

Case No: FD15P00023

Neutral Citation Number: 2015 EWHC 1502 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

ROYAL COURTS OF JUSTICE
Strand, London, WC2A 2LL

Date: 22/04/2015

Before :

HER HONOUR JUDGE JAKENS SITTING AS A DEPUTY HIGH COURT
JUDGE

Between :

IB

Applicant

- and -

MM

Respondent

Jacqueline Renton (instructed by **Hodge Jones & Allen**) for the **Applicant**
Kate Chokowry (instructed by **Dawson Cornwell**) for the **Respondent**

JUDGMENT

HHJ JAKENS:

Introduction

1. This is an application pursuant to the Hague Convention on the Civil Aspects of Child Abduction 1980 brought by Ibrahim IB, the father of AM, a girl born in Germany on 25th December 2005. She is 9 years old. Her mother is MM. AM has a half-brother, DA, born on 16th February 2004. His father is Mr MB who may live in Hamburg. I am told that Mr IB and Mr MB are acquainted. Both DA and AM are cared for by the mother and are currently in the UK with her and her new husband. The Mother married Mr LR, a Nigerian national, on 25th April 2015 in the UK.
2. The parents are represented by Miss Jacqueline Renton and Miss Chokowry respectively.
3. The father is Guinean and but lives with his girlfriend in Hamburg, Germany, The mother is a German national, as are the children. The father asserts that the Mother has wrongfully retained AM in England and Wales, and seeks her summary return to Germany. The mother opposes this from all angles. In the alternative the father seeks an order for contact should his application fail.

Legal framework

4. The parents were not married, but on 12th January 2006 entered into a custody agreement in relation to AM pursuant to S 1626(a) of the German Civil Code and by virtue of that agreement they share joint custody. AM was habitually

resident in Germany prior to her removal and subsequent retention in the UK in July 2014. Her place of habitual residence is Germany.

5. Article 12 of the Convention provides the framework for summary return, and I am fully alive to the fundamental policy considerations at large in this case.
6. Article 13 of the Hague Convention 1980 applies in this case.

Article 13

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

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

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

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

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

7. The mother has raised all the defences available to her pursuant to Article 13 (a) and (b): consent; acquiescence; the child's objections and harm. She invites me to exercise my discretion to refuse the father's application and to allow AM to remain in the UK.

8. The burden is upon the mother to establish the defences to the requisite standard of proof, the balance of probabilities.
9. Article 11 of Brussels II Revised is also applicable. Pursuant to Article 11 (4) a court “cannot refuse to return a child on the basis of Article 13(b) of the convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return”.
10. This is very much a case of two wholly competing versions of events and the credibility of the parties and also the reliability of the views of the CAFCASS reporter Mrs Odze are fundamental to any finding.
11. Neither parent in my judgment has been entirely honest, and I have therefore directed myself in the light of the case of **R v Lucas (1981) 1 QB 720 at 724, 73 Cr App R 159 at 1** to contextualize any dishonesty in assessing evidence. My approach should be to ask myself if the lie was deliberate and related to a material issue, whether there was any innocent motive for the lie, and that I must remember that people sometimes lie, for example, to bolster up a just cause, or out of shame, or a wish to conceal disgraceful behaviour.
12. I have been referred to numerous authorities:
13. As regards consent pursuant to Article 13 (a) the test is provided by **Re P-J (Abduction: Habitual Residence: Consent) [2009] EWCA Civ 588, 2 FLR 1051** at para. 48:
 - i) *Consent must be clear and unequivocal,*

- ii) *Consent can be given to the removal at some future but unspecified time or upon the happening of some future event*
- iii) *Such advance consent must, however, still be operative and in force at the time of the actual removal.*
- iv) *The happening of the future event must be reasonably capable of ascertainment- the Condition must not have been expressed in terms which are too vague or uncertain for both parties to know whether the condition will be fulfilled. Fulfilment of the condition must not depend on the subjective determination of one party, for example “Whatever you may think, I have concluded that the marriage has broken down and so I am free to leave with the child” the event must be objectively verifiable.*
- v) *Consent or the lack of it must be viewed in the context of the realities of the disintegration the family life. It is not to be viewed in the context of nor governed by the law of contract.*
- vi) *Consequently consent can be withdrawn at any time before the actual removal. If it is, the proper course is for any dispute about removal to be resolved by the courts of the country of habitual residence before the child is removed.*
- vii) *The burden of proving consent rests on he who seeks to assert it.*
- viii) *The enquiry is inevitably fact specific and the facts and circumstances will vary infinitely from case to case*

- ix) The ultimate question is a simple one even if a multitude of facts bear upon the answer. It is simply this: had the other parent clearly and unequivocally agreed to the removal?
14. I have also considered in this respect the case of **Re C (Abduction: Consent) [1996] 1 FLR 414** and in particular the observation of Holman J that *“if it is clear, viewing the parent’s words and actions as a whole and his state of knowledge of what is planned by the other parent, that he does consent to what is planned, then in my judgment that is sufficient to satisfy the requirements of Article 13. It is not necessary that there is an express statement that “I consent”. In my judgment it is possible in an appropriate case to infer consent from conduct.*
15. As regards acquiescence I have been referred to **Re H (Abduction: Acquiescence) [1997] 1 FLR 872.**
16. As regards harm/intolerability, I have been referred to the case of **Re E (Children) (Abduction: Custody Appeal) [2011] 2 FLR 758** for the test in relation to assessing the defence at paras 31 – 25. The risk of harm must be “grave”. At paragraph 34 the article is clarified as follows *“...the words physical or psychological harm are not qualified. However, they do gain colour from the alternative ‘or otherwise’ placed in an intolerable situation wich this particular chid in these particular circumstances should not be expected to tolerate”.* Those words can be applied to physical or psychological harm as to any other situation...” there are some things which a child should not be expected to tolerate.

17. I have also been referred to **In the matter of Re S (A Child) [2012] UKSC 10** specifically in relation to the subjective anxieties of a respondent about the return of a child to the state of habitual residence.
18. Given that the issue of a split of siblings who are close has been central to this case, I have had regard to the cases of **WF v FJ, BF, and RF [2011] 1 FLR 1153; Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal) [2015] EWCA Civ 26** and I have also considered the case of **Re LC (International Abduction: Child's objections) [2014] 1 FLR 1458,**
19. As regards my discretion I am referred to the case of **Re M (Abduction: Zimbabwe) [2007] UKHL 55,** and **C v H (Abduction: Consent) 920090 EWHC 660**

Relevant background

20. The Applicant is a Guinean national and has resided in Germany for the last 15 years. His registered address for the purpose of his immigration status is in Stade, but in fact he lives in Hamburg. His immigration status means that there are travel restriction placed upon him and currently he is not able to travel outside Germany. If he did so he would be unable to return there. The Respondent is a German national. They were never married. They began their relationship in 2005.
21. Prior to her relationship with the father, on 1st February 2005, the mother was subjected to an horrific attack, amounting to attempted homicide, by her partner, Mr MB, when she was stabbed by him nine times, in DA's presence.

He was sentenced to 4 ½ years in prison. This was without doubt an uniquely traumatic event for the mother and has clearly greatly impacted upon both her and DA, who was a very young infant at the time. His young life in Germany appears to have been overshadowed by the fear generated by the ensuing threat to the safety of himself the mother from the presence of Mr MB and his influence. The mother asserts that she was obliged to move due to the fear engendered by Mr MB's continued presence in her vicinity after he was released from prison where he had served a sentence as a result of his attack upon her. He is barred by order of the German Court from having any contact with DA prior to his 15th birthday.

22. The parents' relationship lasted between 2005 and 2008, and they lived in Stade. Mother then moved to Cuxhaven with the children until 2010. The father maintained contact there with AM, and also with DA with whom he says he also had a strong relationship.
23. In 2010 the mother moved from Cuxhaven to Essen. She states that she was compelled to move because she was living in fear of DA's father who had been released from custody and was in the vicinity. The father asserts that she moved without his knowledge or consent and he was obliged to issue proceedings for contact. In those proceedings the mother alleged some domestic violence and drug use by the father. However, contact appears to have occurred in accordance with the orders made by the court and to have moved from supervised to unsupervised fortnightly visiting contact with the parents managing it between themselves. I note that the mother did not mention these proceedings in her statement, referring only to the later

proceedings in 2011. It appears that contact broke down in due course, on father's account because the mother was obstructive, on her account because of the father's aggression, drug use and the fact that he would fall asleep on the sofa during visits.

24. The father issued further proceedings for contact in May 2011. Fortnightly contact was established by agreement, supervised and then unsupervised, and drug testing was also ordered, with the father asserting that he was not smoking cannabis, but testing positive on one occasion. Contact did not go well as the father appears to have been prevented from travelling to Essen as at November 2012 because of negative information provided to the Foreigners' Office as regards contact where the mother alleged it was not appropriate as he would just sleep on the sofa. He had to apply for permission to travel and complains that the mother was obstructive to contact.
25. It is clear that the German courts viewed the father's relationship with AM as a very important factor in her life and set contact at a level designed to ensure that fulfilling arrangement was available to her. Any arrangements for contact have clearly been destroyed by the mother's move.
26. The mother met Mr LR in early 2012. He was living in Germany at the time. On her case, the father was aware of this relationship, and the two met. He denies this. In any event Mr LR moved to the UK in August 2012.
27. In March 2014, the mother says that she discussed her plans to move to the UK with the children in the summer and that the father agreed that it would be a good thing for DA in particular. The father appears to agree that there were some discussions in relation to the benefit for DA, but as for having

consented, he denies this absolutely, and his case is now that the mother told him that she was going for 6 weeks, returning after a holiday in the UK in time for the new school year with the children, to which he did not feel he could object as it was only a holiday.

28. In April 2014, the mother and the children travelled here for her wedding to Mr LR. She asserts that the father was aware of their marriage in the UK. The father knew of this trip but says he was not aware that she intended to marry – he thought it was to attend a friend’s wedding. The mother subsequently returned to Germany and the children completed the school year. She de-registered them from school and as resident in Essen but clearly she did not tell the father of these steps.
29. The mother says that the last contact visit by the father to AM took place on the last weekend in June. He says it was earlier in the month, and that the mother told him she was going to travel to see her friend in the UK who had got married there in April.
30. In July 2014 the mother and children came to the UK. The father did not know her whereabouts here. There is a distinct dispute as regards the nature and extent of communication between the parents, the father being clear that he was unable to get hold of the mother for long periods, the mother telling me that he had her number and that of her mother, and indicating more frequent phone contact than he accepts.
31. His case is that at the end of the school holidays on 19th July, when the children had not returned, he rang the mother’s friend “P” to get a contact number of the mother from P’s girlfriend, V, who was in contact with the

mother. P told him that the mother was not returning and he says this is the first time he knew this was the case. On 19th or 20th July he says that V gave him the mother's number. They spoke and she told him there had been a delay and she was coming back a week later. On his account he rang the local Youth Office shortly thereafter on two occasions.

32. He then went in August to the Youth Service in Essen, and finally consulted with his lawyers in September.

33. As indicated, there are a number of factual issues between the parties in relation to phone calls between the father, mother, AM and the maternal grandmother BM, although unhelpfully neither party has gone to the trouble of producing telephone records which would in this case would have swiftly have added substantially to the evidential picture. On the father's case he could not get hold of the mother until he got her number off V when she told him she was going to be a week late. He says he did not speak to her again until December 2014 after his application had gone in, and then again in January when she was furious because of the application. He says they spoke again at the end of the month, when she asked to negotiate and stay in the UK until the end of AM's school year before returning to Germany, and AM also asked him if she could stay in the jurisdiction.

34. The father applied for summary return in January 2015 and just prior to that his lawyers filled in an application for contact. I shall return to this in due course.

35. A without notice hearing took place on 22nd January 2015 and allocation order was made along with disclosure orders. The matter was relisted on the 3rd

February 2015. On 28th January the Tipstaff executed the Location Order, and at the Hearing on 3rd February Russell J listed the matter for PTR on the 9th March, with a final hearing on 18th March and directions included a CAFCASS report.

36. On day one of the hearing, 23rd March 2015 I heard but dismissed an application brought by Mr LR as litigation friend for DA for him to be made a party to the proceedings and to commission a psychiatric report. This case holds a degree of real concern in these circumstances, because DA is caught up in the dilemma currently facing his mother, his primary carer, in circumstances where he is said to have been affected by his experiences in Germany and where a return to that country on the mother's case may cause him considerable difficulty given his experiences and his associations as regards those experiences with Germany. His views have been canvassed by the CAFCASS Officer Ms Odze (who considered, but did not recommend joinder as a party to this application), and I recognise the dilemma and concerns which surround his position. He is very close to his sister, if not dependant upon her for comfort. I did not consider joinder justifiable in the circumstances of this case and his position has been helpfully advanced by Mrs Odze.

37. For the record, the application for joinder in relation to DA also included an application for AM to be made a party to the proceedings. The case was case managed only in respect of the application in relation to DA and only that application was argued before me on the first day. In the event given the outstanding application in relation to AM, I dismiss that application,

having heard from the CAFCASS Officer and having formed a view that despite her close connection with DA, such an application in the circumstances of the case is unnecessary.

The evidence in the case

38. I have read all the evidence. The father has supported his case with ample documentation, the mother has not done so to the same extent. In addition where some of the issues in relation to credibility would have been illuminated by telephone records neither party has sought to obtain what must have been obvious supportive evidence and much time has been wasted on this aspect of the case.
39. I heard the oral evidence of the father, the mother and the CAFCASS Officer Mrs Odze. She gave me an extremely vivid account of her intervention and meeting with the children and her evidence was reliable, in my judgment. In particular she brought life and depth to the children's feelings, having seen them individually, and she also placed particularly reliable and graphic emphasis to the nature and depth of the unusually close relationship which exists between them.
40. I record that as regards the oral evidence of both parties there were some significant difficulties of accurate interpretation from German to English. The father is from Guinea and although he speaks quite fluent German it is not his first language and is heavily accented and very colloquial, which gave rise to a real challenge for the interpreter. The mother has some knowledge of English, but it was established that she should hear all the questions and give all the answers in German through an interpreter for the sake of accuracy and

consistency. The interpreter who accompanied her at the outset did not appear to have any great skill, adequate training or confidence in court interpretation and was therefore replaced by a more skilled colleague after a slow and evidentially treacherous beginning. Both mother's solicitor and I have a working knowledge of the language and not only did it appear that serious misinterpretations were occurring, but also that the interpreter was unable to do his job in accordance with his oath. Mother's solicitors noted some significant discrepancies and it was necessary to listen to the recording with the help of a skilled interpreter to ensure that what mother was saying in her answers in cross-examination was properly understood by those in Court. This has compounded the time required to hear this matter, but it is not the parties' fault.

41. Despite the difficulties which were eventually resolved in large measure, I was able to assess the credibility of the oral evidence to my own satisfaction. This was in no small part thanks to the two competent interpreters who worked extraordinarily hard despite, in one case, finding the demands on her skills very challenging due to the father's accented German.
42. I heard from BM, the maternal grandmother. Her evidence was readily identifiable as direct and spontaneous. She was not visible, but the nature of the questions left her no room for manoeuvre or evasion. She was largely credible in my judgment, and her evidence supported the mother's account that the father had agreed to the relocation. She was clear that she believed that the father had consented to the move. Clearly she had not been present when he was alleged to have consented, and her source of this information was

the mother, and also the children, who she said both told her that he had given his permission. She told me that the father has told her that he had changed his mind in a phone call on 30th January 2015. It is also consistent with the mother's account that she thought that the mother would be returning to visit her in the school holidays – although it seems they had not discussed whether DA would also be coming. However, she did not appear to know what the details of this were likely to have been. I find that she had a better relationship with the father than he wants me to believe - he was very hostile towards her in his evidence.

The Mother's credibility

43. The mother was clearly the more able witness. She was able to give her account in a clear, detailed and articulate way and appeared spontaneous in her responses. Her credibility is weak in relation to a number of matters, and her overall credibility undermined as a result.
44. I also found from her oral evidence that she is openly hostile to the father and very angry with him. She was quite frank about this and described him as a “father on paper”. She does not view him and having an equal say in the life of his daughter. She made no attempt to disguise her views about him and his role, and on that score she was particularly credible.
45. It has now been raised on her behalf that he has brought his case for immigration reasons. This argument emerged during the hearing and has muddied murky waters considerably. Mother's own evidence was that she did not know that there was travel restriction on the father, because he had another child and had told her that all his documents were sorted, and she was not to

ask him any more about it. If that was truly the state of the mother's knowledge, I am puzzled by the fact that, had the immigration issue been a real issue, there would have been no incentive for the father to agree to the move to the UK. I can only resolve this point by observing that that like many other aspects of this case, assertions at times fly around in the face of logic. I do not intend to accord this last-minute assertion made on the mother's behalf any weight, indeed I find it has been a last-minute makeweight advanced on her behalf in a case where she is desperate to remain in the UK. That in itself raises my concern as to her willingness to present a true case before me. Her credibility is thereby further damaged.

46. I am satisfied that when she moved to Essen she did so without the father's knowledge or consulting with him, which in the context of this case is clearly relevant. Moreover, he was obliged to bring proceedings there and to find her through the system as she did not inform him of her whereabouts, although I hear her explanation that this was because of his aggression towards her.
47. Her credibility has been further damaged by the fact that she blatantly omitted to give the court a full picture of proceedings in Germany, for example, only referring me to the later proceedings in Essen and wholly omitting to mention the proceedings in Cuxhaven in 2010. She was not accurate in saying that contact was always supervised, nor that all contact took place in her home. I find this particularly concerning given that she would have been aware that the father had access to court records and these were facts which could have readily been checked from those records, as in fact occurred.

48. She told me that she moved here primarily to get away from Mr MB. Her written evidence is that she left because of her marriage to Mr LR, and her evidence as to this was unusual and rather ambiguous. She said it was natural that she should move to be with her husband, but that her primary reason was to get away from Mr MB. Miss Renton reminds me that the children had been in Essen – so out of direct harm’s way - since 2010, and that he had been released from prison since 2009. She says that the mother did not think to move until 2013, but even then she did nothing to action that until a year later. There were orders in place to prevent his contact, and I am not aware of any need to seek emergency protection from him having arisen subsequent to his release. I do not in this case minimise the impact upon this family of what occurred at the hands of Mr MB, and there appears to be a strong element of abiding trauma in his regards harboured and shared by both children, and, no doubt, the mother. DA was in receipt of some kind psychological counselling as a result of this, and I find it likely, (despite the accurate observations by Miss Renton), that the “Mr MB factor” has been very real, on-going, traumatic and current emotional situation for the mother and, unfortunately, both children have been affected by this, on the evidence of Miss Odze, but that he did not pose any identifiable, actionable threat to them after his release. Further, I am far from satisfied that the mother’s main, most important motive for moving to the UK was because of Mr MB’s presence in Germany. That is an invention in my judgment. It was a motive but so was her marriage to Mr MB.

49. Against the more dubious facets of the mother's evidence, I was nevertheless satisfied that she was at times giving me a clear account, albeit qualified by her attitude towards the father. Some aspects of her evidence on careful study, rang true. For example, having also heard at great length from the father, and taking into account the enormous frustration which he must be feeling, nevertheless he was at times quite openly aggressive and insulting. He called the maternal grandmother stupid, and frequently lost his temper, which makes me accept the mother's evidence that he was aggressive towards her. On the other hand I reject her assertion that the father told her it would be easier to travel to London than to Essen when she says he approved the move. It may be hypothetically the case, but certainly not the case in the light of the absolute restriction on his leaving Germany.
50. It has been a necessary exercise to look at each of the mother's allegations in the light of her hostility towards the father and her misleading by omission. What concerned me was a significant lack of precision as regards the detail of her case in relation to consent. In addition, even on her own case, there were clearly only the sketchiest outlines as regards future contact – just a return to Stade and her mother's address during the school holidays.

The father's credibility

51. The father was at times agitated and frustrated by the process of giving evidence, no doubt in part due to the significant technical difficulties. I also record that beyond what might be reasonable frustration at the technical difficulties, my appraisal was that he presented as ranting, angry and uncontrolled at times. He was not a sophisticated witness, and despite the raw

emotion, much of what he told me rang true. Given his limited literacy, I do not underestimate his difficulty in following the proceedings, and focussing on dates and details, and the added problem of giving evidence by video with the use of an interpreter. I have made every allowance for all the difficulties, but I found that he was at times very unfocussed on the facts of his own case and at times worryingly unclear about dates and events which form part of his own evidence. That is not unusual – events date from last summer and into early this year, but he appeared at times unwilling to listen to the questions being asked. He readily and unhelpfully went off-track over and over again. He was not able to give yes or no answers to many of the questions he was asked – rather than agree or affirm he would repeatedly say “maybe”. On the central matters in issue he was clear.

52. His past difficulties with the truth were illustrated by the fact, as I find, that he misled the German court by stating that as of May 2011 he was no longer smoking cannabis. He was, as the documents clearly prove, but he did not see this as lying to the court. Rather, in his mind he had “given up”, i.e significantly reduced his cannabis use, but a significant reduction is not the same as abstinence. Nevertheless his case was that he was abstinent. This illustrates that he can be highly elastic in his account at times, although this was clearly some time ago now.
53. It is also the case that he raised for the first time in this case in oral evidence that he thought the mother was going to the UK for a period of 6 weeks. That in my judgment was a significant omission. Much has been made of that. He was categorical about this, and despite the fact that he is not a good historian it

appears to me to but such a fundamental detail that its omission undermines his credibility. He gave me the impression that he had come up with that figure for the first time. He uses that period as measure for the time he says he contacted his friend P but it is not a very reliable measure given the chronology.

54. In addition, in his oral evidence, he told me as regards their expected return, that it could have been “July, August, September or October”. That was unhelpful and said in anger. The father was in the witness box for a very long time, and had to keep repeating his evidence over and over when he could not be readily understood or heard. I do not place any weight of that particular piece of evidence which was no more than an outburst. He tells me that the first time he realised that they were not coming back was when he spoke to “P” on 18th July.

55. This inability to pin things down in time, despite having had the advantage and support of competent lawyers to record his evidence, leads me to conclude that he is an unreliable witness of fact and detail, but I have taken his literacy difficulties into account. Looking therefore at the documentary evidence to see if there is any assistance, his credibility in relation to the proceedings in Germany is supported by the documents from the court there. It is less easy to be certain in relation to the document he has provided from the Youth Office in Hamburg. That document shows this: that on 27th August 2014, he went to the Youth Office and told them *that “ ..Mrs M had moved to London with their joint daughter. He said that he had not been able to see the daughter for two months. He also wondered how the child would be educated. He said he*

was worried". It is a document which both Counsel seek to employ in support of the opposing case, Miss Chokowry because it does not contain any positive assertion that the father did not agree, the father because it is supportive of his case. I remind myself that Article sets the frame work for summary return and i have taken full account of the policy engaged in the application of the convention in these circumstances.

My findings in relation to the mother's defences

56. Having debated the parents' credibility, before I discuss the defences I record that the evidence of the CAFCASS officer has been a beacon of light in terms of identifying and separating out the threads of evidence which are most pertinent to my decision. Mrs Odze was measured and level in her appraisal of both the children in this case and where at times I was unable to rely upon the evidence of either parent in relation to the issue, her reporting and her assessment provided the key.

ARTICLE 13(a)

CONSENT

57. There are a number of possibilities here:

- i) that the mother is telling the truth and that in March she gave the father a complete and honest picture of her plans to move to the UK with the children, and that he gave his full agreement to those detailed plans, and is simply lying in all respects
- ii) that she did not do so;

iii) or that the father consented and subsequently changed his mind, either before the mother moved, or afterwards.

58. The father is categorical in his bald assertion that he never consented and never agreed to the children remaining in the UK. In both cases there are holes in the evidence of the parents which have rendered the task of establishing where the reality lies very challenging, and it is by no means clear cut. There are serious inconsistencies and gaps in the available evidence, and the evidence of the parents is patchy by turns. At times it has been necessary to draw inferences on the evidence to establish a narrative, and there is scope for error even so.

59. As regards the possibility that the mother gave the father chapter and verse about her move and he consented to her leaving with the children at the end of the school year, in the full knowledge that she was married, and on the basis that she would return to Germany with AM in the school holidays, I make the following observations:-

60. There is evidence from the children and the grandmother which supports the fact that the father agreed: the children say that he did so in their presence. However, I am cautious about this. Father accepts that he and the mother did discuss the merits of a move from, at the very least, DA's point of view. He also says agreed that the mother could take the children on holiday to the UK in April 2014 and the summer of 2014, but was not aware of her plans to marry.

61. I am not satisfied that at the meeting in March (which was prior to the mother's marriage in April in the UK) that the father was told about the

forthcoming marriage. It is likely that he found out about the marriage at a later date. He says he did not know about the marriage until after the start of the proceedings. However, I am satisfied that he knew about the relationship before that time.

62. The grandmother and children are clear that the father agreed but then changed his mind. That is of course consonant with the mother's narrative. In relation to the grandmother's evidence. She says that the father only wanted contact with AM. I do not place reliance on this assertion. They had not spoken for a very long time and there is a real chance that they were in any event talking at cross-purposes. He may well have said that he wanted contact, but he was clearly by that time seeking AM's return and he is likely to have been uncompromising. Whilst I accept that the grandmother was clear in her evidence, I am not able in the context of other evidence to accept that it represents the father's true stance.

63. I find that at the very least, in March, the mother raised in general and hypothetical terms that it would be good for DA to go to the UK. In addition I find that at the very least, he agreed to the mother going to the UK for holidays.

64. However I also bear in mind the mother's previous behaviour in moving away whilst in Germany and not telling the father where she was going, the significant lack of importance which she attaches to him and his relationship with his daughter, and her general mistrust and hostility she reveals to me. I combine this with the fact that she did not tell him that she had de-registered the children from school and residence in Germany. It is highly likely that she

was motivated to keep the father in the dark as regards her true plans and movements.

65. I do not accept her evidence that the father said it would be easier for him to travel to London from Hamburg than to Essen as supportive of his agreement. It is highly unlikely, given that he could not travel out of Germany. At most that may have been a comment or thought expressed by him as part of a conversation of generalities and hypotheses, but I cannot take it to mean that he did any more than speculate about the potential value of a move sometime in the future. He may even have been aware of the mother's wish to move to the UK, but that does not equate with knowing that she truly planned to do so imminently.
66. How then do I view the apparent fact that the children and grandmother believe that he consented to a move? The children appear to have been present at the time from their comments to Mrs Odze. I find that the father at the very least did agree to them going to the UK in terms of having holidays there, on the basis that he could not prevent this, and approved generally of the idea that it might be a beneficial place for them to live, but this does not amount to him agreeing to a permanent and specific move.
67. The children may well have been party to the general discussion along the above lines and taken this as consent. It was highly convenient for the mother to take this as consent as well, and from that I infer that the mother was happy to maintain the narrative for the children that Mr IB had fully agreed to a plan to relocate.

68. I cannot find that she informed the father fully of her plans. There is not even a mention of where in the UK she was going to go, in her own evidence. Had she done so it is highly unlikely that he would have readily agreed because firstly, he could not travel to the UK because of the travel ban, and moreover, he is unlikely to have agreed to some vague promise to bring the child back to Germany during the school holidays for contact. He had twice had to apply for contact, once when the mother moved unilaterally without telling him about her plans. The mother had every reason to conceal or her real plans from the father, including the marriage, because had he known the extent of them it is highly unlikely that he would have agreed to the specific plan to move.
69. Also missing is what she told him after March. I gain the clear impression that he was kept in the dark by her. This is likely to have been her approach to him generally over the years, given her hostility and the lack of meaningful communication between them. I find she misled him about why she was going to the UK in April – she said it was for a friend’s wedding. He also knew that she had bought tickets to travel in June, but it is likely that he thought that this was for the purpose of a holiday. He did not know that she had re-registered the children from school or from their place of residence. It was clearly in the mother’s best interests to pull the wool over the father’s eyes, because it is likely that she would have been alive to the possibility that he would not readily have consented and she was set on her move. She did not even provide him with a contact address in the UK, and I am satisfied that she was generally unresponsive to his attempts to contact her by phone.

70. AM's version of events to Mrs Odze is this: "*The mother had told the father that " we were going to England and that she was going to be married. First he said it was OK but when he found out she was going to get married, he said that we should go back to Germany"*". That, if correctly recorded, must have occurred in March before the mother married in April. It chimes with the mother telling the father in March that she was going to the UK in April, but not telling him that she was getting married there, and with him subsequently discovering, possibly while they were there in April, that she was going to get married and therefore requiring her to return to the Germany. Neither party have dealt with this to any extent. Nevertheless, it is evidence supportive of the father's case in that if correct, he was unhappy about them being in the UK at that time, which in turn make is more likely that he did not consent to the mother relocating. It is not like that AM fabricated this.
71. I have considered the comment to AM made to Mrs Odze that: " My dad called...actually I can't quite remember what he said to me when he called. I remember saying that I would call him often when I am in England, twice a week or something but he said no, I should stay in Germany – but my mum had already bought the tickets and I really wanted to go to England because I was looking forward to it."
72. That statement raises a possibility which I cannot overlook: Clearly I have to treat AM's words with care although she appears to have been very clear and expressive. She is clearly referring to the trip to the UK being a future event and the father not agreeing to her going to the UK. It is notable that the father does not in any way follow this line in his own evidence. If AM's words can

be relied upon, the father was saying this clearly before the mother and children went to the UK. The father is categorical that neither the mother nor AM ever mentioned that they were moving to the UK. In assessing AM's evidence it is not clear whether she was there at the time the father said they should return to the UK, or whether the mother just told her it this had happened.

73. On the other hand it would support the mother's contention that the father knew of their plans and that they were plans for a permanent move, but on the other hand, it would tend to defeat her case on consent by supporting the father's contention that he did not agree to a move happening. It is a telling omission from his case and likely therefore not to be an accurate recollection, because it would have served him in his application to raise the fact that he withdrew his consent prior to the move. In itself it is illustrative of the degree of confusion in parts of the evidential matrix of this case. I am driven to conclude that although AM's words are clear, there is some indication that she is confused in relation to this, at least in terms of her memory. On balance I discount this as demonstrating that the father knew about the mother's plans and so withdrew his consent.

74. All the above pointers lead me to the following conclusions as regards the chronology, which do not wholly accord with either the mother or the father's accounts, but which appear to me to be the most likely scenario on the evidence. I bear in mind that contact between the mother and father over the relevant period was sporadic, and communications were likely to have been quite poor and sporadic.

- i) In March the mother and father discussed the desirability of DA in particular being in the UK and he agreed to her travelling there for holidays. This was taken by her as his consent, although it is unlikely to have amounted to unequivocal informed consent to a specific plan. She did not give him any meaningful details of her plans and did her best to keep him in the dark.
- ii) She did not tell him she was going to marry in April in the UK and he found out later, possibly while she was there, that this was the case. It is unlikely that he would have consented in these circumstances. .
- iii) It is likely that mother began to carry out her plans during the summer, bought tickets and began to clear out her home in Germany. The father firmly maintains that he believed that she was going for a holiday, and on the evidence I find that it was the mother's intention to let him think this.

75. In all the circumstances I find that even if the father had agreed in general terms that the UK had something to offer the mother and children he did not consent unequivocally and clearly to a permanent arrangement, only to holidays. He did not at any time give clear and unequivocal consent to the mother and children relocating. The mother has not proved her case that the father consented to the requisite standard. I have borne in mind the observation in the case of **Re C (Abduction: Consent) [1996] 1 FLR**, and I have viewed the father's action in the round. I do not believe that he was fully aware of the mother's plans initially but at some point he must have realised

that she was going to stay in the UK with the children, a plan to which he would never have readily consented.

ACQUIESCENCE

76. There is much evidential conflict in relation to phone calls but the mother has not sought to prove her assertions by providing me with the relevant phone records which might have been readily available in this case.
77. The father explained that around 20th July, he got the mother's number from V her friend, and rang her but only spoke to AM. He asked her if they were coming back, but she did not want to answer. The mother told him there was a delay and she was coming back next Sunday. When the mother and children did not return, he tried to call her but her numbers were not working, and then made enquires by telephone of the Youth Office in Essen who told him the mother had relocated. I accept his version of these events.
78. I accept the father's evidence that the mother repeatedly told him she would be coming back. In July I find that she did tell him she would be coming back, but later than planned. It is likely that the mother did so to appease or deceive the father.
79. This would in turn explain the father's evidence that he only realised that the mother and children were not coming back until it was confirmed by P. I accept his evidence that he thought they were going for an extended holiday, and he had not been able to do anything about it, and I also accept his account that the mother had told him that her return was late. It is safe to infer from her conduct that she knew that the father would react and object, and decided to keep him as much in the dark as possible. That would at the very least explain

why he did not act immediately. It appears that there was in reality little meaningful or accurate contact between them.

80. The mother argues that father never asked for her to return to Germany prior to his application, and did nothing to show his disagreement before September. I have accepted his version of events that he made enquiries after July at the Youth Office and that he then “reported to” (by which I take to mean attended) the Youth Office on 27th August, so that assertion is not proven. AM at some point appears to have registered his disagreement from a phone call, perhaps the example she gave to Mrs Odze referred to above. Despite that call, it is likely that the mother was evading communication with him, and I accept his evidence that he had difficulty in contacting her throughout the time she has been in the UK.
81. Looking at the chronology, the father thought they would be back on 19th July, the end of the holidays. I am satisfied that he made enquiries of the Youth Office and then consulted solicitors he did so because he wanted to find out what he could do in these circumstances to remedy the situation. He rang more than once, then went in order to enquire and then pursue the mother. He had of course had to pursue her previously. It is unclear whether he tried to persuade the mother to return but I did believe his account that she kept telling him that she would be back.
82. I do not accept the mother’s evidence that the father called her in January and asked how long she was going to be staying in the UK. He had by this time already contacted the youth office, and his lawyer, and had not had any contact at Christmas as the mother had promised. It is highly unlikely that he

acquiesced in this way, nor do I accept her evidence that she believed until the point of his application that he consented to her living in Germany. On all the evidence and from her actions I find that she must have known that the father would not only not have agreed, but would also have sought to pursue her. I prefer his version of the evidence in relation to the calls between them because it is more consistent. He is clear that he never agreed to them remaining and was not prepared to broker contact, which is wholly consistent with his uncompromising stance and demeanour.

83. In January there was a discussion between the maternal grandmother and the father. It is unlikely that the father told her he would withdraw his application if contact could be arranged, because he is very uncompromising. Even if he did so that would not support a defence of acquiescence in my judgment. Sadly there has been no scope for compromise in this case. It is indeed not too late for the father and the mother to agree arrangements for contact and that would have been by far and away the best approach and solution to this unhappy situation, and the fact that the father is now seeking a return without attempting a compromise is not in any way to his credit. He will be well aware that his application is causing maximum stress to the mother and thereby likely to cause maximum stress and upset to his daughter and to DA.

84. Miss Chokowry has argued that there is great relevance to this issue in the fact that the father's contact application was completed in 20th October 2014, and the application for summary return was completed on 3rd November 2014. She submits that demonstrates that the father was only seeking contact. I have heard the explanation from Mother's solicitors, that this was routine

completion of work without any chronological significance. I do not accept Miss Chokowry's submission on the basis that it is speculative and the point is not proved.

85. Taking all Miss Chokowry's point in to account, the facts of this case I do not find that there is sufficient to satisfy me that the defence of acquiescence is made out.

ARTICLE 13 (b)

HARM

86. I have considered all the possible scenarios involved in a return of AM to Germany: with her mother, step-father and DA, with only her mother, where DA and LR remained in the UK, and on her own to the care of her father, her grandmother or foster-care.
87. I have considered the case of **Re C (Abduction: Grave Risk of Psychological Harm) [1991] 1 FLR 1145; WF v FJ, BF and RF [2011] 1 FLR 1153** and **Re E (Children: Custody Appeal) [2011] UKSC 27**.
88. The term "grave", which must be established. qualifies risk, not harm, but a nexus must exist between the two nouns. I remind myself of the analysis of Baroness Hale:

"..the words ' physical or psychological harm' are not qualified. However, they do gain colour from the alternative "or otherwise" placed "in an intolerable situation". As it was said in Re D [2007] 1 AC 619 para 52, "Intolerable is a strong word, but when applied to a child must mean " a situation which this particular child in these particular circumstances should not be expected to tolerate". Thos words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other

situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress, it is apart of growing up. But there are some things which is it not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse, or neglect of the child herself. Among these, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that is there is such a risk the source is irrelevant, e.g where the mother's subjective perception of events leads to mental illness which could have intolerable consequences for the child.

[35] Fourth, Article 13 (b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right to so demand. More importantly, the situation which the child will face on return depends crucially on the protective measure which can be put into place to secure that the child will not be called upon to face an intolerable situation when she gets home. Mr Turner accepts that if the risk is serious enough to fall within article 13(b) the court is not only concerned with the child's immediate future, because the need for effective protection may persist.

The relevance of the mother's anxieties

89. I have been referred to **Re S (A Child) (Abduction: Rights of Custody) [2012] UKSC 10** in relation to the perception of risk and the anxieties of a parent which might in principle found a defence. On this score, it is essential to examine the situation which in reality faces the mother, and to what extent her anxieties have a bearing on the case.
90. It is inescapable that the mother suffered a life-threatening, life-changing, horrific, and traumatic attack at the hands of Mr MB. Her experience and that of her children have been in that respect off-the-scale. She has made a new life with her husband and although I am sceptical that her primary reason for moving to the UK was to get away from Mr MB, I do accept that it was a live factor in her desire and her decision to get away from Germany. Her move from Cuxhaven was on her account precipitated by Mr MB's proximity

following her release which I accept which is telling in relation to her abiding anxieties in his regard.

91. However, she was able to live in Germany for years following Mr MB's release. She was also on her account prepared to return to Germany to visit her family in Stade after her move to the UK, with at least AM though not, she says, with DA. However that was likely to have been for short visits, not for any length of time, and not with DA.

92. She contemplated that option of visits to Stade without qualification in terms of any need for protection for herself or AM. It was also the grandmother's expectation that she would be returning to Germany but only for visits, and the grandmother was not clear what would be happening to DA during those visits. Whilst the argument in terms of AM's own physical safety in Germany is weak in terms of any direct threat which Mr MB might pose, and there is no inherent risk in terms of her physical safety were she to return, I am satisfied that she is likely to be genuine in her concerns about him whether or not rooted in his present reality. It will be of little comfort to her that the father is apparently in touch with Mr MB and advocates that he has "turned his life around". I have no reason to believe that the mother is anything other than likely to be afraid of Mr MB in abstract but very real terms as a result of the trauma he caused her. Whilst she does not specifically argue that a return would cause her mental ill-health, it is quite safe to assume that there is an element of abiding trauma in her case, despite having lived in the same country until July of last year.

93. An additional consideration is whether the mother would be caused really serious anxieties if she were to be separated from DA, to the point that this would make the situation where she to be back Germany with AM intolerable for AM. DA had a good relationship with his step-father, but this has not been tested out in terms of his step-father caring for him. To date his primary carer throughout his life has been his mother and he has also derived considerable emotional comfort from his sister – they even share a room, and he turns to her before he turns to his mother. It is absolutely inevitable in my judgment if the mother were to return to Germany for any significant period of time with AM, that she would be extremely anxious for DA's welfare even if he were safe with Mr LR. Into the mix I add the fact that it is perfectly plain that DA's security has been hard won given the difficulties he appears to have had. I accept the criticism that there is little evidence in support, but in this respect I am satisfied by the mother's account of his problems and also of the fact that he has made gains since coming to the UK. It is inevitable that were the mother to be obliged to return to Germany without DA, who would be affected by a return, she would be anxious for him.

94. On the evidence, and particularly on my own assessment of the mother in evidence, she is not able to avoid transmitting her anxieties and her negative views to the children, and she has clearly brought all her own trauma as a result of Mr MB's assault into the lives of both DA and AM, and fostered it in a way which leaves them in no doubt. As regards transmission of her trauma, DA has shared it throughout his childhood, AM throughout her life, AM demonstrated to Mrs Odze just how Mr MB had stuck a knife into the mother. As regards the transmission of her negative views, in any return scenario, it is

highly likely that the mother will leave AM in no doubt as to who is the villain, responsible for breaking her heart and forcing her to return to Germany against her will which is likely in turn to do further damage to AM's fractured opinion of, and relationship with, her father. There would be a grave risk of serious psychological harm from the potential loss of her relationship with her father if that were to occur.

95. I find on the evidence that the mother's state of mind is likely to be a key ingredient and it is an element which I am compelled to add to the mix which when assessing the question of whether there is a grave risk of harm is established were AM to be returned to Germany.

The state of mind of DA

96. Miss Chowkory argues that the state of mind of the mother as illustrated by the authorities can also apply to the state of mind of a sibling child.
97. Miss Renton invites me to consider the reality of DA's situation on the evidence. She argues that in reality there is very little evidence as regards his experiences in Germany, prior to his move to the UK. I find that it is likely that the attack which occurred many years ago when he was very small did impact seriously in him, in line with the opinion of Mrs Odze, engendering as it did a separation at a very early age from his mother while she recuperated. It is also clear that the dreadful family history has been fostered, and he harbours a real worry that his father will come and kidnap him – something which I note.

98. The difficulties he is said by the mother to have experienced might be attributable to any number of factors but also to his childhood experience. A possibly psychosomatic skin condition; behavioural issues and nightmares appear to have been the main problems, and I accept that the mother obtained medical help, and some form of counselling for him to address these issues. In addition, he has experienced a number of moves in a household where unpleasant memories have been unaddressed, and his mother has had a number of partners. He has been exposed to parental disharmony between the mother and Mr IB, and not doubt to the views and emotions of the mother in relation to both his father and AM's father. He is therefore quite a vulnerable child, but is doing better here on Mrs Odze's reliable analysis.
99. I accept that DA has a strong fear of his father, and returning to Germany, and I find it safe to infer that given the unusual and specific nature of his fears and the fact that they are associated with his past specifically in Germany, that there is chance that a return would cause him some emotional harm. There is no doubt in the evidence that he believes would be afraid and unhappy to be there. For him, there is nothing good about Germany. If he did have to return, it would not only affect him, it would of course seriously affect AM who shares his fears and bears their heavy burden. It would be clearly inimical to DAs welfare to be returned to a country which represents for him such trauma, and it is striking that his difficulties here, on the evidence of Mrs Odze appear to have currently been resolved and he is transformed into a happy child who is relieved of nightmares.

100. The significance of his state of mind to the issue of harm is that it goes into the mix and has considerable weight, given the connection with his sister, the closeness of their relationship, his abiding and genuine fears and the impact upon him of a negative outcome, which is likely to compound the negatives for AM as well.

Splitting AM and DA

101. I have considered the prospect and implications of a return to Germany involving the separation of AM and DM, for anything more than a very short period of time.

102. The effect of a summary return would be to split the siblings possibly temporarily, but certainly not for a short time, potentially for some considerable time, potentially permanently.

103. The importance of the sibling relationship is well known and this case is characterised by the unusual strength of the relationship, and the closeness in age of DA and AM, and their shared, difficult experiences. In **Re M (Republic of Ireland) (supra)**, the subject child had an older sibling who was not the subject of the application. It was held that to separate siblings who had lived together all their lives would place them in an intolerable position. That strikes me as a forceful premise in the context of this case. I have also considered the case of **Re LC (International Abduction: Child's objections) [2014] 1 FLR 1458**, and the Supreme Court remitted the same case for hearing in the issue.

104. In **WF v FJ, BF, and RF (supra)**, siblings where one subject child held a stronger objection than their sibling who was also a subject child, and as a consequence neither were returned. These were siblings who had always lived together. In this case the CAFCASS Officer was clear that separation from DA would place AM in an intolerable situation if she were to be separated from her mother and her brother. I find that she is so close to her brother and their relationship so significant, that it is highly likely that even were she to be separated only from her brother, this would be of such major significance to her that the situation of loss and grief is likely to be intolerable. Furthermore, as she is in no way generous towards her father at the moment she is likely to blame him fairly and squarely for her distress.
105. Miss Renton has argued that the children could remain together and return together to Germany, with the mother and/or with LR, and not necessarily to an area where they could be found. Whilst in theory that is correct, such a return likely in the circumstances of this case to impact extremely harmfully on DA and AM by association, as well as the mother.
106. In relation to the argument that AM could return alone to Germany, that is likely to involve a serious degree of grief, fear and loss in my judgment, even if she were to be in the care of her grandmother. Even if she were to be in the care of her mother, the mother's anxieties and attitude are likely to impact upon her. The risks to her are likely to be compounded if she were to return alone to the care of her father because of the separation and her real anxieties. It is likely that separation after a life-long and highly significant sibling relationship would place AM in an intolerable situation. The intolerable

situation would be compounded because of AM's strong fears and objections, and in my judgment return in the circumstances of this case on whatever option would be intolerable for AM.

107. I have borne in mind the observation of Mrs Odze that Am is a resilient child but that is posited specifically in terms of not being drawn into the parental conflict and I separate it out and disapply it in relation to the issue of separation and return.

AM'S OBJECTIONS

108. AM does not wish to return to Germany. She is an articulate and competent 9 year old who can express herself in English and German. Simply, she clearly objects and that is supported by the CAFCASS Officer. "*AM has expressed objections to returning (to Germany) with or without the mother and DA*". Of course that in itself is not determinative.
109. AM is settled and happy here and there has been a degree of relief for both children. Mrs Odze has given me a clear picture of her feelings. It is significant that she told Mrs Odze that she had stopped having nightmares (which she shared with DA) "*because I wasn't in Germany anymore*". AM feels more emotionally secure here than in Germany.
110. Mrs Odze makes the following observation, which is very significant in my judgment: "From my interview with her, I fear that a return to Germany is likely to place AM in an intolerable situation if she were separated from the mother and her brother DA with whom she appears to have a close

relationship. In view of the fears that they hold about DA's father, I do not believe that the situation would be resolved, even if the mother and DA did go back."

111. AM really does not want to go back. She says that her heart would be broken. She would be scared if she went back, and angry because of her father. Her body language when contemplating a return being ordered was described as follows: "*She became quieter, more subdued, sad and almost tearful...she conveyed the message in words and demeanour, in a way that was palpable to me, how much she preferred to remain here where she (and DA) felt more emotionally safe being free from nightmares*".
112. I have assessed her objections in the light of the fact that there is likely to have been a heavy degree of exposure to the mother's hostile and belittling attitude to the father, and I record that in the past, despite the mother's hostility, AM wanted to see her father, which in turn makes me confident that her objections are at this point in time are likely to be her own. In addition Mrs Odze assesses her as resilient and therefore as not being drawn into the parental conflict, which gives added strength to the independence of her views and objections. The mother will have passed on her negative views about the father to AM and Mrs Odze was clear that they are at large and the situation is naturally talked about within the family.
113. I accept Mrs Odze's assessment of AM's maturity – she is of an age and a maturity that gives me confidence that real weight must be attributed to her objections.

114. I have born in mind the nature of AM's objections: she does not want to be parted from DA, or leave the UK and she feels this acutely. Her objections go well beyond just a preference to remain here. She and her brother are relieved of their shared nightmares and it is safe to assume that a return to a situation of shared apprehension is something she would strongly object to. The consequences of a return to Germany for DA and her shared fears are also at the heart of her objections. DA sees nothing good in Germany. I have considered the observation of Mrs Odze that AM does not object to a return to Germany as a country in Convention terms, but upon reflection I am inclined to disagree. AM's objections are set out paragraphs 24 to 28 of Mrs Odze's report. When I total up the picture, it does in my judgment pass the threshold and amount to an objection to a return to Germany as the place which holds a particular fear for her of the presence of DA's father. I may be wrong about that, but even if I am, I view AM's objections in the context of her situation as a whole and I have no reason on the basis of Mrs Odze's evidence to doubt their authenticity.
115. AM's objections to a return are plainly congruent with her welfare in so far as the separation of siblings in such circumstances is likely to be intolerable, because of close relationship she has with DA and her role in his world and his in hers.
116. I am satisfied that AM objects clearly and unequivocally to a return and it is appropriate to take account of her objections in considering how to exercise my discretion.

Protective measures

117. There is no substantial exploration of protective measures in the case. In relation to DA, there were protective legal measures in place restricting the father's contact. Real protection for AM would have to be emotional protection from the consequences of the intolerability of separation from her brother, and/or her mother. Even if they were not to be separated, and all returned together, there is potential for the knock-on detrimental consequences which have been explored earlier in this judgment. However the concern I have is that the fears for the children are deeply connected to the trauma of their mother.
118. There are no readily available solutions to address this family dynamic which is the primary source of risk in the case.
119. Other protective measures such as injunctions in Germany would not be required as Mr MB has not acted against the mother since the attack years ago, and there is no evidence that MR IB would cause harm to AM.

MY DISCRETION

120. The door is open to the exercise of my discretion. I find that there are really compelling reasons for not returning AM summarily to Germany. These are rooted in the close life-long relationship she has enjoyed with DA. He is a vulnerable child. It is clear that he harbours strong fears about a return and it is clear that AM shares those fears. It matters not that they are not rooted in her own direct experiences. They have been generated by the hugely significant

attack on their mother and her extended, abiding trauma, and I cannot in the circumstances minimise this aspect of the case. For DA that trauma arose in Germany and his father's presence there, however innocuous now, is frightening for him. It is impossible to hive AM off from this pervading dynamic, although potentially therapy might assist. The real problem is that there are no "protective measures" which could address this shared trauma in a concrete and definable way. The father is definitely not perceived as protective in relation to Mr MB, and indeed, it is concerning to know that he appears to be actively aware of his situation and be at the very least slightly connected to him.

121. In addition, separation temporarily, which is possible, or even longer term, which is also possible, is highly likely to place AM in an intolerable situation. A return would be likely to expose AM to a situation which she would find intolerable in terms of separation from her brother, or if he were to return with her, she would in effect find herself as the author of his misfortune and that too is likely to prove intolerable. To place AM in an intolerable situation would in my judgment be contrary to the policy of the Convention.
122. Her welfare is likely to be further compromised if she were to be uprooted from her school, As confirmed by them, she has settled well, and I note that she has had a childhood characterised by change and uncertainty and change so this is significant.

CONCLUSION

123. I dismiss the father's application.

124. I recognise that there are really significant implications in this decision in relation to AM's welfare because contact with her father must, in the light of his immigration status, occur in Germany. This judgment relates to a summary return only.

125. (Further directions)

HHJ Jakens

22.4.2015

126.