Neutral Citation Number: [2022] EWHC 1097 (Fam)

Case No: FD21P00770

IN THE HIGH COURT OF JUSTICE

**FAMILY DIVISION**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 17/03/2022

**Before**:

MRS JUSTICE MORGAN

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**Between:**

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| --- | --- | --- |
|  | **GH** | Applicant |
|  | **- and -** |  |
|  | **SN** | Respondent |

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**Mr Graham Crosthwaite** (instructed by **Miles & Partners**) for the **Applicant**

**DR Onyója Momoh** (instructed by **Nagy & Co Solicitors**) for the **Respondent**

Hearing dates: 16th & 17th March 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE MORGAN

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

**Mrs Justice Morgan:**

1. This is an application by the Mother pursuant to the 1980 Hague Convention for the return of her daughters born in 2008 (now 13) and 2010 (now 11) respectively to Hungary. It is resisted by the Father.

**Background**

1. The Applicant Mother is 42 the Respondent Father 45. They are married. Both have rights of custody. They moved to the UK from Hungary in October 2005 before the birth of either child. The intention when moving here was to save money and buy a property in Hungary. They lived first in London and then moved to Hertfordshire where they bought a property in about 2015.
2. In December of 2020 the family went to Hungary for what was originally intended to be a holiday over the Christmas period. At the point when the family would otherwise have returned in January to the UK, the Mother suggested that she and the children should remain in Hungary. The father agreed. The Mother says that the parties at that stage agreed that the move to Hungary was to be permanent. The father says it was not. Both however say that when in December 2020 they decided that the children should remain in Hungary with their mother that this was on the basis that if the children were unhappy with the arrangement they should return at once to the UK
3. In January 2021, the father returned to the UK and the Mother and children went to live in a property owned by the parties in Hungary. The children were enrolled in a school in Hungary. Both parents went with them on the first day to enrol them at the school. Subsequently the father drove over a lorry load of the girls’ belongings including furniture from their bedrooms.
4. The mother and the two girls remained in Hungary. The father, who has a construction business in the UK worked here in the week and travelled out to see them every, or nearly every, weekend. The parents’ relationship broke down. The mother filed divorce proceedings in Hungary on 29th June 2021. She started a new relationship with a friend of the father.
5. During the summer of 2021, it was arranged between the parents that the father would spend 3 periods of time with the girls. On the third of the visits, when the Mother believed them to be staying with him in Hungary, the girls revealed to her in a phone call that they were in the UK. The Father did not return them as had been arranged on 15th August 2021. He accepts he removed the children to the UK, without the Mother’s knowledge because he knew that she would oppose it
6. The Mother issued this application on 13th October 2021.

**The Issues**

1. The Mother’s case is that the father’s removal of the children was wrongful within the meaning of Article 3 of the convention. The court is therefore required under Article 12 to order the return of the children forthwith. The Mother is prepared to offer undertakings to the court in the usual form as to protective measures should a return be ordered including not to institute criminal proceedings and to pay for direct flights. No submission has been made to me at this hearing that the protective measures would not be adequate were I to direct return.
2. The father accepts that the Mother has custody rights with respect to the children but asserts that in August 2021 the children were not habitually resident in Hungary. In the event that the Court concludes otherwise he argues that the children each object to a return and further that there is a grave risk that an order for return would subject the children to physical or psychological harm or otherwise place them in an intolerable situation
3. Thus the basis on which he defends the proceedings is:

(a) Article 3: habitual residence;

 (b) Article 13: child’s objections; and

 (c) Article 13(b): grave risk of harm and/or intolerability.

1. At a hearing before HHJ Vavrecka sitting as a Deputy High Court Judge s 9 (1) the parties agreed that the following issues fall for determination today

(a) Were the children habitually resident in Hungary at the time F removed them to England in August 2021?

 (b) If so, do the children object to a return to Hungary?

 (c) If so, what weight should be given to the girl’s objections and how should the court exercise its discretion whether to order a return?

 (d) Has F made out a case on Article 13(b) (grave risk of harm/intolerability)?

 (f) If so, what protective measures could or should be put in place to ameliorate any risk of harm or intolerability?

1. Both parties have filed statements of evidence along with supporting documents. For this hearing I heard oral evidence from Ms Baker, the Cafcass officer who completed the Report. I received written and oral submissions from Mr Crosthwaite and Dr Momoh for the applicant and respondent respectively.

**The Mother’s Case**

1. The Mother’s case is that by the time the children were removed by their father in August, they were habitually resident in Hungary. This she asserts is so on an objective view of the factual reality of the children’s lives within the community in which they were living and the degree of social integration. In this case however there is she says the additional feature of the Hungarian proceedings in relation to the children. Within those proceedings, the mother says the question of habitual residence has been determined by the Hungarian courts and therefore she submits it is simply not open to the Father to argue – or to me to find – that the children were not habitually resident at the time of their removal.
2. As to the children’s objections, the Mother’s case is that the father has manipulated and influenced the children such that to the extent that they express objections, which she accepts they do, I should not attach such weight to those objections so as to refuse to order a return. She points in particular as evidence of the degree of manipulation to the fact that the Father involved the children in a plan to remove from Hungary which was kept by the three of them secret from their mother. She agrees that there are complexities to the case which require a full analysis and investigation to enable welfare decisions to be made in relation to the children’s living arrangements. Her case however is that this cannot be done in these summary proceedings but should be undertaken by the court in Hungary which has jurisdiction and is already seised of the matter. There are (disputed) allegations made in relation to the Father which may be characterised as relating to domestically abusive, violent and coercive behaviour as to which I am not conducting any fact finding at this hearing but which may form part of the court proceedings on foot in Hungary.
3. The Mother’s case on the defence under 13 (b) is that the Father has not made out any separate and distinct case in that respect; that what he is in effect inviting the Court to do is to import under that heading a conclusion of intolerability, because of the objections the girls have expressed. In any event her case is that he has not met the high bar to satisfy the court on that defence.

**The Father’s Case**

1. The father does not accept that the children were at the time of the removal habitually resident in Hungary. They had, he said, lived all their lives in England and had not on his case lost their habitual residence. He does not accept that the Hungarian Courts have determined this issue and even if they have he says, I am not bound by it and can look at the issue again since there is, he submits an extant appeal in which he appeals any decision on habitual residence. On his behalf a submission was made that inviting me to look at the matter again was not inviting me to review the merits of the measures taken by the Hungarian Courts and so would not be an affront to Article 27 of the 1996 convention.
2. It follows, he asserts that the removal of the children from Hungary was not a wrongful removal. He agrees that he arranged the removal secretly from the mother and involved the children in keeping it secret from their mother. This was he says in his statement for these proceedings because if the mother had known that he intended to remove the children to the UK she would have opposed it. He denies that he has influenced the children, they have, he says, been well placed to form their own view, most particularly of their mother’s new relationship with his best friend and of the reported difficulties moving to an education system which necessarily requires written work in the Hungarian language. Much of the time in Hungary he has not even been present since he only visited at weekends. His case therefore is that the children’s objections are their own, authentic and expressed from a degree of maturity and independence that I should by reason of them refuse the return to Hungary. He invites me to exercise my discretion not to return.
3. The Defence under 13 (b) he puts as following effectively as a matter of logic because the strength of the objections is such that it would be for the girls an intolerable situation were they to be returned despite their objections.

**The Legal Principles Engaged**

1. The relevant and applicable law is agreed as between counsel whose detailed summary I largely adopt here.

**The 1980 Hague Convention**

1. The aims and objectives of the 1980 Hague Convention are expressed within its preambles and initial articles. Particularly, by the second preamble, it is recorded that the Contracting States are *“Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access”*.
2. Article 1 states the objectives of the Convention, which are as follows:

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

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

1. I observe that in the context of this case it is regrettable, but not a delay the cause of which lies with the parties, that in relation to what is said to be a wrongful removal during the summer holidays of last year, the matter comes on for hearing in March of this year.
2. The Convention seeks to achieve its aims in relation to the safeguarding of custody rights by establishing a mechanism by which a parent (or other person or body that holds rights of custody) can seek the return of a child from one Contracting State to another. That mechanism is established by Article 12 which requires, “*where a child has been wrongfully removed or retained in terms of Article 3”*, the authorities of that State to “*order the return of the child forthwith”*.
3. The conditions precedent, which an applicant must establish if the application for summary return is to proceed to consideration of the exceptions to return, are contained within Articles 1, 2, 3 and 5 (in relation to the Conventions material scope or *ratione materiae*), Article 4 (in relation to its personal scope, or *ratione personae*) and Article 35 (in relation to its temporal scope).
4. Article 3 of the Hague Convention provides that:

“*The removal or the retention of a child is to be considered wrongful where –*

* 1. *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*
	2. *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.*”

1. Article 12 of the Hague Convention requires that:

*“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.*

1. And goes on to provide:

*The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.*

*Where the judicial or administrative authority in the requested state has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.”*

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

*“The whole object of the Convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their “home”, but also so that any dispute about where they should live in the future can be decided in the courts of their home country, according to the laws of their home country and in accordance with the evidence which will mostly be there rather than in the country to which they have been removed…’*

1. In his judgment in *B v B* [2014] EWHC 1804 (Fam)*,* Mr Justice Mostyn described the operation of the Convention in the following way*:*

*“It is important to understand what the Convention does not do.  The Convention does not order a child who has been removed in the circumstances I have described to live with anybody.  The Convention does not provide that the parent who is left behind should, on the return of the child, have contact or access in any particular way.  The Convention does not provide that, when an order for return to the child's homeland is made, the child should stay there indefinitely.  All the Convention provides is that the child should be returned for the specific purpose and limited period to enable the court of her homeland to decide on her long-term future.  That is all it decides.”*

**Rights of Custody**

1. In *Re D (a child) (abduction: rights of custody)* [2006] UKHL 51, [2007] 1 AC 619, [2007] 1 All ER 783, [2007] 1 FLR 961, Baroness Hale held at paragraph 37:

*“Therefore, in common with the understanding of the English and Scottish courts hitherto, and with what appears to be the majority of the common law world, I would hold that a right of veto does amount to “rights of custody” within the meaning of article 5(a). I see no good reason to distinguish the court’s right of veto, which was recognised as “rights of custody” by this House in In re H (A Minor) (Abduction: Rights of Custody) [2000] 2 AC 291, from a parental right of veto, whether the latter arises by court order, agreement or operation of law.”*

**Habitual Residence**

1. There are a number of judgments in relation to the habitual residence of children, most of which are conveniently summarised by Mr Justice Hayden in his decision in *In re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174 (Fam); [2016] 4 WLR 156. In that judgment, Mr Justice Hayden summarised the various authorities in relation to the determination of a child’s habitual residence in the following way:

 *i) The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (A v A, adopting the European test).*

*ii) The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses.  It must be emphasised that the factual enquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (A v A, Re KL).*

*iii) In common with the other rules of jurisdiction in Brussels IIR its meaning is 'shaped in the light of the best interests of the child, in particular on the criterion of proximity'. Proximity in this context means 'the practical connection between the child and the country concerned': A v A (para 80(ii)); Re B (para 42) applying Mercredi v Chaffe at para 46).*

*iv) It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (Re R);*

*v) A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (Re LC).  The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused.  It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration.*

*vi) Parental intention is relevant to the assessment, but not determinative (Re KL, Re R and Re B);*

*vii) It will be highly unusual for a child to have no habitual residence. Usually a child lose a pre-existing habitual residence at the same time as gaining a new one (Re B); (emphasis added);*

*viii) … (this paragraph is to be omitted as a result of the decision of the Court of Appeal in M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention) [2020] EWCA Civ 1105), see below)*

*ix) It is the* ***stability*** *of a child's residence as opposed to its* ***permanence*** *which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there (Re R and earlier in Re KL and Mercredi);*

*x) The relevant question is whether a child has achieved* ***some degree of*** *integration in social and family environment; it is not necessary for a child to be* ***fully*** *integrated before becoming habitually resident (Re R) (emphasis added);*

*xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (Art 9 of BIIR envisages within 3 months).  It is possible to acquire a new habitual residence in a single day (A v A; Re B).  In the latter case Lord Wilson referred (para 45) those 'first roots' which represent the requisite degree of integration and which a child will 'probably' put down 'quite quickly' following a move;*

*xii) Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (Re R).*

*xiii) The structure of Brussels IIa, and particularly Recital 12 to the Regulation, demonstrates that it is in a child's best interests to have an habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence; As such, "if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former" (Re B supra);*

*18. If there is one clear message emerging both from the European case law and from the Supreme Court, it is that the child is at the centre of the exercise when evaluating his or her habitual residence.  This will involve a real and detailed consideration of (inter alia): the child's day to day life and experiences; family environment; interests and hobbies; friends etc. and an appreciation of which adults are most important to the child.  The approach must always be child driven.  I emphasise this because all too frequently and this case is no exception, the statements filed focus predominantly on the adult parties.  It is all too common for the Court to have to drill deep for information about the child's life and routine.   This should have been mined to the surface in the preparation of the case and regarded as the primary objective of the statements.  I am bound to say that if the lawyers follow this approach more assiduously, I consider that the very discipline of the preparation is most likely to clarify where the child is habitually resident.  I must also say that this exercise, if properly engaged with, should lead to a reduction in these enquiries in the courtroom.  Habitual residence is essentially a factual issue, it ought therefore, in the overwhelming majority of cases, to be readily capable of identification by the parties”*

1. The formulation quoted above was approved by majority of the UK Supreme Court in *In re C and another (Children) (International Centre for Family Law, Policy and Practice intervening)* [2019] AC 1 at para 56.
2. Of particular importance to the modern understanding of the concept of habitual residence, and particularly the loss and acquisition of habitual residence following an international move, is the judgment of Lord Wilson in *In re B (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 606. At paragraphs 45 and 46, Lord Wilson held as follows:

*“45. I conclude that the modern concept of a child’s habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo in which the courts below have placed B. The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a seesaw. As, probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new state, up will probably come the child’s roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it.*

*46. One of the well-judged submissions of Mr Tyler QC on behalf of the respondent is that, were it minded to remove any gloss from the domestic concept of habitual residence (such as, I interpolate, Lord Brandon’s third preliminary point in the J case), the court should strive not to introduce others. A gloss is a purported sub-rule which distorts application of the rule. The identification of a child’s habitual residence is overarchingly a question of fact. In making the following three suggestions about the point at which habitual residence might be lost and gained, I offer not sub-rules but expectations which the factfinder may well find to be unfulfilled in the case before him:*

* 1. *the deeper the child’s integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state;*
	2. *the greater the amount of adult pre-planning of the move, including pre-arrangements for the child’s day-to-day life in the new state, probably the faster his achievement of that requisite degree; and*
	3. *were all the central members of the child’s life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it.”*
1. It is of note however that the Court of Appeal more recently in *In re M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] 4 WLR 137 held the following:

*“61. In conclusion on this issue, while Lord Wilson's see-saw analogy can assist the court when deciding the question of habitual residence, it does not replace the core guidance given in A v A and other cases to the approach which should be taken to the determination of the habitual residence. This requires an analysis of the child's situation in and connections with the state or states in which he or she is said to be habitually resident for the purpose of determining in which state he or she has the requisite degree of integration to mean that their residence there is habitual.*

*62. Further, the analogy needs to be used with caution because if it is applied as though it is the test for habitual residence it can, as in my view is demonstrated by the present case, result in the court's focus being disproportionately on the extent of a child's continuing roots or connections with and/or on an historical analysis of their previous roots or connections rather than focusing, as is required, on the child's current situation (at the relevant date). This is not to say continuing or historical connections are not relevant but they are part of, not the primary focus of, the court's analysis when deciding the critical question which is where is the child habitually resident and not, simply, when was a previous habitual residence lost.*

*63. In many cases, as in the present case, the parties and the court have used the summary of the law set in by Hayden J in Re B, at [17]. I agree that this is a helpful summary save that, for the same reasons given above, what is set out in sub-paragraph (viii) (which I quote below) might distract the court from the essential task of analysing "the situation of the child" at the date relevant for the purposes of establishing jurisdiction or, as in the present case, whether a retention was wrongful. Accordingly, in future I would suggest that, if Hayden J's summary is being considered, this sub-paragraph should be omitted so that the court is not diverted from applying a keen focus on the child's situation at the relevant date:*

*‘(viii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move (In re B - see in particular the guidance at para 46).’”*

1. Relevant to that which falls to be considered in this case, subject to the view I form on the issue of Habitual Residence are the defences raised by the father under Article 13 of the Convention.

**Article 13 of the 1980 Hague Convention**

1. Article 13 of the 1980 Hague Convention provides that:

*“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:*

*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*

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

*The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.”*

**Child’s Objections**

1. It is well established that there are three limbs to the child objections exception.  It is necessary for a respondent first of all (“the gateway stage”) to show that:

the child objects to being returned, and the child has attained an age and degree of maturity at which it is appropriate to take account of his or her views.

1. Provided these two limbs are satisfied, the court will then go on to exercise (as the third limb) its discretion as to whether to order a return, holding in its mind that “*taking into account*” a child’s views does not necessarily mean that those views must be followed, still less that they are determinative of the matter.
2. The Court of Appeal has considered this defence comprehensively in *In re M and others (Children) (Abduction: Child’s Objections)* [2016] Fam. 1 and again in *Re F (children) (wrongful retention: child’s objections)* [2016] 1 FCR 168 where Black LJ stated the following:

“*32. In Re M, I said:*

‘*69. In the light of all of this, the position should now be, in my view, that the gateway stage is confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views. Sub-tests and technicality of all sorts should be avoided. In particular, the Re T approach to the gateway stage should be abandoned.*

*76. I now turn to how the law will work in practice. I do not intend to say a great deal on this score. The judges who try these cases do so regularly and build up huge experience in dealing with them, as do the CAFCASS officers who interview the children involved. I do not think that they need (or will be assisted by) an analysis of how to go about this part of their task. In making his or her findings and evaluation, the judge will be able to draw upon the entirety of the material that has been assembled in relation to the child's objections exception and to pick from it those features which are relevant to his or her determination. The starting point is the wording of Article 13 which requires, as the authorities which I would choose to follow confirm, a determination of whether the child objects, whether he or she has attained an age and degree of maturity at which it is appropriate to take account of his or her views, and what order should be made in all the circumstances. What is relevant to each of these decisions will vary from case to case.*

*77. I am hesitant about saying more lest what I say should be turned into a new test or taken as some sort of compulsory checklist. I hope that it is abundantly clear that I do not intend this and that I discourage an over-prescriptive or over-intellectualised approach to what, if it is to work with proper despatch, has got to be a straightforward and robust process. I risk the following few examples of how things may play out at the gateway stage, trusting that they will be taken as just that, examples offered to illustrate possible practical applications of the principles. So, one can envisage a situation, for example, where it is apparent that the child is merely parroting the views of a parent and does not personally object at all; in such a case, a relevant objection will not be established. Sometimes, for instance because of age or stage of development, the child will have nowhere near the sort of understanding that would be looked for before reaching a conclusion that the child has a degree of maturity at which it is appropriate to take account of his or her views. Sometimes, the objection may not be an objection to the right thing. Sometimes, it may not be an objection at all, but rather a wish or a preference.’*

*33. I do not propose, in what I say here, to alter one word of those passages. I re-iterate that an over-prescriptive or over-intellectualised approach is to be discouraged and that a straightforward and robust process is required. The judge must ask him or herself simply, "Does the child object to being returned to his or her country of habitual residence?*”

**Grave Risk of Harm/Intolerability**

1. In his decision in *Uhd v McKay* [2019] 2 FLR 1159, Mr Justice MacDonald summarised the authorities relevant to Article 13(b) (and particularly situations where the Article 13(b) defence is based wholly or partly upon an asserted impact upon the respondent’s mental health) as follows:

*67“The law in respect of the defence of harm or intolerability under Art 13(b) was examined and clarified by the Supreme Court in Re E (Children)(Abduction: Custody Appeal)*[*[2011] UKSC 27*](https://www.bailii.org/uk/cases/UKSC/2011/27.html%22%20/o%20%22Link%20to%20BAILII%20version)*,*[*[2012] 1 AC 144*](https://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKSC/2011/27.html)*. The applicable principles may be summarised as follows:*

* + 1. *There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.*
		2. *The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.*
		3. *The risk to the child must be 'grave'. It is not enough for the risk to be 'real'. It must have reached such a level of seriousness that it can be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two.*
		4. *The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'. 'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'.*
		5. *Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child's immediate future because the need for protection may persist.*
		6. *Where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation would become intolerable, in principle, such anxieties can found the defence under Art 13(b).*

*68.In Re E, the Supreme Court made clear that in examining whether the exception in Art 13(b) has been made out, the court is required to evaluate the evidence against the civil standard of proof, namely the ordinary balance of probabilities whilst being mindful of the limitations involved in the summary nature of the Convention process (which include the fact that it will rarely be the case that the court will hear oral evidence and, accordingly, rare that the allegations or their rebuttal will be tested in cross examination). Within the context of this tension between the need to evaluate the evidence against the civil standard of proof and the summary nature of the proceedings, the Supreme Court further made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as grounding the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm can be identified.*

69. *However, as I have had cause to note in a number of cases recently, the methodology endorsed by the Supreme Court in Re E by which the court assumes the risk relied upon to establish the exception under Art 13(b) at its highest is not an exercise that is undertaken in the abstract. The requirement, made clear in Re E, for the court to evaluate the evidence against the civil standard of proof whilst taking account of the summary nature of the proceedings, must also mean that the analytical methodology endorsed by the Supreme Court in Re E by which the court assumes the risk relied upon at its highest is not an exercise that excludes consideration of relevant evidence before the court. Indeed, in Re C (Children)(Abduction: Article 13(b)*[*[2018] EWCA Civ 2834*](https://www.bailii.org/ew/cases/EWCA/Civ/2018/2834.html%22%20/o%20%22Link%20to%20BAILII%20version)*, Moylan LJ held as follows by reference to the judgment of Black LJ (as she then was) in Re K (1980 Hague Convention: Lithuania)*[*[2015] EWCA Civ 720*](https://www.bailii.org/ew/cases/EWCA/Civ/2015/720.html)*:*

*"[39] In my view, in adopting this proposed solution, it was not being suggested that no evaluative assessment of the allegations could or should be undertaken by the court. Of course a judge has to be careful when conducting a paper evaluation but this does not mean that there should be no assessment at all about the credibility or substance of the allegations. In Re W (Abduction: Intolerable Situation)*[*[2018] 2 FLR 748*](https://www.bailii.org/cgi-bin/redirect.cgi?path=/ew/cases/EWCA/Civ/2018/664.html)*, I referred to what Black LJ (as she then was) had said in Re K (1980 Hague Convention: Lithuania)*[*[2015] EWCA Civ 720*](https://www.bailii.org/ew/cases/EWCA/Civ/2015/720.html)*when rejecting an argument that the court was "bound" to follow the approach set out in Re E. On this occasion, I propose to set out what she said in full:*

*'[52] The judge's rejection of the Article 13b argument was also criticised by the appellant. She was said wrongly to have rejected it without adequate explanation and to have failed to follow the test set out in §36 of Re E in her treatment of the mother's allegations. In summary, the argument was that she should have adopted the "sensible and pragmatic solution" referred to in §36 of Re E and asked herself whether, if the allegations were true, there would be a grave risk within Article 13b and then, whether appropriate protective measures could be put in place to obviate this risk. That would have required evidence as to what protective steps would be possible in Lithuania, the submission went.*

*[53] I do not accept that a judge is bound to take this approach if the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an Article 13b risk. That is what the judge did here. It was for the mother, who opposed the return, to substantiate the Article 13b exception (see Re E supra §32) and for the court to evaluate the evidence within the confines of the summary process. Hogg J found the mother's evidence about what had happened to be inconsistent with her actions in that she had continued her relationship with the father and allowed him to have the care of E, see for example what she said in §37 about the mother not having done anything to corroborate her evidence. She also put the allegations in context, bearing in mind what Mr Power had said about something good having happened in E's parenting, which she took as a demonstration that E would not be at risk if returned to Lithuania (§36). The Article 13b argument had therefore not got off the ground in the judge's view. The judgment about the level of risk was a judgment which fell to be made by Hogg J and we should not overturn her judgment on it unless it was not open to her (see the important observations of the Supreme Court on this subject at §35 of Re S, supra).  Nothing has been said in argument to demonstrate that the view Hogg J took was not open to her; in the light of it, it was unnecessary for her to look further at the question of protective measures. She would have taken the same view even if the child had been going back to the father's care, but the Article 13b case was weakened further by the fact that the mother had ultimately agreed to return with E.'*

*[40] As was made clear in Re S, at [22], the approach "commended in Re E should form part of the court's general process of reasoning in its appraisal of a defence under the article". This appraisal is, itself, general in that it has to take into account all relevant matters which can include measures available in the home state which might ameliorate or obviate the matters relied on in support of the defence. As referred to in Re D, at [52], the English courts have sought to address the alleged risk by "extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting state to protect him once he is there.  In many cases this will be sufficient" (my emphasis).*

*[41] I would also note that the measures being considered are, potentially, anything which might impact on the matters relied upon in support of the Article 13(b) defence and, for example, can include general features of the home state such as access to courts and other state services. The expression "protective measures" is a broad concept and is not confined to specific measures such as the father proposed in this case.  It can include, as I have said, any "measure" which might address the risk being advanced by the respondent, including "relying on the courts of the requesting state". Accordingly, the general right to seek the assistance of the court or other state authorities might in some cases be sufficient to persuade a court that there was not a grave risk within Article 13(b)."*

*70.In the circumstances, the methodology articulated in Re E forms part of the court's general process of reasoning in its appraisal of the exception under Art 13(b) (see Re S (A Child)(Abduction: Rights of Custody)*[*[2012] 2 WLR 721*](https://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKSC/2012/10.html%22%20\o%20%22Link%20to%20BAILII%20version)*), which process will include evaluation of the evidence before the court in a manner commensurate with the summary nature of the proceedings. Within this context, the assumptions made with respect to the maximum level of risk must be reasoned and reasonable assumptions based on an evaluation that includes consideration of the relevant admissible evidence that is before the court, albeit an evaluation that is undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention.*

*That the analytical process described in Re E includes consideration of any relevant objective evidence with respect to risk is further made clear in the approach articulated by Lord Wilson in Re S to cases in which it is alleged, as it is in this case, that the subjective anxieties of a respondent regarding a return with the child are, whatever the objective level of risk, nevertheless of such intensity as to be likely, in the event of a return, to destabilise the respondent's parenting of the child to a point where the child's situation would become intolerable. As noted above, in Re E the Supreme Court made clear that such subjective anxieties are, in principle, capable of founding the exception under Art 13 (b). However, it is also clear from the decisions of the Supreme Court in Re E and in Re S that there are three important caveats with respect to this principle.*

*First, the court will look very critically at an assertion of intense anxieties not based upon objective risk (see Re S (A Child) (Abduction: Rights of Custody) at [27]). Second, the court will need to consider any evidence demonstrating the extent to which there will, objectively, be good cause for the respondent to be anxious on return, which evidence will remain relevant to the court's assessment of the respondent's mental state if the child is returned (see Re S (A Child)(Abduction: Rights of Custody) at [34] and see also Re G (Child Abduction: Psychological Harm [1995] 1 FLR 64 and Re F (Abduction: Art 13(b): Psychiatric Assessment) [2014] 2 FLR 1115). Third, where the court considers that the anxieties of a respondent about a return with the child are not based upon objective risk to the respondent but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise the respondent's parenting of the child to a point where the child's situation would become intolerable, the court will still ask if those anxieties can be dispelled, i.e. whether protective measures sufficient to mitigate harm can be identified (see Re E (Children)(Abduction: Custody Appeal at [49]). Within this context, in Re S Lord Wilson observed at [34] as follows:*

*"The critical question is what will happen if, with the mother, the child is returned. If the court concludes that, on return, the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned. It matters not whether the mother's anxieties will be reasonable or unreasonable. The extent to which there will, objectively, be good cause for the mother to be anxious on return will nevertheless be relevant to the courts mental state if the child is returned".*

*Accordingly, within the foregoing context I accept Mr Harrison's submission that in evaluating the extent to which the anxieties of a respondent about a return with the child that are not based upon objective risk to the respondent but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise the respondent's parenting of the child to a point where the child's situation would become intolerable, the court should consider, amongst other factors, the objective evidence (if any) that the respondent will have good cause to be anxious if the child were returned to the jurisdiction of habitual residence, as well as the protective factors that may ameliorate such a situation.*

*In circumstances where the aforesaid objective evidence includes findings made by the Australian court, and where the mother continues to advance before this court an account that is at entirely at odds with those findings, I note the following passage from the judgment of Lord Brandon in The Sennar (No. 2) [1985] 1 WLR 490 at 499B-C concerning the circumstances in which findings made by a foreign court are binding on this court under the principle of issue estoppel:*

*"The first requirement is that the judgment in the earlier action relied on as creating an estoppel must be (a) of a court of competent jurisdiction, (b) final and conclusive and (c) on the merits. The second requirement is that the parties (or privies) in the earlier action relied on as creating an estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same. The third requirement is that the issue in the later action, in which the estoppel is raised as a bar, must be the same issue as that decided by the judgment in the earlier action."*

**Protective measures**

1. The proper approach to protective measures in this context is addressed by the Court of Appeal at paragraph 41 of its judgment in *Re C (Children)(Abduction: Article 13(b*) [[2018] EWCA Civ 2834](https://www.bailii.org/ew/cases/EWCA/Civ/2018/2834.html)[2019] 1 FLR 1045which is quoted within the body of the quote above.
2. Hungary and the United Kingdom are both signatories to the 1996 Hague Convention. The 1996 Hague Convention allows for measures taken in the context of a return order made pursuant to the 1980 Hague Convention to be recognized and, if necessary, enforced upon the return taking place pursuant to Article 23 of that Convention: see *Re Y (Abduction: Undertakings Given for Return of Child)* [2013] EWCA Civ 129; [2013] 2 F.L.R. 649, CA and *B v B* [2014] EWHC 1804 (Fam).

**The Law –Exercise of Discretion**

1. In *Re M (Abduction: Zimbabwe)* [2008] 1 AC 1288, Baroness Hale stated the following in considering how the court should exercise its discretion:

“***[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, [2007] 1 FLR 961, 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 secondly, 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 Art 12 of the United Nations Convention on the Rights of the Child 1989, 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.*

***[47]****In settlement cases, it must be borne in mind that the major objective of the Convention cannot be achieved. These are no longer ‘hot pursuit' cases. By definition, for whatever reason, the pursuit did not begin until long after the trail had gone cold. The object of securing a swift return to the country of origin cannot be met. It cannot any longer be assumed that that country is the better forum for the resolution of the parental dispute. So the policy of the Convention would not necessarily point towards a return in such cases, quite apart from the comparative strength of the countervailing factors, which may well, as here, include the child's objections as well as her integration in her new community.*

***[48]****All this is merely to illustrate that the policy of the Convention does not yield identical results in all cases, and has to be weighed together with the circumstances which produced the exception and such pointers as there are towards the welfare of the particular child. The Convention itself contains a simple, sensible and carefully thought out balance between various considerations, all aimed at serving the interests of children by deterring and where appropriate remedying international child abduction. Further elaboration with additional tests and checklists is not required.*”

**Evidence**

1. Whilst I had lengthy statements and exhibits from each parent, by permission of the court the only oral evidence I heard at this hearing was that of the Cafcass Officer Ms Baker. Ms Baker prepared one report dated 26th November of last year. At the time she saw the girls she had not seen the Mother’s statement of evidence dated 25th November filed in these proceedings but she had seen it before finalising her report the following day. Ms Baker had been directed to consider whether the children or either of them should be separately represented within these proceedings and it was her clear view that they should not be. She felt that they had each been sufficiently able to state their views. Whether or not those views were followed would be a matter for the court and to draw the children further into the dispute between their parents would be likely to lead to them feeling emotionally pressured and burdened by their parents conflict and would not be of benefit to them. To their credit neither parent took issue with this conclusion.
2. Ms Baker had discussed with the children their opposition to living in Hungary which she identified as hinging primarily upon the fact that to date, they have lived in England for the majority of their life. Their reasoning for seeking to remain living in England appeared justified when considering their experiences of education, friendships and home life. In particular the children, especially G had told her they found school very difficult and that the need to read and write in Hungarian language made things very difficult for them. The spoken language does not pose a similar impediment since these girls have been brought up within an Hungarian speaking family – and I note Ms Baker’s observation that the father speaks only very little English.
3. Cross examined by Mr Crosthwaite Ms Baker accepted that the involvement of the children in the removal and keeping it secret from their mother had been both irresponsible and inappropriate parenting on the part of the father. She agreed also that references made by the girls to their mother *stabbing in the back*  their father by starting a relationship with his best friend might be seen as an adult expression of language likely coming from their father, but that did not she thought detract from the fact that the girls had themselves seen and so had the opportunity to form their own view of the mother’s new boyfriend. They had their own experience of that relationship regardless of what their father might say. What she did agree however was that since the Mother is clear that the relationship did not start before the breakdown of the marriage whereas the father says that it did, then any belief by the girls that it was an extra marital affair, was something which they learned from him. She agreed that influencing the children and drawing them into an adult dispute on one parent’s ‘side’ against the other was again inappropriate. Questioned further about the seemingly adult language used by the girls in some of their objections it emerged that, in a way that had not been apparent on the fact of her report, when G made reference to the mother having *ruined our childhood*  that was not in fact a volunteering of her own view but a reporting of something that her father has said to them. On any view, adjusting to the parent’s separation has been a very difficult time for both children
4. Ms Baker had considered the question of whether in the wider sense the children’s views had been influenced by their father. From her report, a mixed picture appeared. Many of their reasons for not wishing to return to Hungary they were able to articulate. However in her report she observed in the following terms *This said, taken at face value, there is a lack of balance in each of the children’s accounts and they are aligned with their father’s position. I find it likely that G and M’s views are likely to have been influenced, to some degree by their father. There was an absence of warm and tender feeling toward their mother, or any sense of really missing her which I am confident they do. However, I do not agree that the children have been manipulated or alienated to the degree suggested by the mother.*
5. In her oral evidence she maintained – notably when asked in terms of the authenticity of the views by Dr Momoh – that much of what G and her sister said was a reflection of how they genuinely felt and a preference to be in the UK. There were however aspects she said which came from their father- their understanding of the breakdown of their parent’s marriage which for them was central to the change in their lives, was that the ‘fault’ for this lay with their mother. Ms Baker’s view when asked about this was that the children should not be involved in discussion about that at all and that it was damaging to them to be put in a position of taking sides in something that inevitably would not be black and white. Asked by Mr Crosthwaite if she agreed that this was emotional manipulation by the father, portraying himself as the victim, she did. She added the caveat that in relation to the remark about their childhood being ‘ruined’ it was the girls themselves who were portrayed as the victims and not the father.
6. The fact that the girls are so caught up in the dispute between their parents troubled Ms Baker. Her evidence is that she holds concerns about the wellbeing of each child both of whom I believe must be very conflicted about their relationships with their parents post separation. M’s wellbeing concerned her the most. She noted that although she engaged sufficiently in discussions during her meeting with her M presented throughout it as subdued. Ms Baker’s sense was that she had glimpsed only the tip of the iceberg regarding the emotional difficulties M is experiencing
7. As to maturity Ms Baker had consider that so far as G is concerned, *at aged thirteen, I recognise that the court will need to consider her views accordingly. My assessment is that G sensibly put across her wishes and experiences of life and I did not detect any reason to doubt that she was appropriately mature for her stage of development*. Similarly with M Ms Baker reported as follows. *When thinking about her younger sister, I am mindful of the comments from M’s school that she is struggling emotionally. However, she too provided a sophisticated account of her views and when I attempted to explore further the reasoning behind her wishes, she was able to elaborate.*  I have accordingly, with the caveat about M’s emotional state, taken the maturity of expression of their views as congruent with their chronological age

**Discussion**

**Habitual residence and the Hungarian Proceedings**

1. There are ongoing proceedings in Hungary. As to those proceedings the evidence before me establishes the following

(i) On 29 June 2021, the Mother issued divorce proceedings, and on 13th July 2021 proceedings for child arrangements, in Hungary. Self-evidently both of those applications predate the removal which is the subject of this application.

(ii) On 9th November 2021 the Buda Central District Court concluded that “*the parties came to Hungary as a result of a joint decision, registering their children in the Primary School in Hungary was also a joint decision, that the children attended for half a year. This jointly established situation was changed by the Respondent, unilaterally, without the knowledge or agreement of the Petitioner*.” It further ruled that the Father “*acted unlawfully in modifying the established situation*” and the Court therefore “*assigned the children’s residence at the address of [The Mother] in Hungary*”. The Hungarian Court refused Father’s application to suspend the Hungarian proceedings on the basis that there were by then ongoing Hague Convention proceedings in England & Wales.

(iii) The Father attempted to appeal that decision, but on 15th December 2021 his appeal was rejected by the Metropolitan County Court acting as a second instance court.  The appeal court pointed out that the father had within the Hungarian Divorce proceedings issued by the Mother counter-claimed for the dissolution of the marriage, the right to exercise parental custody of the children, mandatory child maintenance from Mother and contact arrangements. He had not objected to the jurisdiction of the court. Explicitly the ruling dated 15th December 2021 notes that “*The first instance court reached the decision that in essence the children’s habitual place of residence in the summer of 2021 at the start of the proceedings when the Respondent took the children to England was Hungary*” and endorses that finding of the court of first instance. It further noted and endorsed the conclusion that the Father had acted unlawfully when he removed the children from Hungary in August 2021 in breach of M’s rights of custody.

(iv) By the order of 15th December 2021 the Father was ordered to “*hand over the children at the children’s designated place of habitual residence which is the Claimant’s address within 15 days*”. He has not done so.

(v) A further hearing in the Hungarian court took place on 24 February 2022 at which the father participated by video-link.  This was primarily concerned with exploring prospects of settlement. To no effect. A further hearing has been listed on 6 May 2022 at which I have been told that the Mother anticipates there may be substantive decisions regarding the children.

1. Dr Momoh at this hearing, late in the day sought permission to admit a document said to be an appeal by the father of the court’s decision on 15th December 2021. That appeal she submitted included an appeal on the finding of habitual residence and wrongful removal. Were it within this jurisdiction that would make it a second appeal to which certain consequences would attach. I do not know and have not had expert evidence to assist me knowing what would be the position in Hungary. For the purposes of this hearing however, I have proceeded on the basis of giving permission to admit that document and taking it at face value. I reject Dr Momoh’s submissions either that the document represents an extant appeal of the habitual residence findings or that it permits me to go behind and not regard myself as bound by the findings on which the authority of the State where the measure was taken (Hungary) based its jurisdiction. I note that at the part of the document headed ‘Legal Reasoning’ which equates on reading to Grounds of Appeal, there is not pleaded or even mentioned the issue of Habitual Residence, rather the proposed appeal centres on the failure to ascertain what in this jurisdiction would be the wishes and feelings of the children.
2. I accept the submission on behalf of the Mother that the children were habitually resident in Hungary at the time of their removal and that that is a matter which had already been determined by the Hungarian Courts. I accept that the Hungarian courts were seised of the matter and had jurisdiction at the time of removal.
3. Even if I were to be wrong about that I would reach the same conclusion on Habitual Residence having regard to the factual test by examination of the degree of social and family environment in Hungary. By the time of their removal they had remained by agreement of both parents in Hungary following what would otherwise have been the end of the holiday the family had taken there. They had moved to live in accommodation in Hungary owned by the parties. The children’s belongings had been driven over by their father in a lorry, following the decision that they should remain in Hungary, so that they would have them in their home. Their life in Hungary involved their integration in their wider family spending time with their grandparents and cousins. They started school in January immediately following the decision to stay there. To the extent that the intention of the parents is helpful on this issue both parents attended to enrol them. There has been in the course of this hearing suggestion in submissions by the father that from January to March there was something akin to a trial period to see how things were going. The father also says – though there is no evidence before me and the Mother disputes that – the children were continuing to attend online education at their English school until March 2021. Even if I accept that, which seems improbable given that they were attending physically during school hours their Hungarian school, they were removed from the school Roll in England in March 2021 at the request of the parents by an e mail from the parents’ joint e mail address sent on 18th March 2021 which e mail gave also the address of the children’s school in Hungary. I note also that within the divorce proceedings the Father in writing by e mail to the Mother’s Hungarian Attorney in May 2021 included the following line in respect of the children’s living arrangements ‘*Accepting that the marriage broke down but in the interest of our children I undertake to come home every second weekend to be able to be with them’*  . From which again to the extent that the intention of the parents assists on the question of HR, demonstrates to me that there was by then a situation where the children were integrated into life in Hungary and the father would be coming as he put it ‘home’ to spend time with them there.
4. It follows from my conclusion on Habitual Residence that the Removal was unlawful. That it was planned and calculated involving as it did even on the father’s own account the children in the deception of their mother, was a disgrace.

**The Children’s Objections**

1. Dr Momoh submits on behalf of the father that both girls genuinely object to a return to Hungary and that each of them have attained an age and maturity at which it is appropriate to take account of their views. To take account to the extent that I should accord such weight to them as not to direct a return. In this aspect of his case the father places heavy reliance on the report and the evidence of the Cafcass officer Ms Baker.
2. The Mother through Mr Crosthwaite accepts that the girls have expressed the views ascribed to them, though he draws attention to the way in which as detailed elsewhere in this judgment, the expression of some of those views carries with it indicator of roots in an adult dispute. He does not take issue with characterisation of the girls as broadly having maturity in line with their chronological age, but does submit that the views they express have to be regarded with caution since they are, he says, influenced by the father. The Cafcass officer, whilst acknowledging some influence by the father, has, says the Mother, underestimated the effect of that influence.
3. Having heard evidence and in particular the effective and measured cross-examination of Mr Crosthwaite I am not convinced that the Cafcass officer’s view of the Father’s influence on the children is as well considered as it might have been. That is not intended as critical of Ms Baker. She had not at the time she saw the children seen the Mother’s evidence with its exhibits. She was clear that she did not finalise the writing up of her report until she had seen the statement. When I look at the dates however, it coming in the day before the Cafcass report was filed, that cannot have given Ms Baker much time to reflect on whether the information it contained cast at all in a different light that which she heard from the children, still less to think about whether to see the children again. A striking example of this is the education point. Having heard from the girls that one of their objections was the difficulty of education and their new school, to the Mother’s statement was attached as exhibits evidence from the girls’ school in Hungary. These provide evidence that they were in fact attaining well and were well integrated into their peer groups. In fact this contrasted with some of the evidence Ms Baker had from the school in England where M had been reported as incredibly quiet, not engaging with others well and appearing sometimes withdrawn. Her English school also noted that she does not mix well or in the classroom setting comment or engage frequently in discussions.
4. This might have caused Ms Baker, given the opportunity, to consider further her investigations. For example her conversation with G in which there had been the curious remark from her in relation to her good grades “but it doesn’t actually mean much if I don’t understand the actual subject” and her objection that in Hungary she ‘couldn’t really learn’. Set against the objective reports from the school (rather than from either parent) it seems to me that that is an example of something where Ms Baker might have considered further how G came to be expressing the view that there was a barrier to her educationally in Hungary.
5. It is illustrative of the overall impression I formed from reading and listening to Ms Baker’s evidence. I accept that each of these girls were expressing a wish not to return to Hungary. I accept also that in part those views were their own authentic views. I remind myself that an objection is to be contrasted with a preference or a wish. The breakdown of their parent’s marriage has clearly affected both of them – the references by M to how they had seemed to her *from inside and outside* to be the *perfect family* when they lived in England were a sad and appropriately child-like expression of what had been lost to her. Likewise G’s description of having had *an amazing relationship* with her mother before the move to Hungary. It seemed to me that from both girls there came a strong sense that what they were most wishing for was things to return to the way they were before their parent’s separation and marital breakdown. Which of course they cannot.
6. It is also my view having heard Ms Baker’s evidence that the girls were each directing their comments to her to where and with which parent they would ultimately wish to live. I agree with Mr Crosthwaite that that is not a straightforward decision to be made summarily and requires a proper welfare analysis
7. Ultimately I have reached the view that the views of the children are in part authentic but that it is more likely than not that they have been influenced by their father. Whilst the Cafcass officer accepts there has been manipulation and influence, it is likely that the extent is greater than the Cafcass Officer regarded it. In this regard I have in mind particularly:
8. Their involvement in the unlawful removal, the arrangements made to leave Hungary and come to the UK, and within that context the deception of the mother
9. The exposure to the breakdown of the parents’ marriage and the evidence of ‘recruitment’ which I am satisfied there is to the father’s ‘side’ in that unhappy circumstance
10. The wholly negative view of their mother and the reports of their father’s view that she has *ruined* their childhood and *stabbed* the father in the back
11. The lack of congruence between the report by G in particular of the educational opportunity available to her in Hungary and the objective 3rd party evidence as to the progress and achievement of both girls from the Hungarian schools
12. Since the views are at least in part authentic however, it is appropriate to consider first whether they are in the character of objections rather than a preference or a wish. On a narrow balance – and more so in relation to the evidence in respect of G - I think it is appropriate to regard the girls wishes as objections. I accept also that each – again more clearly in respect of G than her sister- has reached an age and maturity at which I should take account of their objections.
13. Moving on to the exercise of my discretion. It is acknowledged that the discussion is a wide one in these circumstances. It involves welfare considerations and the consideration of a broad range of relevant factors. Dr Momoh submits that I should exercise my discretion against a return to Hungary. Mr Crosthwaite submits that even if I find that I should take account of objections they cannot be determinative of the case or be accorded great weight. He reminds me rightly that it is no doing of the Mother that there has been a significant delay in this case being heard by the court in this jurisdiction.
14. I recognise that there is a pressing need for a welfare-based decision as to these girls’ future. In the course of her report Ms Baker said this: *Whilst it is beyond the remit of these proceedings to test these accounts or make a factual determination on welfare matters, should their mother’s account be truthful the children will have experienced emotionally and psychologically harmful parenting from him that reportedly included manipulation and an intentional overhaul of boundaries. Regardless of the country within which the children reside, it is likely that the local family courts will be best placed to complete a wider welfare assessment and assist this family determine the care arrangements in the best interest of G and M*. I agree that those matters are beyond the remit of this court. I have reminded myself that it is no part of my function to conduct either a factfinding hearing as to the disputed welfare issues or to determine the long term living arrangements for the children. The Hungarian Court is -and has been since well before the unlawful removal – seized of family proceedings. There is a hearing listed on 6th May 2022 and it will be appropriate for that court to make decisions.
15. Bearing in mind as I must the nature and strength of the Children’s objections in this individual case, I take account of them but it is nevertheless appropriate in my judgment to direct a return to Hungary. I bear in mind also in the wider sense that I must give weight to Convention considerations and bear in mind that the Convention only works if as a matter of generality, having regard of course as I have here to the particular individual circumstances, children who have been wrongfully removed from their country of habitual residence are returned. Ideally more promptly than has been possible here.
16. Dr Momoh in reality made no separate and further case in relation to the father’s 13 b) defence. There was no evidence placed before me which came close to establishing the grave risk of harm required to establish that that defence is made out. I accept and agree with the submission made on behalf of the Mother that it amounted to no more than a re-statement of the child’s objections defence as to which I have already made determinations.
17. Accordingly, I will make the direction sought by the Mother. It will be for the Hungarian Court to determine welfare issues.
18. I will make all necessary ancillary orders including such directions as may be necessary to make this judgment available to the court in Hungary for the hearing listed 6th May 2022.