

Neutral Citation Number: [2014] EWHC 2802 (Fam)
IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

Friday, 22nd July 2014

Before:

HER HONOUR JUDGE FINNERTY
SITTING AS A DEPUTY HIGH COURT JUDGE

(In Private)

In Re R (A Child)

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MR. EDWARD. BENNETT (instructed by Dawson Cornwell) appeared on behalf of the Applicant
Father.

THE RESPONDENT appeared in Person.

J U D G M E N T

JUDGE FINNERTY:

- 1 This is an application issued by T (whom I will refer to throughout this judgment as "the father") for the return of his seven year old son, R, to Japan pursuant to the Hague Convention on the civil aspects of International Child Abduction 1980 which has now been adopted in Japan commencing 1st April 2014.
- 2 The father's application is opposed by the child's mother, M (whom I will refer to throughout this judgment as "the mother"). The father is represented by Mr. Bennett of counsel. The mother appears as a litigant in person supported by a friend. She had the services of an interpreter but during the substantive hearing these were not required as the mother speaks quite excellent English. The interpreter has not attended for this judgment but the mother has indicated that she is content for me to proceed in the absence of the interpreter.
- 3 The purpose of the Hague Convention is to provide a swift mechanism to secure the safe return of a child wrongfully removed or retained from their home country so that any dispute about where the child should live can be decided by the court in his home country. In this particular case the mother has already issued two applications to the Family Court in Tokyo, the most recent of which was issued on 6th June 2014 and is listed for a hearing before that court on 8th August 2014.
- 4 Turning now to the factual history, the parents and their child are Japanese nationals who were born in Japan. Both parents are academics. The father is a professor of economics at a university in Japan. The mother is a reader in economics at a different university in Japan. They married in September 2005 and separated in April 2013. They have not divorced. Following their separation they reached an agreement through mediation with the Tokyo Family Court, which was entered onto the court record. The agreement can be found in the document at C15 of the bundle.
- 5 Terms of mediation.

"(1) Both parties live separately for a while.

(2) While living separately they shall try to rebuild the relationship to respect each other both in words and in acts and to talk and discuss.

(3) The applicant shall allow the respondent as following: to access the 8son of parties at a place other than the plaintiff's house, staying with him overnight. At the beginning of the visitation the respondent picks up Rui where he is and at the end the respondent deliver him to the applicant's house. Every month from 7:00 pm, first Friday to 7:30 next Sunday, Tuesdays, three days, every month from 7:00 pm, second

Friday to 8 next day, every month from 7:00 pm third Friday to 7:30 next Sunday; Tuesdays, three days; every month from 7:00 pm, fourth Friday to 8:00 next day.

(4) When the child attends an event, like parents visiting and watching classes day or when the child is ill, the parties shall discuss and make an agreement on the alternative time, place and manner of the visitation considering the welfare of the child."

In respect of that particular part of the translation of the mediation agreement, the mother submitted an alternative translation which can be found at A23 of the bundle. That reads as follows:

"When there are events concerning the respective child such as parent observation day at school etc. or when the respective child falls ill the parties concerned shall discuss and decide on the date, time, venue and method of visitation in due consideration of the child's welfare."

Returning the to the document at C16, paragraph 5:

"The parties promised to try to have more time to spend with all the three being together.

6. The respondent shall pay ¥100,000 every month; by the end of each month his share of marital costs maintenance whilst living separately from October 2013 to the divorce or the end of separation by the bank transfer into the account specified by the applicant, the handling charge of the transfer should be on the respondent.

"7. The respondent admits that he owe an obligation to pay ¥600,000 for unpaid marital costs maintenance to September 25th 2013 and shall pay by the end of October 2013 by the same way as in previous term. The handling charge of the transfer should be on the respondent.

"8. The respondent promises to pay a third of his bonus in June and December. By the end of each month from December 2013 to the divorce or the resolution of separation."

That document is dated 25th October 2013.

- 6 When that agreement is compared with the father's original proposals set out in a letter from his attorney dated 3rd August 2013 (which appears at C58 of the bundle) it can be seen that there was no consensus reached within mediation about the removal of R from Japan. Following mediation the parents had a disagreement about the mother's wish to take R to the United Kingdom for a year whilst she took up an academic post at Cambridge University. That disagreement is illustrated in various documents contained within the court

bundle. At C40 there is a letter dated 24th December 2013 from the father to the visa manager at the United Kingdom Visas and Immigration Section of the British Embassy. It reads as follows:

"Dear sir or madam, my name is T, a Japanese citizen living in Tokyo. I am writing to you about UK visa for my son. Unfortunately, since the beginning of October I and my wife have been officially separated. Under the observation of the court of domestic relations in Tokyo we have agreed with a mediation firm that specified that my son would stay at my home for six days a month. Recently I am very afraid that my wife tries to bring my son for a year to Cambridge, England where she plans to do her overseas study in her sabbatical leave from her office, a private university in Tokyo. Although I have clearly and repeatedly opposed my wife's proposal to bring our son to Cambridge for a year, she is still explicitly telling me that she will bring our son. All I can do now is to ask the government of UK to follow the Hague Convention on the Civil Aspects of International Child Abduction. More specifically, in case my wife tries to obtain a visa for my son, please carefully examine the application whether there is consent from his father who is me. Currently I have no intention to agree to his long stay abroad including in the UK. Please find below some information about my son, and he sets out the details of R and also of the mother."

7 At C42 and C43 there is an email exchange between the father and British Embassy dated 14th March 2014. The first in time is from the British Embassy:

"Dear Sir, we would be grateful to know if you made or signed a written consent for child's travel on 24th January 2014. We look forward to hearing from you soon. Thank you."

That email was sent at 16:14. The reply from the father is timed at 16:55:

"Dear Sir or Madam, thank you for your inquiry. My answer is no. I have not signed a written consent for my child's travel to UK. Please find attached the letter I submitted to the Visa Manager on December 24th 2013. I am really afraid that my wife tried to bring our kid to UK without my consent. Sincerely yours."

On 31st March 2014 the mother applied to the Family Court in Tokyo for a variation of the mediation agreement. The translation of that document produced on behalf of the father can be found at C17 of the bundle. C18 under the heading: "The reason you need to apply", the following is set out:

"That the applicant wants to take care of the minor while she is studying in Britain for one year, that is it necessary for the applicant to take the

minor abroad with her to give the minor valuable experiences and that it is necessary to change the terms of visitation and access."

After the final submissions had been made, the mother sent an email to the court correcting the translation in that document at C18 of the bundle. Her correction reads as follows:

"That it is necessary to vary the terms of visitation because the applicant will look after the minor whilst her one year foreign research assignment in the UK and because it is necessary to bring the minor along to provide him with valuable experiences."

The email from the mother was forwarded by the court to Mr. Bennett to seek any comments from him on behalf of the father. Mr. Bennett does not accept the new translation submitted by the mother. In my judgment, the issue as to the correct translation does not require determination as it does not affect the substance of this judgment.

- 8 The background to the application made by the mother is set out in a letter which the mother sent to the father's attorney. It is dated 20th March 2014 and appears in the court bundle at A25:

"Dear Madam, as there has been no effort on the part of T to restore the relationship as specified in the mediation agreement, I have no choice but to acknowledge that there is no prospect of our relationship being restored. Also, given T's abrupt change of his approval on the child's move to England, along with his mother's professional assignment there, which he used to say as a desirable experience for the child, I have come to a conclusion that a divorce is the best option for the child's welfare and future as well as our own. Although we have had considerable discussions that the divorce mediation are ready, I would like to enter into a divorce agreement again. As you have been told during the mediation processes and as T has been aware for several years, I will be posted in England from one year from this April. Therefore it would not be possible to exactly observe the access arrangements set by the mediation agreement. My new assignment in England should not be taken as something to deny the access right of the child to the father nor the access right of the father to the child. And as has already been told to Mr. Towa, I am agreeable to accept his visitations as long as such visitations are not against the welfare of the child. Please be informed that we will be entering into the following residence on 15th April. Moreover, I am contactable at the following email address...",

and the letter sets out the mother's address in Cambridge together with her email address.

- 9 So pausing there, whilst living in Japan these parents had a disagreement about whether R should accompany his mother to the United Kingdom during her research assignment. They could not resolve that disagreement between themselves and, as a result, the mother applied to the Family Court in Tokyo for a judicial determination of that disagreement. However, the mother did not await that judicial determination. On the same day that she lodged her application with the Family Court in Tokyo she and R flew to the United Kingdom on flight tickets which she told me covered a return flight to Japan leaving the United Kingdom on 28th April 2014. In her submissions the mother told me that she never had any intention of using those return tickets. R arrived in the United Kingdom without an entry visa. It is agreed that the father was telephoned by the mother from the airport in the United Kingdom in the early hours of the morning of 1st April 2014 requesting his permission for R to enter the United Kingdom. It is agreed that it was made clear to the father that unless he gave his permission, R would be detained within the airport and put on the next plane back to Japan. The mother accepts that the father was also spoken to by a member of the UK Border Agency and that he was told that the child had a return flight ticket for either 28th April or after four weeks; the mother was unsure which of the two explanations had been given. The mother also submitted that the father was told that if he gave permission for R was to enter the United Kingdom he would have leave to remain for six months. It is the father's case that he gave permission for R to enter and remain in the United Kingdom limited to the period covered by the flight tickets, thus returning either within four weeks or on 28th April.
- 10 At D2 of the bundle there is a letter from the father addressed to the Home Office dated 7th April 2014. It is headed: "About the stay of my son age of 7, Japanese in the UK":

"My name is T, a Japanese citizen. On March 31st my wife, also a Japanese citizen brought our sole son, R, age is seven, to the United Kingdom as a tourist. Since then my wife has not answered my enquiries where my son is. She has not let me talk to my son. I am now really afraid that inside the UK without my consent my wife is trying to obtain a long stay visa for my son in order to enrol him in a primary school at Cambridge. If she would apply or has already applied for a long stay visa for my son it would mean that she had let my son enter the UK by making a false declaration of my son's purpose of visit.

"Please note that my wife has let my son enter the UK as a tourist by showing your passport control officer my son's return ticket to Tokyo. According to the officer, the return ticket was scheduled four weeks later. I also need to inform you that the previous application for a long stay visa for my son, submitted by my wife was declined by the UK authority because my wife had requested someone to forge my signature on the application form."

He then sets out his son's name and details and his wife's name and details:

"I here sincerely request the UK Home Office not to provide my son a long stay visa which enables my wife to keep him in the UK for more than four weeks. I do hope that my son resumes his primary school study in Tokyo as quickly as possible. The new semester of his primary school started today, April 8th.

"Background. Since the beginning of October 2013, I and my wife have been officially separated. Both my wife and I have parents' right of our sole son. Under the observation of the Court of Domestic Relations in Tokyo we have agreed on the mediation plan that specified that my son would stay at my home for six days per month. Since December 2013, however, my wife often told me that from April 2014 she would like to bring our son to Cambridge where she would do her year long research stay in a college of the University of Cambridge. I clearly and repeatedly opposed her plan to bring our son to the UK for a year.

"Considering that my son had been facing both the unstable family problems and the study problems. Moreover, such long stay in the UK would violate my son's rights to see his father six days per month. Since February, based on my wife's request, my wife and I have been discussing about the schedule of our mutual counsel for divorce, but before settling the schedule on March 31st my wife and her parents brought my son to the UK without making any previous notice to me.

"On April 1st at the midnight, around 1:30 in Japan time, I got a sudden call from the Passport Control in London. The officer on the phone told me that my son was in front of him brought by his mother with a return ticket to Tokyo four weeks later and asked my decision whether to let my son enter the UK as a tourist or not. I had sent several letters to my wife to warn her not to take our son to the UK so I was so upset when I got a call from your Passport Control.

"Considering the long flight and how tired my son was, to my regret I could not tell the officer to decline my son's entry. I questioned the officer whether it was sure that my son would leave the UK for Tokyo within four weeks, but I could not understand his reply well, English over the phone at midnight. My son does not understand English at all. I could not make a decision to leave him alone at the airport even for a few days. I had no choice but told your officer: 'Please let him in'. I here deeply thank the procedure by the UK Home Office to let your passport control officers try to protect my son. But I here also need to emphasise that my agreement to my son's entry to the UK is conditional on my son's four week return ticket.

"I have never agreed to my son staying in the UK for more than four weeks. As I wrote above, since their entry to the UK my wife has not told me where my son is and I have not been able to talk to my son. Now, I am really afraid that my wife tries to obtain a dependant visa for my son by a post-entry application inside the UK by utilising her year long research visa supported by the University of Cambridge and tries to keep my son in the UK for more than four weeks.

"To my email protesting their misconduct, my father-in-law, father of my wife, replied that mothers, his daughter's parental right, is superior to father's, my parental right. Such statement clearly indicates that my wife and their parents do not care the mediation plan approved by the court of domestic relations in Tokyo. Please do not provide my son a dependant visa which enables my wife to keep in the UK. I am afraid that permission for six months' long stay in the UK as a tourist was already given to my son but my son did not visit the UK to attend a primary school. Please note that I, his father, have not agreed to my son's year long stay in the UK. My wife and their parents are violating my son's right to see his father. I would be highly appreciated if the home office takes any possible measures to send my son back to Tokyo as quickly as possible. Then my son can resume his study in his primary school in Tokyo. Thank you for your kind consideration in advance."

On 11th April 2014 the father was served with notice of the application issued by the mother on 31st March 2014 in the Tokyo Family Court. On 1st May 2014 the father applied to the Japanese and English central authorities. On 20th May 2014 the mother sent an email to the father seeking his consent for R to remain in the United Kingdom. That email can be found at C68 of the bundle:

"Subject: How R is doing/consent letter. Dear T, I believe you are leading a busy life. I attach the photos to let you know how R is doing. He is doing fine, already got used to the school here and enjoying after school activities such as choir and cricket. I would be grateful if you could write a letter of consent for him to accompany his mother's stay so that he will be able to stay in England for the rest of the time. I would appreciate your timely reply. Please note that I have been keeping on my Skype during the weekend. However, we cannot contact you as you are not turning on your Skype. Please speak with R."

On 29th May 2014 the International Child Abduction Contact Unit for the Central Authority of England and Wales instructed solicitors to pursue an application on behalf of the father for the summary return of R to Japan. The application dated 30th May 2014 was issued by the court on 2nd June 2014 and served upon the mother on 4th June 2014. On 6th June 2014 the mother issued the second set of proceedings in the Tokyo Family Court seeking the sole

custody of R. That application is listed for a hearing on 8th August 2014 at 1:15 pm.

- 11 The mother informed me that she intends to return to Japan with R on 30th July 2014 in order to attend that hearing. Accordingly, the father has sought to resolve these proceedings by agreement on that basis. However, the mother has refused to reach an agreement unless the father gives his irrevocable consent to the child either remaining in this jurisdiction or if she does return to Japan with him, returning to the UK with her. (G54 of the bundle) That is an email from the mother to the father dated 8th July 2014:

"As you are directly contacting me, and as your solicitors are not replying to my enquiries made more than ten days ago, I appreciate your prompt reply in the following matter.

(1) whether you will abide by the separation mediation clause of October 2013 during R's return to Japan and until such that the custodial judgment is made;

(2) whether you consent to writing an irrevocable consent for R to stay in England until the end of March 2015 upon the custodial judgment by the Tokyo Family Court."

- 12 I turn now to the law. Article 12 of the Convention provides as follows.

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

Article 3, provides as follows:

"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:

"(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."

- 13 The mother submitted that the father's application must fail because the father had failed to prove two essential constituents. Firstly, he had failed to prove that he had rights of custody and, secondly, he had failed to prove that R was habitually resident in Japan when his application was issued. The mother is correct, that the burden of proving rights of custody and habitual residence rests upon the father. The mother is correct in her submission that if the father fails to prove either of them his application must be dismissed. Dealing with each in turn, firstly rights of custody. The mother has submitted that the father had failed to exercise his rights of custody after R was brought into the United Kingdom because he had refused to have any contact with the child after 16th April 2014. In support of her submission she relied upon a number of emails which can be found commencing at C65 of the bundle. C65 is an email from the mother to the father dated 19th April 2014:

"Dear T, as we have finally settled into our residence this week after moving places, I would like to propose an access/contact with the child via Skype. I would be grateful if you could turn on the Skype this weekend. Thank you for your co-operation."

C67, and email dated 6th May 2014:

"Dear T, I have tried many times to contact you over Skype and R has left two or three messages on your answering machine as he wishes to talk to you. Please contact him. Our relationship problem should not affect him in this way. I have told him that daddy is probably busy but please have pity on him. Thanking you for your co-operation."

C68 is the letter to which I have already referred within this judgment.

- 14 I return to the law and Article 5. Article 5 defines rights of custody. It states:

"For the purposes of this Convention rights of custody shall include rights relating to the care or the ... of a child and in particular the rights to determine the child's place of residence."

Thus rights for custody are different from rights of access. On the evidence I am perfectly satisfied and find that this father had rights of custody at the date this application was issued. These parents remain married to one another. Within the documentation relied upon by the mother is a document headed: "Child Abduction Japan", which can be found at A26 of the bundle. At A27 under the heading: "Custody Issues", is the following:

"In Japan unless there is a court order to the contrary, married parents have joint custody of their children. When parents decide to divorce they must agree who will take sole custody of any child."

On 6th June 2014 the mother issued her application in the Tokyo Family Court seeking sole custody of R. Pending determination of that application I am satisfied and find that the parents have joint rights of custody in respect of R.

- 15 Turning now to the issue of habitual residence, the mother submits that by the date this application was issued R had become habitually resident in the United Kingdom. She sets out her argument in the document at A12 of the bundle. Under the heading: "Habitual residence counter-proof".

"Before leaving Japan the child bade goodbye to his classmates, teachers, friends and instructors at his outside school lessons and was eagerly studying English. The mother together with the child moved to the UK on 31st March 2014 in order to commence her research abroad assignment of one year at the University of Cambridge. The child and mother settled into their residence on 15th April for which a tenancy agreement until 31st March 2015 was concluded prior to their arrival on 5th March 2014. Their residence in Cambridge is their sole residence and the base of their ordinary life since 15th April.

"The child started schooling on 28th April after the initial meeting with the school head teacher on 24th April, and has been attending and enjoying the school since then. The child and mother had ceased to be habitually resident in Japan by the time immediately before the claimed retention. Therefore the fact that the child has been staying in England beyond 1st May does not constitute a wrongful retention from the jurisdiction of Japan within the meaning of the Article 3 of the Hague Convention.

"According to Justice Munby *Re R Abduction Habitual Residence* [2004] 1FLR 216 an expected stay of six months was found to be sufficient to constitute a habitual residence. In a more recent case the application was dismissed on the basis of a child and mother being fully integrated into a social and family environment in England for an intended stay of 12 months. *Re HK Children*, 2011 EWCA Civ.1100.

"It has also been ruled that a child may acquire a habitual residence in one month as stated by Lady Justice Butler-Sloss with that settled intention a month can be, as I believe it is to be in this case, an appreciable period of time, *Re S (A Minor: Child Abduction)* [1992] 1FLR 548. In her judgment she also states citing another authority that a young child cannot acquire habitual residence in isolation from those

who care for him. While they live with both parents he shared their common habitual residence or lack of it. Thus in this case the child could have acquired his habitual residence only with the mother who possessed the full rights to relocate with the child and who was the only parent with whom the child lived all through his life including the time prior to coming to England."

16 I reject the mother's submissions for the following reasons. Firstly, the mother's applications to the Family Court in Tokyo issued on 31st March 2014 and 6th July 2014 are, in my judgment, evidence of her acceptance that the child remained habitually residence in Japan and subject to the jurisdiction of the court in Japan. Secondly, on my finding these parents have joint custody rights in respect of R; the mother cannot unilaterally change the habitual residence of R without the agreement of the father. Thirdly, in my judgment there is no evidence of a capability to form a settled intention to stay for a specific period of time because although the mother's sabbatical was for 12 months, R's entry into this country is under a tourist visa and only permits him to stay in the United Kingdom for a period of six months.

17 I turn now to the Article 13 defences raised by the mother. Article 13 provides as follows:

"Notwithstanding the provisions of Article 12, 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 return of the child if it finds that the child objects to being returned and has obtained an age and degree of maturity at which it is appropriate to take account of its views."

In her submissions the mother conceded that the father had not given his consent to R being taken to the United Kingdom for 12 months. However, she asserted the following: firstly, that the father had acquiesced in the child remaining in the United Kingdom; secondly, that there is a grave risk that a return of the child to Japan would expose him to physical or emotional harm, or otherwise place him in an intolerable situation; and, thirdly, that R objects to being returned. The burden of proving each defence raised rests upon the

mother. If any defence were established this court would have a discretion as to whether to order R's summary return to Japan.

- 18 I deal with each defence raised in turn. Firstly, acquiescence. The mother's submissions are set out in her document at A14 of the bundle under the heading: "Acquiescence".

"The father never expressed his expectation to the mother that the child was to be returned to Japan at the end of April but instead kept silent which led the mother to believe that he had acquiesced the child's stay in England as provided by *Re H & Ors (Minors Abduction (Acquiescence))* [1998] AC 72. Although, admittedly, in a form of passive action."

The mother sets out part of the judgment in *Re H*:

"...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 rights to the summary return of the child and are in consistent with such return justice requires that the wronged parent be held to have acquiesced."

The mother has identified the leading case on the meaning of consent or acquiescence. However, within her document she has failed to place the passage upon which she relies in its full context. It is necessary therefore for me to do so. I refer to *Re H* [1998] AC p.72 commencing the judgment at p.90. Judgment of Lord Browne-Wilkinson under the heading: "Summary".

"To bring these strands together, in my view the applicable principles are as follows. For the purposes of Article 13 of the Convention the question whether the wronged parent has acquiesced in the removal or retention of the child depends upon his actual state of mind. As Lord Justice Neal said in *Re S (Minors Abduction (Acquiescence))* [1994] 1 FLR 819 at 838:

'The court is primarily concerned not the question of the other parents' perception of the applicant's conduct but with the question whether the applicant acquiesced in fact.'

"(2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.

"(3) The trial judge in reaching his decision on that question of fact will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent and to his bare assertions in evidence of his intention, but that is a question of the weight to be

attached to evidence and is not a question of law. There is only one exception, whether 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."

The exception is developed by the learned judge in the judgment at p.89:

"There are circumstances in which one party A, has so conducted himself as to mislead the other party B as to the true state of the facts. In such a case A is not allowed subsequently to assert the true facts as against B. In English law this is typically represented by the law of estoppel but I am not suggesting that the rules of English law as to estoppel should be imported into the convention.

"What is important is the general principle to be found in all the developed systems of law. It follows that there may be cases in which the wronged parent has so conducted himself as to lead the abducting parent to believe that the wronged parent is not going to insist on the summary return of the child. Thus, the wronged parent may sign a formal agreement if the child is to remain in the country to which he has been abducted. Again, he may take an active part in proceedings in the country to which the child has been abducted to determine the long term future of the child. No developed system of justice would permit the wrong parent in such circumstances to go back on the stance which he has to the knowledge of the other parent unequivocally adopted. To do so would be unjust.

"Therefore, in my judgment there are cases in which the wronged parent knowing his rights has so conducted himself, vis-à-vis the other parent and the children, that he cannot be heard to go back on what he has done and seek to persuade the judge that all along has ... intended to claim the summary return of the children. However, in my judgment these will be strictly exceptional cases. In the ordinary case behaviour of that kind will be likely to lead the judge to a finding that the actual intention of the wronged parent was indeed to acquiesce in the wrongful removal. It is only in cases where the judge is satisfied that the wronged parent did not in fact acquiesce that his outward behaviour demonstrated the contrary that this exceptional case arises.

"In my judgment, these exceptional circumstances can only arise where the words or actions of the wronged party show clearly and unequivocally that the wronged parent is not insisting on the summary return of the child. They must be wholly inconsistent with their request for the summary return of the child. Such clear and unequivocal conduct

is not normally to be bound in passing remarks or letters written by a parent who has recently suffered the trauma of the removal of children."

- 19 In my judgment, the evidence in this case demonstrates unequivocally that the father never acquiesced in R remaining in the UK for longer than one month. I have already referred to the letter written by the father to the Home Office dated 7th April 2014 which is at D2 of the bundle. After the four weeks had expired the father immediately applied to the Central Authorities of Japan and the United Kingdom. In her oral submission, the mother developed her written submission and asserted that: "He stopped all communication after 16th April. I took that as he was not going to object". In my judgment, a failure to communicate with either the mother or R after 16th April cannot be described as the sort of unequivocal demonstration of his intention not to seek return of R to Japan in the sense envisaged by the learned judges in the case of *Re H*.
- 20 Turning now to the wishes and feelings of R. On 10th June at 2014 Bodey J. directed the preparation of a report by CAFCASS. That was filed on 17th July 2014. It had been prepared by Mr. John Power who met with R on 14th July 2014. That can be found in the court bundle commencing at E1. Commencing at paragraph 7, Mr. Power has set out part of his discussion with R:

"7. I asked R if he understood why he was meeting me. He replied: 'Not really'. I explained to him that his daddy wants him to return to Japan because he says he did not agree to him coming to England for longer than a month and his mummy wanted him to stay in England for about a year. He understood this. I asked R who he said goodbye to when he left Japan and he said that all the children in his class said goodbye to him and each one gave him a gift, pencils etc. He describes a little leaving ceremony. He said his mother and maternal grandmother accompanied him to the airport and travelled with him. He said that the maternal grandmother is also living with them in Cambridge. R said his father did not come to the airport because he did not want him to come to the United Kingdom. He said his daddy did know he was going to the United Kingdom but said it was fine to go to the United Kingdom once but not a second time. R then said he was not sure if his father knew about the first trip, though I thought he must have to make the argument that one visit was sufficient. I asked him what he missed most about Japan and he said the food. His favourite is Karataj which his paternal grandmother makes. He added that his mum too was a good cook and she told me at the end of the interview that she was taking R to a restaurant in Chinatown before travelling back to England.(?) I asked R what he liked about England and he replied: 'My school'. I asked him if he liked his school in Japan and he said: 'Not much'. I asked why and he said that his school in Japan was very strict. The teachers were strict. I asked him to give me an example and he said that if you do something

wrong and are told off by the class teacher in Japan it's a big drama and the whole class has to stop what they are doing and wait and watch.

"I asked R about his paternal grandparents and he stepped up a gear and became more animated. He said his paternal grandfather kept a garden and his grandmother had two children, his father and his father's sister. He said that his grandparents sometimes came to visit and I asked him if he liked that. He said he was frightened of his grandmother and I asked him why. He said she gets angry quite a lot and I asked him to give me an example and he said: "She's always tidying up and making housework". It was at this point that he told me his grandmother cooks Karataj which he said he likes.

"R told me that he spent every weekend with his father at his place and Monday to Friday at his mothers. He said his father was not strict. He said that his father had lots of DVDs and they play computer games and on the Ipad. His favourite computer games are Angry Birds and Star Wars. He knew a lot about Star Wars and interests he shares with his father. He reminisced about staying in a hotel with his father and watching Star Wars 6. He said he had Star Wars 4, 5 and 6. When he stays with his father he eats lots of Karataj and sushi.

"The mother had told me that they are returning to Japan on 30th July to renew R's visa. I asked R what he was looking forward to and he said seeing his dad and seeing his friends. He has maintained Skype contact with his friend, Christian, since he has been in the United Kingdom."

- 21 In her oral submissions her mother stated: "I do admit that the child does like his father". But she told me that she had asked R whether he would prefer to go to Japan or to stay in the United Kingdom and he chose the latter. When he was looking at the issue of R's wishes and feelings, Mr. Power reached the following conclusion. Under the heading:

"Does R object to returning to Japan? By any measure he doesn't. He is returning at the end of the month to renew his visa and is looking forward to seeing his father and friends. But he does want to return to this green and pleasant land to be with his mother for one year only while she is undertaking research at Cambridge University."

At paragraph 33:

"R does not object to return to Japan, but wants very much to remain here temporarily which is his clear understanding of why he is in the United Kingdom."

22 In my judgment, Mr. Power is absolutely correct, R does not object to returning to Japan. On the contrary he is looking forward to his forthcoming visit and to see his father and his friends.

23 The final defence raised by the mother was in respect of the alleged grave risk of harm should R return to Japan. She sets out her submissions about this in her written document at C49:

"Grave risk concern for the child in case of summary return. Forcing the child return, separating from his mother will put the child into a grave risk of mental and psychological torment. The child has always lived with the mother and is extremely close to her. The child has experienced a psychological instability while he was staying at his father's flat over the weekends after the separation as per the mediation agreement concluded on 25th October 2013. The father typically has his mother and his elder sister as helping hands during the access contact period. However, the child is afraid of his paternal grandmother who is severe and exercises physical punishment. As one example the child had a long term negative impact due to his paternal grandmother's severe physical punishment he received at the age of three, that the child became incapable of defecating in the toilet for more than three years, and had suffered from continual constipation. Leaving the child in Japan would put the child in the risk of being abducted by the father which would result in intolerable.

"Degradation of the child's welfare. Given the father's negligence of the child and the mother, there is also a risk of the child being prohibited to be in contact with the mother if he is abducted by the father. The father has repeatedly told the mother, even when she was abroad on her work trip, not to contact the child whilst the child is spending his time at the father's residence."

In her document at A15:

"There is a serious risk that the child may be abducted or retained by the father during the court process in Japan because this is essentially the only possible way for him to gain any prospect if at all of the sole custody right by creating and accumulating the facts of being the parent who has mostly recently been taking care of the child.

"The mother's concern on the grave risk of harm to the child, especially that of psychological torment if he is to be separated from the mother to whom he is extremely close, thereby to be put under the father's custody has already been expressed in the document to which I have already referred. Adding to that fact it should be noted that the child became unstable and refused to go to school for the first and only time here in

England on the Monday following his direct contact with the father over the weekend to 27th June in Cambridge. The child kept clinging onto the mother crying even after arriving in his classroom. He was properly late for school for the first time on that day. The reason for the child's instability was only attributable to the words and attitudes of the father towards the child."

- 24 In the case of *Re E (Children Abduction Custody Appeal)* [2011] 2 FLR at p.578, Baroness Hale explained the concept which underlies this particular defence. She said this:

"First, it is clear that the burden of proof lies with the person, institution or other body which poses a child's return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under Article 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination.

"Second, the risk to the child must be grave. It is not enough, as it is in other contexts such as asylum, that the risk be real. It must have reached such a level of seriousness as to be characterised as grave. Although grave characterises the risk rather than the harm there is in ordinary language, a link between the two. Thus, a relatively low risk of death or really serious injury might properly be qualified as grave, while a higher level of risk might be required for other less serious forms of harm.

"Third, 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 was said in *Re D*, 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. Those 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 part of growing up, but there are some things which it is not reasonable to expect a child to tolerate. Among these of course are physical or psychological abuse or neglect to the child itself. Among these also we now understand can be exposure to harmful effects as seeing and hearing the physical or psychological abuse of the other parent.

"Fourth, Article 13(b) is looking to the future, the situation as it would be if the child were to be returned forthwith to his home country. As has

often been pointed out this is not necessarily the same as being returned to the person who has requested the return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when he gets home."

- 25 In my judgment, none of the issues raised by the mother if proved to the appropriate standard of proof establish the Article 13(b) defence, but are more properly described as the sort of welfare issues and concerns which may fall to be considered by the court concerned with determining the future for R. The court in Tokyo is already seized of that issue and will be addressing it on 8th August of this year. Therefore, it follows from my findings that, firstly, I am satisfied that R has been retained in the United Kingdom unlawfully in breach of the father's custody rights. Secondly, that Japan is R's country of habitual residence and, thirdly, that none of the Article 13 defences have been established. Accordingly, pursuant to Article 12, I must order the return of R to Japan forthwith. There is no definition of the term "forthwith". In this case, as we know, the mother intends to return to Japan with R on or about 30th July 2014 to attend the hearing listed at the Tokyo Family Court. Accordingly, in my judgment, it is fair and proportionate to order the return of R to Japan on or before 30th July 2014.
- 26 At the beginning of this judgment I explained that the purpose of the Hague Convention is to provide a swift mechanism to secure the safe return of a child wrongfully removed or retained away from his country of habitual residence to enable the court in his country of habitual residence to decide any parental disputes about him. In this case, as I have indicated, the Family Court in Tokyo is already seized of two applications to resolve parental disputes about this particular child. The mother should have waited until the Family Court in Tokyo had resolved those disputes. This adjudication will require R to be returned to Japan to enable the Family Court in Tokyo to exercise its jurisdiction.