as agreed, on various pretexts.
36. The mother and S (who has also made a statement and wrote a letter to the court) deny that this represents reality. It is denied that S is a drug dealer. They have shops and market stalls. It is the mother’s case that although there is some overt untruth in what has been said, there is some factual foundation, in that real incidents, many quite historical, have been built on and exaggerated through discussion, fuelled by adolescent feelings and in an atmosphere of fear and hostility in the father’s home from him and his family, to effect a change in residence.
37. The mother says that L had planned with his father to fail his last year so as to support a move to England.
38. She says that with her the boys are not physically disciplined and the sanction for misbehaviour is to take away electronic items or to ban access to them, but the extent of this had been exaggerated. On one recent occasion this had happened in response to L smashing up his room in temper. An item was damaged in the past when it was being moved but was replaced. L has refused to take part in family

life for some time now, chooses to spend most time in his room, and has spoken covertly to his father outside permitted time. B has not behaved in the same way. The children are not isolated. There has been no name-calling, threats, bullying, or intimidation. There was a funfair mishap when B was hit with a plastic dart from a plastic gun, but it was not deliberate or serious.

39. It is the mother's case that the father has never accepted S's relationship with the mother and his role in his former family. The children got on well with him and had an affectionate relationship with them, but over the last 18 months the father has successfully driven a wedge between S and L.
40. The mother says that she has had management problems with L for about a year now although not with B. She suspected for some time that L was under influence and pressure by the father. The father had never raised any concerns with her. L has been particularly defiant with S. Although L and B are very fond one another, L, who is very much an adolescent as I observed, has rather outgrown B of late. B is close to MJ. I accept that what she and S say has not been tested.

Discussion

41. The following observations focus on the 'objections' defence where I am directed to form some understanding of their foundation.
42. What the boys say may be the complete objective truth, unadulterated by any form of influence or re-creation of memory. Not all step parents are benign, and children can be scapegoated. But in this case it would be inappropriate to accept all I have been told without question and without it being tested. There is nothing inherently incredible in what either the mother or S say. The picture they present is consistent with the picture of an elder boy in particular who has been encouraged by the other parent, whether deliberately or not, both on direct visits and through telephone calls and other contacts, to adopt the worst possible view of his life in Spain, and who does not understand that the parents might be playing out their family conflict through him, nor that the perceived restrictions of contact with his father (a major complaint) might stem from influence, or the extent to which emotional pressures may be being placed on him.
43. I do comment that B's fear that S, in a domestic setting, or otherwise, by way of punishment or reprisal, may shoot him with a crossbow seems fanciful. The mother's account of a fun fair accident was different to B's. There was no opportunity to challenge her about her account of course, but B's account is not on the face of it inconsistent with such a setting. He was not asked to elaborate on the circumstances.
44. This statement has the appearance of something of which B in particular has been made fearful. The father advances this as a real danger, which seems to imply that he has encouraged this fear, if indeed B genuinely holds it.
45. This feature of the case causes me considerable doubt in itself as to the authenticity of the expressed fears of S or their real foundation.

46. A prime focus of L's concern is what he sees as the interference of his relationship with his father. It was the discussion of this that led to his upset with me. The boys have both pointed to their perceived advantages of life in England including education and downplayed their life and family in Spain.
47. L's response to being asked about the affectionate card he wrote to S last year for Father's Day is significant. When asked to explain why he had written this he said 'I had to', but could not explain why he had 'had to'. B's card read 'To the best step dad in the world'. Mother has also produced photographs of apparently happy family events with S present the authenticity of which has not been challenged.
48. At 14/15 L is unlikely to have any conception of the extent to which he, or his brother, may be susceptible to influence and the rewriting of history in discussion with an adult.
49. L has not focussed at all on the proposal that S should move out and enforceable orders be made by this and the Spanish Court or undertakings given. Neither of the boys seems to have a full understanding of the role of Spanish Court.
50. L said to Ms Northcutt that at Easter a decision had been taken to wait until B was older and he implied the same to me. That is not consistent with 'clear and present danger' or an intolerable situation. Neither is that it took a month for the decision to remain to be finalised so that it was taken the night before departure, if that is indeed what happened.
51. I was urged on behalf of L to consider that he had conducted himself with maturity and to recall that he had been upset. L was very polite and I did note his distress when talking about his perception that he had not had enough time with his father. He addressed me throughout with real feeling in so far as I can tell. I also observed in court the sense of solidarity with which L and his father conducted themselves, and how when they perceived the mother's counsel to be discomfited when I intervened in a dispute between him and L's counsel, they looked at each other with pleasure. Their demeanour and body language was both confident and oppositional to the mother. The mother in contrast was very sad and subdued. L's demeanour in the case was very much the active engaged combatant rather than a frightened sad young person, and certainly did not run counter to the mother's case that this father and son pair are mutually presenting a case against her, and even supported it. If I am not entitled to make these observations about L's presentation, they are not the foundation of my conclusions, and I would have come to the same conclusion without them.

The law and my conclusions

52. The burden is on those who put forward the defences to establish them.
53. Article 12 provides that a return order may be refused if the court '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.'
54. The test to be applied is broken down into the 'gateway stage' and the discretionary/evaluative stage.

55. In Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal) [2015] EWCA Civ 26, Black LJ stated [69] that the courts task is '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 or her views.' All other factors go into the discretionary stage. Article 12 refers only to 'return' and not to the country of habitual residence.
56. I accept that the boys are expressing objections to return. In my view whether they are objecting to return to an individual or to a territory is a matter for evaluation at the second stage. But if I am wrong it does not matter in this case.
57. I accept that both boys are of average intelligence and of maturity commensurate with their ages.
58. Age and degree of maturity goes to the concept of whether it is appropriate for the court to take account of views i.e. of objection. Precise understanding of the legal processes does not affect the evaluation that at 14 going on 15 L is sufficiently old and mature for it to be appropriate to take account of his views.
59. The test which Ms Northcutt applied in respect of B, that he understands that the decision to be taken is whether he should be returned to Spain, is relevant to **Gillick** competence to understand the legal issues in the proceedings, but I have to apply a broader test.
60. I see age and maturity as being intertwined. A 15 year old may not understand the nuances of the impact of objection, and may not understand how vulnerable a 15 year old is to manipulation, particularly if a parent presents him or herself as a victim; nor what his purportedly uninfluenced decision will mean to him in reality, nor of the effect of protective measures, but it is material that he is approaching the age of 16 when the Convention ceases to have applicability. An 11 year old may have a relatively sophisticated understanding of the issues, but is still a child.
61. There is no issue with L's understanding. Ms Northcutt comments that he did not really understand the role of solicitor. That strikes me as irrelevant to the objections defence.
62. I regard 'take account of' as requiring me to use a child's views as a starting point, from which other factors may lead me to depart, or at the very least as something which I cannot ignore. The obvious contrast is the very much younger child, or the learning disabled child, who has no real understanding of what is contemplated.
63. It does not mean that I start from the position that those views are likely to prevail, or dictate the weight that I must give to them.
64. I have come to the conclusion, reasonably easily in L's case, with some vacillation in B's case, that both have reached a sufficient age and stage of maturity to take their views into account.

65. In **Re M (Abduction: Child's Objections: Appeal) [2014] EWCA Civ 1519** Baroness Hale said “[46] *In child's objections cases, ...Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are 'authentically her own' or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances.....”*

66. In **Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal) [2015] EWCA Civ 26**, Black LJ stated, (when wording the second discretionary stage)

“We know now that 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. We also know that the discretion is at large; there is no requirement of exceptionality, and the court is entitled to take into account the various aspects of Convention policy, the circumstances which gave the court discretion in the first place, and wider considerations of the child's rights and welfare.”

Article 13(b) Defence

(a) *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.*

67. In **Re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27 [31]** Baroness Hale cautioned against placing any “gloss” on the wording of the defence as set out in Article 13 (b) but stressed that the defence would apply in very restrictive circumstances.

68. The risk must be more than “real”; it must be a “grave” one, although grave may relate to the degree of harm as well as the degree of the risk. At paragraphs 34-35, Baroness Hale said:

“[34] ‘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’ and this can relate to both physical and psychological harm. “Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. if there is such a risk, the source of it is irrelevant: e.g., where a mother's

subjective perception of events leads to a mental illness which could have intolerable consequences for the child.

[35], article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. ... this is not necessarily the same as being returned to the person, institution or other body who has requested her return.”. “... the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home.”

69. The discretions are essentially based on the same factors, so I deal with them together.
70. Age and stage of maturity must be relevant at the second stage too. I accept that L is now just 15, but he was 14 when the process started, and has been solely in the care of his father. B is only 11. His views have come to be vociferously expressed. But he simply does not understand what this means for him.
71. Although the cut-off age is 16, a young person nearing that age should not be assumed to be free from influence and that his/her objections should prevail.
72. I doubt very much whether L has any contemplation what his purportedly independent decision will mean for the future. However at his age I cannot ignore his views.
73. In B’s case his age and stage of maturity explains his lack of understanding of the role of the court in providing a protective regime. He talks of running away. I see no indication that this is anything more than a threat, or that he has thought through what this means at all. B’s expressed fears have increased during his time here so that he is now making a threat to run away even if he is with L. L does not make that threat. I have a concern that B has been influenced to make this threat.
74. I cannot conclude that the views of either boys are “authentically their own”.
75. The father says that he has not addressed B’s threat with him at all, and professes himself unable to intervene in any way, as he ‘will have no influence’ over B once he is in Spain. If B does so he is beyond parental control. Spain has social care arrangements which can be invoked. The father’s failure to tackle B is an implied approval or encouragement to say this.
76. This is quite a common threat in this kind of case, both national and international, and I have never known it acted on. I have known much older teenagers in local authority cases run away, but never having announced it before hand. Invariably they are ‘street wise’ and many are harboured by relatives.
77. I consider that it is highly unlikely that B will run away. He has nowhere to go to and no previous history of doing so.
78. Both have said that they will return with their father.

79. If they will not return to their father then there are three options:
- The mother
 - J
 - D
80. J and D will be able to step in whilst the mother is confined.
81. What B said about his knowledge of his aunt was self-servingly inconsistent. I conclude that he knows her better than he says. But in any event these are not babies where it might be suggested that there is a risk of psychological damage by being torn from a primary attachment and placed with strangers. There is nothing said against the aunt.
82. The boys have places to which to return at school.
83. Neither of them objects to Spain as such but objects to the presence of S. Sometimes person and place can be intertwined. In this case that does not appear to be so. Both boys have said that they are prepared to return to Spain with their father. Both of them have stressed their preference for England, their father's family, English schools.
84. The history suggests that there is likely to have been adult overlay in the development and execution of L's strong desire to remain with his father. There is at least a *prima facie* case that he has been subjected to a degree of influence, and that he has planned with his father to take a unilateral change of residence, and that B has been dragged along in his wake.
85. The following features are also relevant. They are consistent with the decision being that of the adult(s) influence, and when taken together, probably not with a reaction to unsolicited complaints;
- The father's complaint (in his statement) that his marriage to the mother broke down because of a prior association with S (which she denies).
 - A previous history of abduction when the children were much younger for which I do not have a reason or explanation.
 - The timing of this holiday retention
 - That it was considered and postponed in April 2015 but postponed until B was older with the implication. It was perceived that he would be better able to perceive and to articulate views
 - No warning was given
 - Much discussion took place with the boys before the decision was taken

- iv) The decision was only taken the night before the departure notwithstanding that the father says that he had been considering it for sometime.
86. The court is mandated to look at the source of a child's objections, and if a fear without true foundation has been fuelled by a retaining parent, then it cannot be a bar to return, and it is not in the child's interest for return to be frustrated in reliance on it. There are features of this case which are consistent with this conclusion.
87. Against that is the risk that there is some or perhaps complete objective truth in what the boys say about their stepfather. There is also the argument that wishes as to residence should in any event prevail. In L's case that is likely to be a stronger argument than in B's. Those matters are however for investigation by the court of habitual residence.
88. Miss Kirby asks me on behalf of L to take the allegations as true and then consider protective measures. I have previously set out the reasons for which a court may conclude allegations are not objectively true, and may stem from adult influence, as I am directed to do when weighing child's objections. But for the purpose of 'grave risk of harm' and 'intolerable situation' I look at protective measures on the basis of treating the factual allegations as true, as Miss Kirby asks me.
89. The Spanish Court can be accessed with in a week. The Spanish Court will take undertakings with the utmost seriousness and they will be enforceable. Pursuant to Article 11 BII R also I must assume this. All the complaints about S are made in a domestic context and as a parental figure. The boys' situation cannot be regarded as intolerable if undertakings are in place. That is so, even taking the allegations at the highest, nor do I have to allow fear to stand in the way of return if these fears are unreasonable, and have been encouraged or not dispelled, either under a category of grave risk of harm or objections, the undertakings will protect against them. A specific undertaking can be given in respect of any weapon.
90. The balance of risk and harm comes down firmly in favour of the return of both boys to Spain, on the basis of the proffered undertakings. Neither boy makes any real complaint about physical abuse from their mother save for the one incident, and that she prioritises their stepfather. She and S are now prepared to part in order for the boys to return. L's complaint that he and his mother have little in common does not come under any definition of risk of harm.
91. Return to Spain so that their future can be determined there is also the policy of the Convention. This case bristles with factual issues which need to be determined in the boys' interests. Factual allegations as to the behaviour of S and the boys' lives in Spain, and the family relationships, over 7 years can best be determined there. Evidence from witnesses there, and from the schools, and so on, will be highly relevant. A determination as to the extent, if any, to which the father and his family have undermined the boy's family life will partly depend on evidence from the mother and S, and assessment of the father and his role can easily take place in the Spanish courts. The mother will have a small baby and find it less easy to travel than the father. The children and parents speak Spanish.

92. Contact will not take place in any satisfactory way in this country. There have already been problems for various reasons.
93. The boys have said that they are prepared to go back to Spain with their father. He protests that he cannot afford to take the boys back and stay there. Airfares would have to be paid for if contact were occurring, and it is the father's responsibility that airfares were wasted in September 2015 when the boys were not returned. I know nothing of the father's finances.
94. I note that the father lived in Spain from March 2011 to January 2012 in order to facilitate contact before the holiday contact regime was established because he wanted to see more of the boys. He has not complained of any harassment by S or any adverse encounters at all.
95. I was not impressed by the reasons given for the mother's father, who lives in Spain, being unwilling to help him return which seemed principally designed to support his case in respect of S.
96. I see no reason why the father and the boys cannot return together for the purpose of the Spanish court making a decision.
97. If the father will not return with them, then they are able to fly without an adult, providing that they are put on a plane.
98. If he will not, that is his decision, and if they will not return to their mother, even on the basis of the undertakings, I am satisfied that aunt and/or friend, against whom no complaint is made and who seem to be much closer on enquiry than originally acknowledged, will assist.
99. The harm from failing to return them, when they are likely to become even more estranged from and alienated from their home environment, and a court enquiry will be made very difficult, is potentially much graver than the harm from returning them.
100. I have to bear in mind that eventualities may arise, either from the legal process, or other events, where B is to go back to Spain without L, although I assume that L will wish to go back with him. It has been urged on me that the boys should not be separated. In a case of suggested alienation, in which the older child has said to have been an active factor in that his views have been transmitted to a younger child, it is a moot point, and really one for the Spanish court, as to whether children should necessarily remain together. In any event the mother says that the closeness and dependence is a new development. It is easy to see how this would come about after retention and a separation from the established main home and carer.
101. In any event I cannot ignore that the children each have more than one sibling and that mother's case is that B and MJ are close.
102. I note that both boys said to their guardians "this case isn't about MJ, it's about me"; indicating some discussion. I am not prepared to assume that either boy has distanced themselves from their sister.

103. I have come to the conclusion that in spite of the passionate way in which this case against return has been presented that both boys must return to Spain.
104. The mother says that the father has always refused to seek an order or participate in proceedings there because in Spain welfare proceedings are always coupled with maintenance, which he has always refused to pay. I have not heard his response and this may be hotly denied. However Spain is the country of habitual residence and jurisdiction and absent prorogation must determine substantive issues for the boys. I note that the boys too would prefer this court to determine any substantive case but that is not a matter for them, or for me.
105. I was unimpressed by Ms Northcutt's statement that she will report this case to social services if the children are to return. Although I am sure this is not intended, this shows a misunderstanding of the evaluative role of the court, and of the Spanish authorities. Ms Northcutt has taken what she has been told at face value without considering the mother's case as a possibility. She has not subjected what she has been told to any form of critical analysis. I note also that she has not made any like statement about the need for social services assessment of the father in spite of what the mother has said about the father's history of drink, domestic abuse, volatility and mental health problems. Ms Northcutt seems a truly kind and conscientious person, and I must assume that she was also swayed by passionate presentation, instead of the cool, analytical approach directed by the Court of Appeal.