Neutral Citation Number: [2013] EWHC 1383 (Fam)

Case No: FD13P00122

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2013

Before :

THE HON. MR. JUSTICE COBB

- -

Between :

LCG	**Applicant**
- and -	
RL	**Respondent**

- -
- -

Henry Setright QC & Michael Gration (instructed by **Dawson Cornwell**) for the Applicant (mother)
Christopher Hames (instructed by **Goodman Ray**) for the Respondent (Father)

Hearing dates: 13, 14, 15 and 23 May 2013

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Judgment

THE HON. MR. JUSTICE COBB

This judgment is being handed down in private on 23rd May 2013 It consists of 31 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Mr Justice Cobb :

Introduction

1. By application brought under the *Child Abduction and Custody Act 1985* (incorporating the Convention on the Civil Aspects of International Child Abduction 1980 ("The Hague Convention")), and under Article 11 of Council Regulation (EC) 2201/2003, LCG (hereafter "the mother", or "M")) seeks the return of her four children to the Kingdom of Spain. This application is opposed by RL ("the father" or "F").

2. The children concerned are T, a girl born on [a date in] 2000 (12 years 8 months old), L a boy born [a date in] 2002 (10 years 5 months old), A, a boy born [a date in] 2004 (8 years 5 months old), and N, a boy born [a date in] 2008 (4 years 4 months old).

3. For the purposes of determining this application, I have read the statements filed by and on behalf of the parties, a number of contemporaneous documents generated at key times in the relevant history, and reports dated 28th February 2013 and 7th May 2013 from Sarah Vivian of the CAFCASS High Court team. I have heard brief evidence from the parties on limited issues, and from Ms Vivian.

4. This case has a range of complexities, both factual and legal. The hearing occupied three days of court time. I had to reserve judgment overnight following submissions. As will become apparent (see discussion of children's objections below) the relationship between the mother and T has become strained in recent weeks. Therefore, by agreement between the parties, I reserved judgment for an extended period of four days so that the mother could have contact with T and her brothers here in England before either party (or the children) knew the outcome of the hearing.

Background

5. The mother is 45 years old, and a Spanish National; she was brought up living in Madrid. She is tri-lingual in Spanish, English and French. The father is 46; he is a British national, though spent a considerable part of his childhood in Spain and is, I understand, bi-lingual in English and Spanish.

6. The parties met when the mother came to live in England in the mid-1990s to study English and to work; the father was in the music business, as a professional musician. They lived throughout their relationship in the O area, most recently in B.

7. The parties never married. As is apparent from §2 above, their four children were born over the next eight years.

8. It appears that the family lived reasonably frugally; on the father's account they were at times "*completely broke*", the father not earning greatly from his music, and the mother working only periodically, doing some translating and teaching; the couple received benefits and credits (see below re: e-mails), and (according to the mother) relied to some extent on borrowings. It was nonetheless the family routine, certainly from 2002, for the mother to take the children to Spain for holidays during each summer, to see her family, often – indeed, as I understand it, invariably – without the father.

9. The children (as will be apparent through my later discussion of the 'objections' of the older three) are bright, engaging and amiable. T and N are inter-changeably bi-lingual in Spanish and English; L and A less so (for A English is probably his marginally stronger suit). In July 2012, L and A were attending the junior school local to the family home; T had also attended the same school but in the academic year beginning in September 2011, she had moved to P senior school where she had obtained a scholarship. A was said to be top of his class at school in the year to July 2012.

10. It is relevant to the background history to note that (on the parents' collective account) T's first academic year at P school (2011/2012) was affected by the fact that she was occasionally bullied. This reached its peak in April 2012 when T joined a week long residential school trip; this trip was, from her point of view, an unhappy experience, and on her return she was miserable. The father told me that she cried the whole journey home from O (from where the father had collected her at the end of the trip) to the family home at B.

11. The parental relationship appears to have been a turbulent one almost from the early days of T's life (2000), and on both parties' accounts deteriorated significantly after the birth of L (2002/3). The father described home life as "*unbearable*" for much of the children's childhoods, with endless "*hostilities*" and "*aggression*". The relationship became, he said, "*destructive*". The father refers to the fact that the parents occupied separate bedrooms for most of the last 10 years of their relationship, the mother sharing a room with the three younger children; difficulties with communication are said to have endured throughout the relationship.

12. Relations appear to have become particularly difficult in 2011 when the father broke his wrist; this took its toll on him physically (given his professional occupation as a musician) and emotionally; he described how this had "*almost destroyed*" him. This caused or exacerbated depression for the father (as he recorded in his statement and acknowledged in his e-mail to the mother).

13. The relationship finally disintegrated in early 2012. The father described it in this way when giving oral evidence: "*[M] and I were in such a bad situation*" (evidence in chief); "*we had broken up; tensions were very high; we were constantly arguing…*" … "*it had been hell for years*" (cross-examination). I accept those accounts. The children were inevitably exposed to the discord, and, on the father's case, T aligned herself with her mother against him. The father's case, which I accept, is that "*the children were becoming increasingly disturbed by the home situation*"; the mother agreed, contending that "*the children were starting to suffer psychologically*".

14. Over the weeks of early 2012, the parties reviewed and, in my judgment, regularly discussed their options. The father proposed that the couple should separate (see the e-mails of 16 September, 18 & 20 December confirming this below). The father says that he suggested that he move out of the home leaving the mother there; the mother indicated that the father had told her to leave the house and obtain council accommodation, though he disputed this. The mother's evidence was that she had proposed that she should return to Spain with the children.

15. The father acknowledged that the mother had in their many arguments "*threatened*" to leave B, and return permanently to Spain, though recognised that in 2012 these '*threats*' were qualitatively different. He told me that he accepted "*that the situation felt different to previous years because our relationship had essentially ended*". I must decide whether these were merely 'threats', or whether these were statements of clear intent, as the mother contends. I must further evaluate the father's response to them; the mother contends that the father agreed to the relocation. I deal with this below.

16. Overall, I am satisfied on the evidence I have heard and read that there were a number of discussions – often fragmented and bad-tempered I expect – between the parties

over the early months of 2012 about their longer-term futures. During this period, the father describes himself as "*not really thinking clearly*", and "*depressed*". In my assessment, that is probably right.

17. On 6 June, the mother purchased one-way tickets to Spain for herself and the children.

18. The mother maintains (though there is no written confirmation of this) that she told the headmistress of the junior school that the boys would be leaving the school, and on the last day of term took in the school uniform for re-sale; as she was friends with the headmistress, she was released from any need to give formal notification. Somewhat to the surprise (and discernible irritation) of P School, the mother gave them written notice of T leaving only on the last day of their summer term.

19. The mother cancelled L's cornet lessons, and his participation in cubs. Notably, the mother's written notice to the cubs supervisor ('K') was communicated via the father, by e-mail, on 17 July 2012, in these terms:

> "*We have decided for personal reasons to move to Spain, we will be missing the UK very much but I think that is what is best for the family right now. L will not be joining you and the cubs for next term.*"

This is a significant e-mail, first because it is explicit about the long-term plan, and secondly because the father received it and read it before forwarding it on to 'K'. The father's case about this now is inherently contradictory; while on the one hand he "*just thought [M] had done this to wind me up*", he nonetheless said that having read it he researched details about the Hague Convention on the internet (having previously spoken with a family member), plainly interested in the legal implications of the mother's plan.

20. On 24 July 2012, the father drove the mother and children to Luton airport, from where the mother and children flew to Spain. As to the parties' intentions at the time:

    i) The mother intended at that time, she told me, to achieve the separation which the father himself had proposed, by her return home to Spain to which he had agreed.

    ii) The father's case on paper was that he had agreed to the mother taking the children to Spain for the summer holiday. His case in oral evidence refined a little; he accepted that he did not know when the children would be back ("*I didn't really know when I would expect to see them again…*": evidence in chief). He recognised that they would probably not be back before the beginning of term, as they had always been in previous years, and did not want to 'pin' the mother down to a firm date or commitment about her return, as he wanted to maximise the prospect that she would choose in her own time to rekindle the relationship.

21. Once in Spain, the mother and children moved in with the maternal grandmother; the maternal uncle arranged (this appears to be accepted) for the children's rooms to be re-decorated and furnished to their taste and needs. The mother made arrangements for the children to commence school, telling me that the parents had earlier agreed to the children attending bi-lingual schools: accordingly, T joined the local Instituto ,

while the boys attended a local Collegio Publico . Over the following weeks, unsurprisingly, the children made friends (at least this is what T told Ms Vivian, a point acknowledged by the father). I note that at the end of term, T was reported to have had "*a good school performance and always showed a perfect adaptation to the course and the Academy*", she "*can be described as an excellent student, very participative and has always shown a great interest in the different subjects*". The father accepts that the children did "*reasonably well*" in their Spanish schools.

22. The father had limited contact with the children in the early days after their departure for Spain, indicating (evidence in chief) that he struggled with the "*emotional stress*" of this.

23. Inevitably, the parties' evidence on the key events surrounding the departure of the mother and children for Spain, and in the weeks which followed, recounted in writing and orally, has been coloured to some extent by a forensic advantage which each sought to gain, and perhaps – particularly in the father's case – by a sense of regret at the outcome of these developments. In the circumstances, it has been helpful for me to review a number of contemporaneously generated documents in the relevant period to try to assess the true position. The parties e-mailed each other in this period; a selection of these communications have been placed before me, and analysed by counsel, each seeking to draw from them points which (they say) support their respective cases.

24. The key e-mails, and my assessment of the relevant contents, are summarised below:

14 August 2012 F→M	"*I would like to know when they have school holidays to buy them some tickets for the children to spend the holidays with me. That is the least you can do. They also have [a/their] home here. In relation to T and any medical decision, you should also keep me informed, ok? In relation to the child benefit, child tax etc we leave it as it is for the time being until we see what sort of solution this has, ok?*"
20 August 2012 F→M	"*I could have stopped you as you know but I didn't do it because I was hoping for both of us to calm down a little so we could start to fix this mess… I would like to think that we can still be together although not now but maybe after a few months or maybe after a year to reconstruct slowly our relation … I am willing to send you more money and to help you in everything I can but with the purpose to solve all this not to make it worse. I could take the big car to Spain and at the same time I could take some of your things and the children's so you could have them … If this means that the result is that you would stay over there and rent a place then let's do it and at the beginning I will live in between the two countries then let be it (sic) … I know non (sic) of us is willing to continue this relationship … I mean to rent a place close to your family where we could start again and I could be between two countries … during the weeks I will be there I think I could give English lessons.*

		… About the taxes I don't know yet. I told you that it is best if the first few months we continue the same … maybe they keep on paying if I am here…"
10 September 2012	M→F	"*The children have started school today and they enjoy it a lot … can you send me some money*."
16 September 2012	F→M	"*That is why I wanted to separate…. I still want to think that this year could be good to try to reconstruct something we once had .. I haven't been the only reason for our separation [M] is a thing of two (sic)*"
16 September 2012	F→M	[later the same day – as e-mail above] "*why don't you come for a couple of days in October so you can organise all of your clothes and everything else that you have here. I will pay for a budget ticket*"
18 December 2012	F→M	"*I don't want to argue with you that is one of the reasons I wanted to separate … let me know if you want a luggage* (sic)"
20 December 2012	F→M	"*I insist that the reason why I wanted to separate is because things weren't going well although I wanted to see if with a bit of times things would improve…*"
"	F→M	"*I will take them* [the children] *on the 23rd at night … until the 5th noon more or less (you wanted them to come back at least two days before school started*"
"	M→F	"*I will need for you to bring me a few things … you'll know if I am asking for too much*"
21 January 2013	F→ M's brother	"*I will take them this weekend if possible or before so they can start school there next week…*"

25. In November 2012, the father flew to Spain for the weekend. He spent the first of the three days with the mother's brother discussing a business deal; he spent part of the other two days with the children.

26. The father provided financial support for the mother while in Spain and sent out winter clothes for the children in a parcel together with some of their "*special toys*". He further said that he had suggested to the mother that he could/should move out to Spain in order to try and "*get her to discuss things*".

27. It was agreed between the parties that the children would spend Christmas with the father. He flew to Spain on 21 December and spent two days with the children before bringing them back to this jurisdiction on 23 December 2012. There is no dispute that

the children would return to Spain on 5 January 2013. The father told me that he intended that the children would return to Spain at that time to resume their life and school there.

28. The mother says that she spoke to the children during this holiday with the father, and they talked to her "*very normally*". However, it was predictable that it would be upsetting for the children, and for the father, for the children to return to B for Christmas. I suspect that the father had not prepared himself adequately for the children's emotional reactions, and as the holiday drew to its close he allowed the children's reasonable upset to govern his own rational thinking.

29. Shortly before 5 January 2013, on the father's case the children (possibly only L and A) hid the children's (and father's) passports in an attempt (said the father) to frustrate their departure. On the appointed day of departure, the father contacted the mother and indicated that the children did not want to return. There were exchanges of messages. The mother was clear: the children must return. The father (as is apparent from e-mails which I have read some of which are referred to above) stalled.

30. On 10 January the mother received an e-mail from the father in which he indicated that he had commenced proceedings in O to secure protective orders here.

31. On 21 January 2013, the mother made this application seeking the relief which I outlined in §1 of the judgment. She made a 'without notice' application before Theis J on that day, and a range of customary directions and location orders followed. Further directions were given at the return date on 29 January 2013, including a direction for a CAFCASS report given the ages of the children and their apparently strongly-held views (evidenced by the hiding of the passports referred to above) not to return to Spain; I deal with this below.

32. Pausing here, I should note that given that the parties were not married, the father does not have parental responsibility for T and L. He does have parental responsibility for A and N, by virtue of the recording of his name on their birth certificates (see *section 4(1)(a) Children Act 1989*). That said, as the mother confirmed in oral evidence, the father has always treated the children the same and I accept that.

<u>The parties' positions</u>

33. As the question of habitual residence is the first issue for me to consider, I outline each parents' case on this issue as follows:

34. **The mother's case**: Over the six months or so prior to 24 July 2012, the mother maintains that:

    i) There were a number of conversations between her and the father about her relocating permanently to Spain; it was an 'ongoing' dialogue, which commenced in or about January 2012; she said that there were about '*twenty*' such conversations; she said that these conversations took place at home, and sometimes in front of the children.

ii) The father had expressly agreed in those discussions that their move to Spain would be best for the children (see her witness statement, and evidence in chief);

iii) T was increasingly unhappy at P School, where the mother said she was being bullied. The mother said that she and the father took this up with the staff (the father denied having done so). The catalyst for the mother's decision to relocate permanently appears to have been her growing realisation of the effect of T's unhappiness at school upon her; this had really manifested itself in January but was significantly worse by April 2012, following the school trip, and was confirmed when T refused to go to school for the last few days of term;

iv) That the father had acknowledged that T was being bullied at P School; the mother's case is that the father had acknowledged after the school trip that T "*couldn't carry on in the school*"; (the father did not deny that he had said this, but could not remember doing so: cross-examination);

v) The children knew that the mother's plan was that she and the children would relocate and that they knew this for some time before it happened; this is evidenced to some extent by:

a) The extract from T's 'Facebook' page which indicated that she knew that she was leaving to go to Spain no less than one week [17 July 2012] before the departure; (this is not consistent entirely with what T told Ms Vivian, which is that she thought she may have been going to Spain for a holiday);

b) L's discussion with Ms Vivian, in which he indicated that he had known from a discussion with his mother *and his father* for a month;

vi) And in fulfilment of the plan to relocate the mother points to the following facts:

a) The mother purchased a one-way ticket to Madrid (she told me that she generally purchased return tickets for the summer holiday trips) (see above);

b) The mother informed the head teacher (Mrs P) at the boys' school on a number of occasions that she would be leaving for Spain with the boys at the end of the term (see above);

c) The mother informed P School on or about 11 July 2012 (the last day of term) that T would not be returning in September (see above);

d) The mother informed 'K' at cubs that L would be leaving (see above);

e) The mother organised a 'leaving party' for T, but not for the boys as they did not want one.

35. The mother further pointed the following evidence as confirmation that the father knew, and was agreement with the plan, that she should permanently relocate:

i) The father had seen the e-mail drafted by the mother addressed to 'K' at cubs confirming that L would be ceasing that activity because of the "*move to Spain*";

ii) The one-way ticket which she had purchased on 6 June for herself and the children which she said she 'sent' to (or showed) the father;

iii) His conduct at the airport when they left in which he said that he would not see them again.

36. In relation to the period since July 2012, the mother relies on the father's conduct (corroborated by the e-mails) as evincing his earlier explicit acceptance and/or his agreement/acquiescence to the children being in Spain:

i) The father had not sought the return of the children to England and Wales at any time, nor did he indicate any objection in any correspondence to their living in Spain;

ii) He had proposed to the mother more than once that he may in fact move out to Spain himself;

iii) He had enquired of the mother when the children's holiday dates in the Spanish schools would be so that the parents could arrange for the children to spend time with him in holidays in England;

iv) He had proposed taking out the family car to Spain;

v) He had proposed that the mother should pay a visit to England (without the children) to collect (or sort out the collection of) some of her belongings;

vi) He had fully intended to bring the children back to Spain on 5 January 2013 to live, and for them to resume school.

37. **The father's case**: By defence filed on 4 February 2013, the father joined issue with the mother's assertion that the children had acquired a habitual residence in Spain by the 5 January 2013, indicating that the children were habitually resident in England & Wales at that date. He maintained that they had never been habitually resident in Spain, and had not consented to the children permanently relocating to Spain in July 2012.

38. The father's case on key points was diametrically opposite to that of the mother, and can be summarised thus:

i) He did not give his express permission to the children residing permanently in Spain;

ii) The mother had not discussed the arrangements for the relocation of the children with him;

iii) He accepted that the mother had 'threatened' to take the children to Spain, and although accepting that the threats about this in 2012 were of a different

intensity or quality than in previous years, he did not regard this as generating the necessary 'consent';

iv) He accepted, albeit less fully than the mother, that T was bullied at school, and was unhappy there; he did not accept that this meant that she had to leave the school;

v) That he was keen to reconcile with the mother; he felt that by letting her go and not 'pinning her down' on when she would come back, this stood the best prospect of ultimate reconciliation;

vi) He was concerned about the children being unsupervised in their mother's care, and unkempt, when he saw them in November and December;

vii) That he was nonetheless intending to return the children to Spain on 5 January 2013.

Findings of fact

39. It is particularly convenient in this case that I should recite my findings on the facts at this stage, before turning to the law.

40. In relation to the period up to 24 July 2012, I find:

i) That the father and mother had reached a point in their relationship in the early part of 2012 where they both recognised that their continued cohabitation was unsustainable;

ii) The father continued to have loving feelings for the mother (and these probably continued until very recently); these feelings were not reciprocated. The father found this rejection painful, and told the mother (more than once in the early part of 2012) that he wanted a separation from her;

iii) The parents discussed options for achieving that separation. I find that the father offered to move out. I further find that the mother told the father that she wished to move to Spain permanently with the children. I accept that the mother had probably threatened this in arguments in the past; in 2012 she made the proposal seriously;

iv) The mother saw her relocation to Spain as the end of the relationship and the start of a new life. The father hoped that by letting the mother go, and giving the mother space, she may come round to love him again. It was in that context that reluctantly, and doubtless with considerable misgivings, the father agreed with the mother that she could go to Spain, indefinitely;

v) The father's agreement for the mother's move to Spain with the children was made in the context of, and reflecting, the realities of the long-running disintegration of this family's family life;

vi) Simultaneous with the ending of the parents' relationship in the spring of 2012, both the mother and the father were individually deeply concerned about T's unhappiness at P School; both were aware that she was being bullied; both

were aware of her upset on the return from the school trip in April; her misery was apparent to both;

vii) I find that the father did tell the mother on the day he collected T from the school trip in April that T "*couldn't carry on in the school*"; I suspect that the realisation that the school arrangement was coming to an end in this way was painful to him but it was the entirely understandable reaction of a concerned father;

viii) When it was apparent to the mother that T was genuinely unhappy at school, it eradicated one of the last few potential reasons for remaining in England; T's unhappiness at school endured to the end of the summer term, and her reluctance to be in school for the last few days of the summer term only served to confirm to the mother that her decision was the right one;

ix) That the mother's plan to relocate permanently to Spain crystallised soon after the parents' discussion in April about T's school placement; hence her purchase of one-way ticket on 6 June;

x) As a discrete part of the history, I am not persuaded that the father necessarily knew that the mother had bought a one-way ticket for herself and the children (there was no evidence of the e-mail being forwarded and I am not sure that the mother would necessarily have spelt this out); but the father did accept (and believe) that the mother and children were leaving 'indefinitely';

xi) I find that the father read, and understood, the e-mail which the mother wrote to K at cubs; it was painful for him to acknowledge the clear message of that e-mail at the time, as now; he did nothing about it when he saw it, because it was consistent with his belief that the mother and children would probably not be around in the autumn;

xii) That the mother and father did tell L at least about a month before he left (i.e. towards the end of June) that he would be leaving permanently to live in Spain (as L told Ms Vivian);

xiii) From a date no less than one week before the departure, T knew that she was leaving England and P school; this was not a secret; it was readily accessible information on her facebook page;

xiv) The mother organised a party for T; it was essentially a farewell party for her;

xv) That at the point at which the mother and children left England, the father genuinely did not know when he would see them again; although in previous years they had returned from their Spanish holidays before the beginning of the autumn term, on this occasion he did not expect her to do so. I accept the mother's case that the father did say to the children at the airport that he might not see them again; he genuinely felt a sense that of finality of this chapter of the family's life.

41. In relation to the period after 24 July 2012, I find that the father's conduct (and the contents of the e-mails set out in §24 above) was consistent with the indefinite nature of the arrangement to which he had reluctantly agreed:

    i) The father did not object to the children's continued presence in Spain, nor did he ask the mother to bring the children back;

    ii) Having researched the Hague Convention in or about July 2012, he did not seek to assert any claim for the return of the children;

    iii) His 'emotional stress' (see §22 above) at having contact with the children was consistent with the reality that the children had left for Spain indefinitely, rather than they had gone for a holiday

    iv) In October 2012, he invited the mother to return to England briefly to collect some of her and the children's belongings;

    v) He sent financial support to the mother;

    vi) He sent some of the children's winter belongings, and some of their special toys;

    vii) He visited the children in Spain in November;

    viii) Most significantly, he went to collect the children on 21 December 2012, fully and genuinely intending to return the children to Spain on 5 January 2013. He told me, and I accept, that he had expected that the children should return to Spain on 5 January 2013 to resume their life and education there – "*to live*" in Spain (cross examination).

42. In relation to the period after 24 July, I further find that:

    i) The children settled in reasonably well to the maternal grandmother's flat in Madrid; T had her own room; the boys shared a room; over the weeks following their arrival, the rooms were decorated and furnished appropriate to their tastes and needs;

    ii) The children settled into full-time education in their new schools in Madrid; they appeared to enjoy them, and did reasonably well in them; L came top of his class (according to mother – cross-examination);

    iii) The children made friends in Spain – certainly T and L;

    iv) The children are – to a greater or lesser extent – bilingual, and would not have experienced any material difficulties with the language;

    And this must be seen in the context that:

    v) The children are Spanish Nationals, with a Spanish mother, and Spanish extended family.

    And further that:

vi) The father accepted the position of the children living in Spain, albeit perhaps (albeit privately) resentfully at times.

43. I deal with the other issues of fact (particularly relevant to the question of the children's views), when discussing the possible exceptions to *Article 12* (i.e. *Article 13*) later in this judgment.

The law

44. The mother's application is determined by reference to the provisions of Article 3 of the Hague Convention which specifies that:

> "*The removal or the retention of a child is to be considered wrongful where –*
>
> *(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and*
>
> *(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.*
>
> *The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State*".

45. If I conclude on the evidence that there has been such a wrongful retention, then I am obliged to "*order the return of the child forthwith*" (Article 12) unless one of the exceptions in Article 13 applies. .

46. Mr Setright QC and Mr Gration acknowledge that "*there does not appear to be any smooth path* [for the court] *to follow*" in reaching a conclusion in this case, given its unusual set of facts, and the not uncomplicated application of the law.

47. I take as the starting point, in evaluating whether there has been an abduction as defined by the international instruments, a determination of the habitual residence of the children as at 5 January 2013, the date of the alleged unlawful retention. To be a wrongful retention on that date, I need to be satisfied that the children were (as contended by the mother) habitually resident in Spain then; the father puts this in issue.

48. Determination of this question is materially complicated by:

i) The different legal status of the two older children compared with the two younger children; the father does not have parental responsibility for T and L;

ii) The different (albeit overlapping) approach of the English Courts and the European Courts to the evaluation of habitual residence, and the extent to which I should be governed by each.

49. If the children (or any of them) are determined to be habitually resident in Spain on the key date, I then have to consider whether any of the three older children object to returning, and if so whether they are of an age or maturity at which their views should be taken into account. If an affirmative answer is revealed to those questions in respect of any of the children, I would then be required to exercise discretion to decide whether to return that child.

50. Independently, I need to consider whether any of the children would be placed in an intolerable situation by being required to return. This arises in this case, argues Mr Hames, by reason (a) of the neglectful care to which the children had been exposed during their autumn in Spain, and to which they would be exposed if they were returned (about which the father complains), and/or (b) of the potential of separating the siblings, it being acknowledged (as inferred above) that different answers may be yielded to the questions around habitual residence in respect of the different children; in any event N cannot be considered in the 'child's objections' category above.

51. **Habitual residence**: The children were undoubtedly habitually resident in England up to 24 July 2012. I need to examine whether there was any change in habitual residence in the period prior to 5 January 2013.

52. On the facts as found by me in §40-42 above, I have little doubt that the children did lose their habitual residence in England on or shortly after 24 July 2012, and acquired a habitual residence in Spain during the autumn of 2012. I am satisfied that by 5 January 2013 the children were all habitually resident in Spain. I so conclude having regard to the broadly consistent application of the 'integration' European test (*Mercredi v Chaffe (Case C497/10)* [2011] 1 FLR 1293: see below) and the English test of a "*persons abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration*" (per *R v Barnet London Borough Council, ex parte Nilish Shah* [1983] 2 AC 309, and *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562 sub nom *C v S (A Minor) (Abduction)* [1990] 2 FLR 442, at 578 and 454). I have had regard to the fact that habitual residence may be acquired despite the fact that the purpose of the move was intended to be fulfilled within a comparatively short duration or the move was only on a trial basis (*Al Habtoor v Fotheringham* [2001] 1 FLR 951; *Re P-J (Abduction: Habitual Residence: Consent)* [2009] EWCA Civ 588, [2009] 2 FLR 1051).

53. The approach of the House of Lords in *Shah* is similar to that articulated in *Mercredi v Chaffe* in which it was held (§22) that:

> "*in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence. However, the Regulation does not lay down any minimum duration. Before habitual residence can be transferred to the host State, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case*" (emphasis added).

54. I recognise that my conclusion on the issue of habitual residence, simply stated above, and derived largely from my clear view of the facts, pays insufficient tribute to the very detailed and skilful arguments from counsel on this issue.

55. I deal with the points raised in submission succinctly below.

56. Taking first the position of T and L, it is my view that the mother had the right to determine their habitual residence (see *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, *sub nom C v S (A Minor) (Abduction)* [1990] 2 FLR 442. The approach of the English Court in this respect appears to be consistent with the approach of the European courts: see the decision of the Court of Justice of the European Union in *JMcB v LE C-400/10* [2011] 1 FLR 518 at §57-58:

> " **…** *the fact that, unlike the mother, the natural father is not a person who automatically possesses rights of custody in respect of his child within the meaning of Art 2 of Regulation No 2201/2003 does not affect the essence of his right to private and family life, provided that the right described in para [55] of this judgment is safeguarded.*
>
> … *That finding is not invalidated by the fact that, if steps are not taken by such a father in good time to obtain rights of custody, he finds himself unable, if the child is removed to another Member State by its mother, to obtain the return of that child to the Member State where the child previously had its habitual residence. Such a removal represents the legitimate exercise, by the mother with custody of the child, of her own right of freedom of movement, established in Art 20(2)(a) of the TFEU and Art 21(1) of the TFEU, and of her right to determine the child's place of residence, and that does not deprive the natural father of the possibility of exercising his right to submit an application to obtain rights of custody thereafter in respect of that child or rights of access to that child*" (emphasis added)

57. In relation to A and N, the father is a fully 'enfranchised' parent (as it was described in this hearing) and his agreement to a change of habitual residence of the younger children would, by reference to English case law, be required.

58. Counsel for both parties acknowledged that the father's position (whether it were an objection or consent) may well nonetheless be relevant to the question of whether T and L (and indeed A and N) have actually acquired habitual residence in Spain; in this respect the father's views would fall to be considered as one of the "*conditions and reasons for the stay in the territory of that Member State"*, which form part of the broad factual enquiry which the court undertakes "*taking account of all the circumstances of fact specific to each individual case"* (see *Mercredi v Chaffe*) but no more.

59. This is acknowledged particularly in this case given (a) the position of the younger children, and the father's right of veto in respect of them, and (b) the fact that the mother and the father both acknowledged that they each treated the children as having similar 'status' – legal or otherwise – in the family.

60. Mr. Hames invited me to rule that any objection of the father to T and L's move of permanent home would carry such significant weight that it would be equivalent, or

nearly equivalent, to an absolute veto; he sought to illustrate that by reference to the decision of Holman J in *FVS v MGS (Habitual Residence)* [2012] 1 FLR 1184, in particular §74 *et seq*. The case of *FVS v MGS* does not in my judgment illuminate the submission, for in that case Holman J was proceeding on an expressly agreed basis (ref §11) that the unmarried couple would be treated for all intents and purposes as if they were married, and that the father had parental responsibility. These contentions, argued Mr. Hames, were consistent with the application of a 'best interests' approach approved in by Baroness Hale in *Re E (Children) (Abduction: Custody Appeal)* [2011] 2 FLR 758 §14-18. However, the important concession in *FVS v MGS* has not been made here.

61. In my judgment, Mr Hames' arguments at the furthest extreme would stretch the concept of inchoate rights of parental responsibility (something previously only applied to rights of custody) past its breaking point, particularly in circumstances where the judicial concept of inchoate rights of custody appears to have been dispelled by Baroness Hale in *Re D (A Child) (Abduction: Custody Rights)* [2006] UKHL 51, [2007] 1 FLR 961.

62. I do nonetheless accept the joint submission of all counsel that the views of the father could be taken into account in the determination of whether there has in fact been a change of habitual residence, and given the position of the father in the family, I accept that any such objection (though on my finding there has been no objection) would have weighed significantly.

63. In *Re H-K (Habitual Residence)* [2011] EWCA Civ 1100, [2012] 1 FLR 436. the Court of Appeal held that the words 'a certain duration' and 'an adequate degree of permanence' in *Mercredi v Chaffe* had to be read consistently with Lord Scarman's opinion in *Shah* (above) that residence could be of short or long duration provided that it was adopted "*for settled purposes as part of the regular order of … life for the time being*". As Ward LJ said in *Re H-K* at §18:

> *"Of course intention is a relevant factor subject to Lord Scarman's caveat at 344 and 27 respectively, that the answer to the question, which is ultimately one of fact, "depends more upon the evidence of matters susceptible of objective proof than upon evidence as to the state of mind of the propositus."*

(See also Thorpe LJ in *Re B (Children) [2012] EWCA Civ 1082* at §9 and §11 respectively).

64. In relation to the father's agreement to A's and N' move to Spain (important, if not critical, to whether as a matter of law their habitual residence had shifted), such agreement needs to be clear but not necessarily adjudged by reference to the exacting standards applied to the test relevant to an Article 13(a) 'consent' case in *Re P-J (Abduction: Habitual Residence: Consent)* [2009] EWCA Civ 588 [2009] 2 FLR 1051 at §48.

65. On the facts of this case, I am satisfied that the father's agreement to the younger children's move to Spain was clear, and unconditional, and was in that sense effective to facilitate a change of habitual residence. It was a true bilateral agreement; the agreement was to their stay being indefinite. In that sense it is less important for me to look at the 'integration' argument.

66. The European test applies a wide consideration of "*integration*" in order to establish habitual residence. In this respect, I have had regard to the approach of the court in *Re A (Area of Freedom, Security and Justice) (C-523/07)* [2009] 2 FLR 1 at §44 and *Mercredi v Chaffe* at §56:

> *"It follows from all of the foregoing that the answer to the first question is that the concept of 'habitual residence', for the purposes of Arts 8 and 10 of the Regulation, must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case"*

67. I am again satisfied on the information that the children had begun to be integrated into their new Spanish lives, establishing a relevant nexus between the children and their new home State.

68. The move to Spain was plainly not an easy one for the children, undertaken against a backdrop of months (probably years) of bitterness and rancour between their parents (and an associated unpleasant family atmosphere in the B home); significantly, they separated from their father for the first time and early contact between the father and the children was difficult to achieve. Inevitably a move, particularly one involving a move of country, created a hiatus in the children's lives, and I have to view 'integration' in that context.

69. In November they had contact with their father; this in my judgment served to unsettle them, not because he did anything deliberate to unsettle them, but because it brought home to them how much they missed him. Overall, however, once in Spain, I am satisfied, for the reasons set out in §42 above, that they did achieve a significant degree of integration into their new social and family environment.

70. Even had I been wrong about the transfer of habitual residence, as discussed above, I consider that the father's conduct viewed both before the departure for Spain and afterwards reflects at the very least an acquiescence in that state of affairs for the purposes of satisfying Article 10(a) BIIR; in so concluding, I consider that, while not strictly necessary to apply such a high threshold, the test of acquiescence applicable to an Article 13(b) defence could be established in this case whether by reference either to:

    i) the first three paragraphs of the test of Lord Browne-Wilkinson in Re H (Abduction: Acquiescence) [1997] 1 FLR 872 (at p.884), and the focus on "*whether the applicant acquiesced in fact*",

    or

ii) in any event the fourth (i.e. "*Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced*").

71. It follows that, by reference to the provisions of Article 3 of the Hague Convention, the retention of the children on 5 January 2013 was in breach of the mother's rights of custody under the law of Spain – the state in which the child had become habitually resident immediately before the retention.

72. Under Article 12, I am therefore obligated to return the children unless I find that one of the exceptions exist under Article 13, which provides as follows:

> "*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*."

73. If such exception exists, I am vested with discretion whether to order that the relevant children should return.

Exceptions to return

74. By the Statement of Defence filed on 4 February 2013, the father raises the following arguments, inviting me to find that 'exceptions' (referred to as 'defences') can be established to the obligation to return:

i) The children object to returning to Spain and the three older children are of an age and level of maturity at which I should take account of their views;

ii) The children would be placed in an intolerable situation if returned to Spain.

75. **Child's objections**: When considering a child's objections to a return under Article 12 the Court must address these questions:

i) Does the child object to being returned?

ii) Has the particular child attained the age and maturity at which it is appropriate to take account of his views?

iii) If so, then how should the court exercise discretion?

76. The question of whether a child has attained the age and degree of maturity at which it is appropriate to take account of their views are questions of fact uniquely for my discretion.

77. In evaluating the children's views in this case I have adopted the principles conveniently summarised by the then President of the Family Division, Sir Mark Potter, in *De L v H* [2010] 1FLR 1229 at §63/64 (I quote also from §66 below):

> "*'Gateway' findings which are required of the court in relation to the discretionary defence of 'child objections' under Article 13 of the Hague Convention are of course:*
>
> *a) That the child does in fact object to being returned; and*
>
> *b) That he has attained an age and maturity at which it is appropriate to take account of his views.*
>
> *On being so satisfied, the matter involves a wide range of considerations in relation to the exercise of discretion: see Baroness Hale of Richmond in Re M (Children)(Abduction: Rights of Custody) [2007] UKHL 55, [2008] 1AC 1288, sub nom Re M (Abduction: Zimbabwe) [2008] 1FLR 251 at paragraphs 43, 44 and 46.*
>
> *As to (a) it is important to bear in mind that the objection to return must not simply be based on the child's preference to be with the abducting parent. The basis of objection is that of return to the State of habitual residence rather than simply to the care of the applicant (see per Balcombe LJ in Re S (A minor)(Abduction: Custody Rights) [1993] Fam 242 [1993] 2WLR 775 sub nom S v S (Child Abduction) (Child's views) [1992] 2FLR 492 at 250 and 499 respectively. Nonetheless leeway has to be given to the fact that, in most cases, the two elements are so inextricably linked that they cannot be separated: see per Wall LJ in Re T (Abduction: Child's objection to the return) [2002] FLR 192 at 203. In relation to this question and, in any event, in relation to the exercise of the courts discretion once satisfied the objection is established, the court analyses on the evidence before it the grounds on which the child's objections are based in order to determine and weigh the strength, soundness and validity of those reasons against the background of the overall purpose of the Hague Convention, namely one of prompt return to the country of habitual residence so that the courts of that country may determine the question of custody and residence on the basis of a full welfare investigation.*"

78. On the important distinction between the child's objections to remaining in the requested State with the Abductor, as against returning to the State of habitual residence, I have had regard to the decision of the Court of Appeal in *Re K*

(Abduction: Case Management) [2011] 1FLR 1268, paying particular attention to the passage which I have underlined below:

> *"Now it does not seem to be that the obligation to hear the child under provisions of Article 11(2) of the Brussels II (revised) regulation means that hearing the child, and hearing the wishes and feelings of the child clearly expressed almost automatically results in the conclusion that the child's objection threshold has been crossed, and all that remains is for the Judge to exercise a discretion. The Hague Convention in its terminology. There must be a very clear distinction between the child's objections and the child's wishes and feelings. The child who has suffered an abduction will very often have developed wishes and feelings to remain in the bubble of respite that the abducting parent will have created, however fragile the bubble may be, but the expression of those wishes and feelings cannot be said to amount to an objection unless there is a strength, conviction and a rationality that satisfies the proper interpretation of the Article".*

79. Wilson LJ observed in *Re W* [2010] 2 FLR 1165 @ para.17 that:

> "*The defence was originally devised as an escape route for mature adolescents only slightly younger than the age of 16 at which, under Art 4, the Convention ceases to apply: Beaumont and McEleavy, The Hague Convention on International Child Abduction (Oxford University Press, 1999) at 178 and 191. But over the last thirty years the need to take decisions about much younger children not necessarily in accordance with their wishes but at any rate in the light of their wishes has taken hold: see Art 12 of the United Nations Convention on the Rights of the Child 1989 and note, for EU states, the subtle shift of emphasis given to Art 13 of the Hague Convention by Art 11(2) of Council Regulation (EC) No 2201/2003 (Brussels II Revised). Fortunately Art 13 was drawn in terms sufficiently flexible to accommodate this development in international thinking; and, although her comment was obiter, I am clear that, in context, the observation of Baroness Hale of Richmond in* Re D (Abduction: Rights of Custody) *[2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961 at [59], that 'children should be heard far more frequently in Hague Convention cases than has been the practice hitherto' related to the defence of a child's objections*."

80. What it means to "*take account*" of the child's objections was further discussed by Wilson LJ in *Re W* (supra) at §22, to mean just that:

> "*Earlier confusion in our jurisprudence about the meaning of the phrase 'to take account' in Art 13 (exemplified, for example, in* Re T (Abduction: Child's Objections to Return) *[2000] 2 FLR 192 at 204B–D) has in my view now been eliminated. The phrase means no more than what it says so, albeit bounded of course by considerations of age and degree of maturity, it represents a fairly low threshold requirement. In particular it does not follow that the court should 'take account' of a child's objections only if they are so solidly based that they are likely to be determinative of the discretionary exercise which is to follow: see* Re D *above per Baroness Hale of Richmond, at [57], and* Re J

and K (Abduction: Objections of Child) *[2004] EWHC 1985 (Fam), [2005] 1 FLR 273, at [31]*".

81. As indicated above, I have been provided with two reports prepared by Sarah Vivian of the CAFCASS High Court team. She has interviewed the three older children on two occasions. For the first report she met the children at her office on 18th February 2013.

82. Her first interview was with T; she found T to be "*a confident, intelligent young girl whose maturity seemed to me to be beyond her years. I think her mature presentation is a reflection of her innate intelligence and personality rather than something that she has prematurely had to acquire as a coping strategy and out of necessity because of her own life experiences*".

83. Ms Vivian reported that T was "*clear and robust*" in her objections about returning to Spain; she "*sees her home, life and future as being in England*". It was evident from the interview that T regards England as her home while considering it "*reasonable*" to visit Spain for holidays.

84. It appeared that T had a rather dismissive attitude to educational standards in Spain, a matter of importance to her; she was also, separately, highly critical of her mother's conduct in removing the children (as she described it in interview) peremptorily in July 2012, and failing to prioritise their needs since that time. When asked if she would go to Spain if a return order was made, T is reported to have said, "*No, I would do everything I could I would not go, not pack and not get in the car*."

85. Ms Vivian then interviewed L. He, like his sister, seemed to be a bright and thoughtful child; he appeared to Ms Vivian to have carefully considered his situation, expressing his views from a position of some maturity. He appeared to express some ambivalence about a return to Spain but was nonetheless clear about his preference to stay in England. When asked what he would want to say to the Judge, L said, "*Can I please stay here? This is where we should live normally where we are. No more arguments. Parents back together and have a proper family*." L appears to be conflicted about where his loyalties should lie.

86. Ms Vivian then interviewed A. He was "*a thoughtful*" boy, though quieter and less outwardly confident that his older siblings. Ms Vivian formed the impression that he was "*quite insightful for his young years*" but found the process of having to express a view aligning himself with one or other parent very difficult; *"I don't really know I am not very confident in any of this, my brain is not working it does not tell me what to say*." Ms Vivian was left with the impression of a boy conflicted about taking sides with one parent.

87. The overall impression of these children given to Ms Vivian was that they had not been overtly influenced to hold a particular line by their father nor, in her opinion, had he sought to recruit them to his own point of view.

88. Ms Vivian believed that they clearly expressed a desire to be allowed to remain in England which is where they believe is their home, where their friends are, and where their life always was and "*where it should continue to be*."

89. Following the interview with the children on 18th February T sent an e-mail to Ms Vivian on 20th February 2013 at 11:54hs. It is a well constructed, articulate, and powerfully argued plea to remain living in England. In this e-mail, T identifies various aspects of her life in Spain which she found less than satisfactory, in particular: (a) the lack of notice of their removal; (b) poor educational standards; (c) low levels of "*attention and care*" from their mother; (d) the "*temporary*" nature of their home; (e) the emotional pressure being placed on them by their mother who in the e-mail at one point T refers to by her first name.

90. T concludes the e mail:

> "*Here in England we are living in a stable home with a very loving father. Our education is looking positive and the boys will all have the chance I had to get a bursary at a good school, which I had but have now lost because of our mother. All our needs are being addressed and we are content and settled. None of us have anything against our mother, so I am sure that we would all be fine with going to see our mother every holiday, as she has made it very clear that she will never set foot in England again. I have to be reasonable and admit that she is still our mother and the boys as well as her would benefit from seeing her in the holidays*."

91. The e-mail is an astonishingly mature piece of prose. Unsurprisingly, in the circumstances, the mother raised issue with the authorship and derivation of that e-mail, and at the pre-trial review raised a question as to how this should be investigated. I caused Ms Vivian to re-interview the children, directing that she should specifically discuss with T the authorship of the e-mail. Ms Vivian conducted these interviews (even from reading the second report, I sensed a little reluctantly) on 29th April 2013.

92. The second interviews on 29th April 2013 revealed little of significance so far as the general views of the children are concerned. T was keen to impress upon Ms Vivian that the e-mail had been all her own work, and was affronted that her mother did not believe her. T's language in interview was described as having an adult tone, informing Ms Vivian that in the last few weeks she has "*ceased talking to her*", for example. There were occasional flashes of petulance in interview, revealed for instance when Ms Vivian asked T to contemplate returning to Spain:

> "*She knows that if I go back I will make her life hell. She knows I catch her out and am holding the boys together and telling them things. She knows I wouldn't leave her in peace and would make things difficult for her. She would want to split us up*."
>
> Later in the interview she added,
>
> "*She wants the attention. All about her. It's really frustrating. I puzzle over it after all she's done, saying she hates me. She is having the time of her life*."

I have been asked to infer that these comments reveal a general lack of maturity; in my judgment, these expressions of frustration do little to shift the overall impression of T as a mature and thoughtful girl, though reinforce my impression of her as strong willed and determined.

93. Ms Vivian found it more difficult to engage A and L in the second interviews. L in particular was reluctant to go with Ms Vivian to talk indicating that "*he did not want to talk about his mother*".

94. Ms Vivian concluded that the boys are:

> "*reluctant to being seen to align themselves with either parent and it is consequently more difficult to get them to open up. That said, the children remain consistent in their expressed feelings about returning to Spain, reflecting their sense that England is their home where their roots are, where they feel they belong in school and among family and friends*."

95. Of the three children, T is the one who is most consistent and clear in her views about a return to Spain, which remained unchanged. Ms Vivian was satisfied, from her interviews with all three, that they were being honest in expressing their views about living in Spain and that "*those feelings should be seen separately from the feelings they express in relation to their mother*." She added, significantly, "*I think the children themselves were able to make this important distinction*".

96. Ms Vivian did not get the sense that the father had exercised any undue influence over the children's view of Spain albeit acknowledged that there were likely to have been discussions in the family home about their mother, and to a degree about the case, but that has been (she felt) of necessity rather than a ploy by the father to manipulate the way the children think and feel about Spain.

97. Ms Vivian clearly felt that T holds a degree of power within the sibling group and that she has engaged to a degree with discussions with her younger siblings about their mother. This, in Ms Vivian's view, was likely to have had some effect on L and A, although Ms Vivian's over-arching impression was that all three children held genuine feelings about a return to Spain. Specifically addressing the authorship of the e-mail, Ms Vivian indicated that the "*tone and wording used in the e mail did not cause me particular concern …. As it resonated with my own experience of T during my first and now second interview with her*."

98. Ms Vivian gave oral evidence before me and was questioned by counsel for each parent. The following themes emerged from her oral evidence:

    i) That T is an intelligent, confident girl who has to some extent assumed the role of "*voice piece*" for the sibling group; she has taken some responsibility for them.

    ii) That T was not consciously aligning herself with her father in an "*outright way*"; Ms Vivian believed that she had not "*gone out to pick a side*" but felt let down by her mother and wanted to be in England: "*in that way, she has aligned herself with her father*";

    iii) T feels hurt, betrayed and sad when thinking about her mother; she was "*angry and frustrated, at times*"; "*she is very disappointed, and jealous*". Ms Vivian agreed that the appearance of a new boy friend or partner in her mother's life may well have influenced some of or all of these feelings;

iv) The position of the boys was more moderate than their sister's; L had indeed indicated that he knew that the family would be leaving for Spain in July 2012 (in contrast to his sister who indicated that there had been no consultation); both boys missed their mother when they are with their father and their father when they are with their mother – they wished the parents to be back together, (interestingly Ms Vivian felt that "*deep down*" T misses her mother hugely, perhaps most of all of them):

v) The boys were nonetheless clear that "*this is where we live*" and (significantly, thought Ms Vivian) L described as being in England as feeling "*cosy*", and that was not a reference just to his current living situation with his father, in Ms Vivian's view; the boys both struggled with torn loyalties, and expressed some ambivalence about a return.

vi) While T's views could properly be defined as "*objections*", that epithet could not be applied to the boys' views which were described as strong and clear "preferences" to remain in England.

vii) Ms Vivian had not been asked to consider a split of the sibling group and, sensibly declined to comment on the impact on the children of such an eventuality.

viii) When asked how T would react if ordered to return, Ms Vivian opined that it would be, "*Hard to tell how she would react*," but "*she seemed a well behaved child; whether or not she would push the boundaries so far, I am not sure*." My understanding of Ms Vivian's answer was that T would, albeit reluctantly, do what she was told, though there was no counting for what the longer term consequences of such a step would be if the relationship with her mother did not improve.

99. Overall the impression I received from Ms Vivian was that these three older children were immensely likeable, thoughtful, and articulate children, all functioning at a high level for their chronological ages; T in particular attached importance to her education and the fulfilment of her potential; I have no doubt, from what I have heard and read, that each child feels deeply torn by the current situation and each would dearly have wishes to be spared the pain the their current situation.

100. Having reviewed the evidence relevant to this aspect of the case, I conclude in relation to T as follows:

i) T is of an age and maturity at which I should take account of her views. This much is clear from Ms Vivian's assessment of T; I am to some extent influenced in this by the e-mail which I have read (and which I am prepared to accept, albeit with some reservation, was all T's own work);

ii) T has many strong feelings about her mother at the moment; they are negative feelings. Those are different from the objections she has to returning to Spain;

iii) T does object to returning to Spain; in particular that objection is based on her view that the quality of education is inferior.

101. I conclude in relation to L and A as follows:

i) L (at 10) and A (at 8), are thoughtful and intelligent boys, who have reached an age and level of maturity at which I should take account of their views.

ii) The views of the boys (in my assessment of the evidence) fall short of clear objections to returning to Spain in that:

a) While they have expressed some dissatisfaction with their life in Spain, and have expressed some satisfaction with their current life in England, their views taken overall reveal an ambivalence about the current situation; their answers taken together showed internal inconsistency, and some confusion;

b) The boys were reluctant to be drawn very much into articulating their views, loyal as they are to both parents;

c) L had told Ms Vivian that he knew that the trip to Spain was a permanent relocation; I wondered whether his averse comments about Spain now were rather more strongly the product of alignment with the father than had been credited; note in this instance the inconsistency with what he had told Ms Vivian and what he had apparently told his father (if the father is right about this): "*if he had known that that was the plan* [i.e. to move to Spain permanently] *he would not have gone on the trip*"; this leads me to be a little cautious before accepting unreservedly what he has said more generally of his impressions of life in Spain;

d) Both boys have been to some extent influenced by their older sister who holds some considerable authority in the sibling group.

Intolerability:

102. The case for intolerability is presented in one of two ways by Mr. Hames:

i) First that the children were essentially neglected in Spain, and that the children would be placed in a position of intolerability if returned to the same neglectful environment; and/or

ii) That a sibling split would create an intolerable situation.

103. In my judgment, there is no, or no sufficient, evidence on which Mr. Hames could establish the Article 13(b) exception on the basis of the first limb above; the threshold for proving such an exception remains high notwithstanding the removal of judicial gloss on the words of the exception by the Supreme Court in the recent cases of *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2011] 2 FLR 758 and *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 FLR 442. There is simply insufficient evidence on this point, as Mr Hames recognised.

104. As to the second basis, I acknowledge that there is a line of authority which demonstrates that in an appropriate case the separation of a sibling group can give rise to an Article 13(b) exception; I have in mind the cases of *Re C (Abduction: Grave*

Risk of Psychological Harm) [1999] 1 FLR 1145 through to *Re H (Abduction)* [2009] 2 FLR 1513 (see also Baker J in *WF v FJ, BF & RF (Abduction: Child's Objections)* [2011] 1 FLR 1153). Equally, however, it is clear that there are cases in which such a separation does *not* give rise to intolerability sufficient to surmount the Article 13(b) 'hurdle' if a sibling group is separated.

105. It will be apparent from the manner in which I propose to exercise my discretion in relation to T that I do not need to consider the potential of intolerability for the children in the context of sibling separation further.

Discretion

106. My finding that T objects to returning to Spain opens the gateway to consideration of whether I should decline to order her return to Spain, while ordering the return of her younger brothers, and/or whether (if that were my view) the separation of the siblings would place them all in an intolerable situation.

107. In reaching a view about how I should exercise my discretion, I have followed the guidance set out in the speeches of the House of Lords in *Re M (Abduction: Zimbabwe)* [2007] UKHL 55, [2008] 2 FLR 251 in particular at §43-56:

> *43.* "*My Lords, in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare. I would, therefore, respectfully agree with Thorpe LJ in the passage quoted in para 32 above, save for the word "overriding" if it suggests that the Convention objectives should always be given more weight than the other considerations. Sometimes they should and sometimes they should not.*
>
> *44. That, it seems to me, is the furthest one should go in seeking to put a gloss on the simple terms of the Convention. As is clear from the earlier discussion, the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will vary enormously. The extent to which it will be appropriate to investigate those welfare considerations will also vary. But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be.*
>
> *45. By way of illustration only, as this House pointed out in Re D (Abduction: Rights of Custody) [2006] UKHL 51; [2007] 1 AC 619, para 55, "it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate." It*

was not the policy of the Convention that children should be put at serious risk of harm or placed in intolerable situations. In consent or acquiescence cases, on the other hand, general considerations of comity and confidence, particular considerations relating to the speed of legal proceedings and approach to relocation in the home country, and individual considerations relating to the particular child might point to a speedy return so that her future can be decided in her home country.

46. *In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. 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.*"

108. I wish T to know that I understand and respect her views. She is plainly a bright and determined young person. However, I do not consider that it would be right to give determinative weight to her views in this case. I say so for the following reasons:

i) It is significant that Ms Vivian considered that T had, to some extent inevitably, aligned herself with her father; this has undoubtedly affected her view of her mother and probably of Spain too; this represented a 180° shift in the attitude of T in a number of months (she having earlier aligned herself strongly with her mother, according to her father; he describing her as an earlier "*accomplice*" of the mother: cross-examination);

ii) I do not believe that T has thought through the consequences of her position; for the purposes of considering the soundness and validity of T's stated objections, I have had regard to the four points articulated by Ward LJ in *Re T (Abduction*: *Child's Objections to Return)* [2000] 2 FLR 192, at 204 (endorsed by Potter P at §66 of *De L v H*), namely (a) the child's own perspective of what is in his own short, medium or long-term interests, (b) the extent to which the reasons for objection are rooted in reality or might reasonably appear to be so grounded, (c) the extent to which those views have been shaped or coloured by undue parental pressure, direct or indirect, and (d) the extent to which the objections would be modified on return and/or the child's removal from the (pernicious in the original, though not relevant here) influence of the abducting parent. I am particularly struck by (d) in this case and my belief that T's objections may well modify once again after her return

to Spain, and once her parents are able to have sensible dialogue about the way forward;

iii) T appears to have a distorted view of recent family history, which cannot go unchecked, and which may well be influencing her current attitude. According to the father, T (like her brothers) has come to believe "*that the fraught home situation previously had been down to their mother*" which, the father adds, "*was so sad to hear*". This is extremely troubling evidence, for two important reasons:

a) On my review of the evidence, I do not accept that the fraught home situation was "*down to the mother*" alone; indeed even on the father's case, this is not right (see, for instance "*It is true that I have treated you badly sometimes… we have both created this…*"). In my judgment, both parents were responsible for exposing the children to the "*unbearable*" atmosphere, and it would be wrong for T to believe otherwise, and to allow her objection to a return to be influenced by such a false premise;

b) When reading this passage in the father's evidence (he was not cross-examined about it), I was struck that the father did not go on to correct T (or the children) or remedy this false perception. To allow T (and her brothers) to continue to believe (and live) this false history would be wholly contrary to their interests.

iv) Although T appeared to Ms Vivian to express her views confidently at the end of February, this had not apparently been her position a matter of weeks earlier, when she was described by her father as unclear about her wishes, indeed "*very confused*" (21 January 2013);

v) T's objections to being in Spain are inextricably linked to her views about being with her mother; I believe that T and her mother need to work out their differences and that will not happen while T is living with her father in England;

vi) T's objections to being in Spain seem to some extent to be influenced by what she believes to be inferior education in Madrid; but I cannot ignore the joint view of the parents that the academic year 2011/12 at P School was in many respects an unhappy one for T, causing T much upset, and both parents considerable anxiety. Significantly, T did not mention this to Ms Vivian.

109. I am further influenced by the following points:

i) Ms Vivian thought that T would dutifully follow the order of the court as she is a "*well behaved child*" (I may add, a testament to her upbringing by both her parents);

ii) Ms Vivian was of the view that T missed her mother possibly even more than the boys miss their mother, though her anger with her mother prevents her from acknowledging this.

iii) I believe that the father will do his best to facilitate the return of the children in the most effective way. Indeed, in an e-mail to the mother in January he indicated that he "*will make sure to calm them down and to assure them that the trip to Spain is something to look forward to… the point is for them to return the least stressed and in the best manner possible and I will do anything possible to keep them content and with a positive attitude*";

iv) I should attach weight to the policy of the *1980 Hague Convention*, weighing heavily as it does in cases where there has been a wrongful retention following the conclusion of a holiday;

v) The parties' clear and acknowledged intentions were that the children would return to Spain at the end of the Christmas holiday with their father, where they have been attending school, so that they could resume their lives and schools in that jurisdiction; I should give effect to this intention.

110. In exercising discretion, I am also influenced by the desirability, if not the need, to maintain the sibling group together; the children are a close and bonded entity, and doubtless have gained strength over recent difficult times from each other.

111. In the circumstances, I propose to order the return of the four children to the Kingdom of Spain.

112. The return of the children to Spain ought to be accompanied by further reflection by both parents on how they should plan their lives going forward to maximise the time that each spends with the children, with the minimum of dispute.

Post-script

113. I would like to add these final comments.

114. This litigation has self-evidently been bruising for these parents. That much was apparent from seeing them in court and hearing them giving their evidence. I ask them to think: how much worse do you think this litigation has been for the children?

115. T in particular has become directly involved in the proceedings – perhaps naturally given her age and her inquisitive mind. Ms Vivian left me in no doubt that it had been counter-productive to have had to interview the children for a second time (pursuant to my own direction, I recognise, albeit at the request of the parties); they did not want it and she felt that it had not been truly necessary. Mercifully T was not more closely embroiled, as had been the father's hope at the PTR when, through counsel, he made an application had been made to join her as a party.

116. All the children, T in particular, will need help from *both* their parents to come to terms with this decision and to move forward.

117. The parents have much to do to repair the damage. They need to take steps to repair their own relationship sufficiently to be able to communicate effectively with one another.

118. The father will need actively to support the return of the children to Spain; he will need to think over the days and weeks ahead what he can do to maintain close,

regular, links with them there. If he genuinely considers that their futures best lie in England for the medium/longer term, then this ought to be discussed, and if necessary he will need to take advice in Spain

119. It is obvious to me that the mother will have to work hard on her relationship with the children, particularly T; in the days and weeks ahead, she will need to work hard to settle them back into their lives in Spain, and importantly to devote unconditional time to all of her children, T in particular.