Neutral Citation Number: [2021] EWCA Civ 1123.

Case No: B4/2021/0507

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
The Hon Mrs Justice Arbuthnot DBE
FD20P00679

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 July 2021

Before :

LADY JUSTICE KING
LORD JUSTICE BAKER
and
LORD JUSTICE LEWIS

- -

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY AVT 1985
AND IN THE MATTER OF IG (CHILD ABDUCTION: HABITUAL RESIDENCE: ARTICLE 13(b))

Between :

KG	**Appellant**
- and -	
JH	**Respondent**

- -
- -

Marisa Allman and Lara Izzard-Hobbs (instructed by **Slater Heelis**) for the **Appellant**
Mark Jarman (instructed by **Sherma Polidore**) for the **Respondent**

Hearing dates : 13 May 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10am on 27 July 2021.

LORD JUSTICE BAKER :

1. This is an appeal by a mother against the order of Arbuthnot J made under the Hague Child Abduction Convention for the summary return of her son, IG, to South Korea.

2. The principal issues raised on this appeal are two matters which have caused considerable problems for judges in recent years – the determination of a child's habitual residence and the approach to the defence available under Article 13(b) of the Convention.

Background

3. The child's father, who is now aged 28, was born in South Korea. The mother, now aged 24, was born in England. In 2018, the parties met online while the mother was studying at university. In August of that year, the mother travelled to South Korea on a student exchange visa, and the parties started a relationship. In January 2019, the mother discovered she was pregnant and moved to live with the father's family in Chuncheon while continuing to attend university in Seoul some 75 km away. In May 2019, the parties underwent a civil marriage ceremony and the following month took part in a traditional Korean wedding ceremony which was attended by the mother's parents.

4. At the end of June 2019, the parties travelled to England and the father was granted a six-month tourist visa. In September 2019, the mother gave birth to IG.

5. In December 2019, the family travelled to South Korea, arriving there on 29 December, when the mother was granted a tourist visa valid for three months.

6. It was the mother's case that difficulties between the parties arose shortly afterwards when the father refused to allow her to book return tickets to England. The mother wanted to return in June 2020 but alleges she was told that she would not be allowed to leave with the child.

7. On 30 January 2020, an application was made on the mother's behalf for a spousal visa in South Korea. On 2 March 2020, she was issued with an alien registration card.

8. On 6 March, the maternal grandmother arrived in South Korea. Three days later, the mother, grandmother and IG left the country without informing the father.

9. During the following six months, there were text communications between the parties which were the subject of evidence before the judge. On 26 August 2020, the father contacted the Central Authority in England. At the beginning of September, he arrived in England and was granted a six-month tourist visa. On 22 October, the mother issued divorce proceedings in the Central Family Court. On the following day, the father filed an application in the Family Division under the Hague Child Abduction Convention seeking an order for the summary return of IG to South Korea. The mother filed an answer, alleging that at the date of his removal from South Korea on 9 March 2020 IG had been habitually resident in England. In the alternative, if he was habitually resident in South Korea at that date so that his removal was unlawful, the mother raised two defences under the Convention – first, under Article 13(a) of the Convention, that the father acquiesced to IG remaining in this country and, secondly, under Article 13(b),

that there was a grave risk that the return of the child to South Korea would expose him to physical or physiological harm or otherwise place him in an intolerable situation.

10. At a preliminary hearing on 2 November, the proceedings were adjourned to allow the parties an opportunity to mediate and an agreement was reached for the father to have contact three mornings a week, subject to supervision until his passport was lodged with his solicitors. An order was made preventing him from removing the child from the jurisdiction. Subsequently, the father lodged the child's Korean passport with his solicitors, the mother lodged his British passport with her solicitors and thereafter the child's contact with his father has been unsupervised.

11. The parties were unable to resolve the dispute through mediation. At a hearing before Theis J at the end of November 2020, directions were given including an order for a report from a South Korean legal expert. That report was duly filed in January 2021. On 29 January, at a further hearing before a deputy judge, further directions were given, including permission to the parties to put additional questions to the expert. Those questions were duly asked and a brief response received at the beginning of February. In answer to questions about the mother's immigration status, the expert, Ms Soya Kim, stated that the mother would be entitled to apply for an extension of her current spousal visa until the conclusion of divorce proceedings, and thereafter to apply for a visa to permit her to remain in Korea to raise IG as a child born during a marriage to a Korean citizen. Any such visa would be for a limited period, but it would be open to the mother to apply for further extensions up to the child's 18th birthday. In answer to a supplemental question, Ms Kim added that the examination will be conducted entirely by the Ministry of Justice and Immigration Office which "has a wide range of discretion". In answer to questions about the recognition and enforcement in Korea of orders made by and undertakings given to the English court, she advised that only a final decision of a foreign court can be recognised and that interim "preservative" orders would not be considered binding, although they "may be considered" by a Korean court making its own decision on the issues. Ms Kim also advised about the interim remedies under Korean law regulating the care of the child pending final determination. An application for such "prior disposition" can only be made within a substantive suit, although it would be possible for the mother to initiate proceedings before she arrived back in Korea. Ms Kim also provided some information about the availability of legal aid and about remedies for victims of domestic abuse.

12. The hearing of the application took place before Arbuthnot J on 8 March on submissions only. At the conclusion of the hearing, the judge adjourned judgment until the following afternoon. In the event, she was unable to start delivering judgment until 4pm that day. In short, the judge concluded that:

    (1) at the date of his removal IG had been habitually resident (although it is said on the mother's behalf that her precise finding about when he acquired habitual residence in that country is unclear);

    (2) there was no evidence of any weight that the father had acquiesced to the mother's retention of the child in this jurisdiction;

    (3) there was no grave risk of harm or reliable evidence that IG would be placed in an intolerable situation if returned to South Korea (although again it is said on

the mother's behalf that the basis on which the judge concluded that the Article 13(b) defence was not established is unclear).

13. Following the delivery of the judgment, the mother's counsel, Ms Allman, asked the judge to address a matter which she asserted had been omitted from the judgment, namely the practical circumstances which the child would face on being returned to South Korea. A lengthy discussion took place between the judge and counsel about the undertakings which the father was offering to facilitate the return. At the end of these exchanges (which have been transcribed for the purpose of this appeal), the judge agreed to prepare a supplemental judgment dealing with that issue. Ms Allman then made an oral application for permission to appeal which was refused. On the following day, counsel filed supplemental written submissions on the proposed undertakings offered by the father.

14. On 15 March, the judge approved an order directing the mother to return IG to South Korea forthwith and in any event by 6 April 2021; and further directing the mother to provide the father with details of the property in that country in which she intended to live, and copies of the flight tickets purchased for the child's return, with a direction to the father to reimburse the mother for the costs of the child's flight. On the same day, the order was sealed. Appended to the order were two annexes containing undertakings given by each party. There was some repetition within the undertakings given by the father which in summary were:

    (a) to pay for accommodation for the mother and IG in Chuncheon "at £300 to £400 per month for a 12 month period or until a final order is made in respect of IG's welfare by the Korean court (whichever is the later)";

    (b) to provide the mother with financial support of £200 per month for the same period, "in addition to £400 the mother is already entitled to" by way of state benefits from the South Korean government;

    (c) prior to the mother's departure from England, to provide £600 to cover the first month in South Korea ("£400 of which would usually be state benefits and the £200 top up from the father");

    (d) by 21 March 2021, to pay a lump sum of £5,200 into a bank account to be set up by the mother, comprising £600 support for the first month, £200 for the following seven months, and eight months' rent at £400;

    (e) after eight months, to pay £600 (covering the rent and his contribution to financial support) in the mother's account;

    (f) to assist the mother to obtain state benefits;

    (g) to assist her in applying for a visa or the extension of a visa;

    (h) not to instigate civil proceedings, or voluntarily support criminal proceedings, against the mother and grandmother for child abduction;

    (i) to pay for IG's return flight to South Korea;

(j) not to remove IG from his mother's care save for contact and pending any order by the South Korean court.

The mother undertook to provide the father with evidence as to the cost of accommodation in South Korea, the level of state benefits received by her, and the cost of IG's flights, to use her best endeavours to assist the father in applying on her behalf for benefits, a visa and housing, and after arriving not to remove IG from South Korea save for agreed travel approved by the South Korean court.

15. On 16 March, the mother filed a notice of appeal, relying on three grounds of appeal and seeking a stay of execution pending determination of the appeal.

16. On 17 March, the judge handed down a written supplemental judgment ("the supplemental judgment").

17. On 22 March, the mother's representatives filed an amended notice of appeal seeking permission to file amended grounds in the light of the supplemental judgment. Permission to amend the grounds was granted the same day. On 26 March, this Court granted a stay of the return order pending determination of the application for permission to appeal, and ordered an expedited transcript of the judgment. On 1 April, Moylan LJ granted permission to appeal.

18. On 12 April, the parties received an approved transcript of the judgment ("the approved judgment"). Noting that it contained a substantial number of amendments to the judgment delivered ex tempore, the mother's representatives asked for a copy of the unamended judgment ("the ex tempore judgment"), which was received from the judge on 13 April. On 19 April, they filed a notice seeking permission to amend the grounds of appeal again, including minor amendments to the existing grounds and by adding a fourth ground alleging procedural irregularity. On 26 April, Moylan LJ granted permission to amend the existing grounds, and adjourned the application to add a fourth ground to the hearing of the appeal, which was listed on 13 May 2021.

19. The three grounds of appeal for which permission has been granted are as follows:

(1) Ground 1 - The court was wrong to conclude that the child lost his habitual residence in England on or soon after his arrival in Korea, and that he subsequently acquired a habitual residence in Korea and was habitually resident there on the date of his removal from Korea to the UK .

(i) The court erred in law in failing to carry out a comparative exercise having regard to the child's circumstances in each of the relevant countries and gave excessive weight to the parties' intentions as it found them to be.

(ii) The court erred in law in treating this as a case in which habitual residence could have been acquired in a short period of time in the face of the mother's opposition.

(iii) In respect of the conclusions as to the parties' intentions, the court failed properly to analyse the evidence as to the parties' intentions having regard to all of the evidence.

(iv) In considering whether the father's actions were tantamount to an unlawful retention in Korea from early January 2020, the court failed to survey the evidence as whole and placed excessive weight on communications between the parties after the child's arrival in the UK.

(2) Ground 2 - The Court erred in its application of the law relating to Article 13(b) of the Hague Convention 1980 in that:

(i) The court failed to carry out the exercise of assessing the risks on the basis that the allegations are true, considering whether appropriate protective measures can be devised to address them, and, if the protective measures would be inadequate, doing its best to resolve the disputed issues where appropriate.

(ii) The court failed to examine in concrete terms or sufficient detail the circumstances in which the child would find himself on return.

(iii) The court erred in law in considering the adequacy of the undertakings offered by affording overriding weight to what the father could afford to pay rather than the level of financial provision that the necessary protection of the child requires.

(3) Ground 3 – In determining whether there was a grave risk that a return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation:

(i) The court departed from, misconstrued, or went beyond the expert evidence without giving reasons for doing so.

(ii) In considering whether the child would be likely to be removed by the father from the mother's care, the court failed to have any or any sufficient weight with regard to the evidence that the father had indicated an intention to do so.

(iii) The court was wrong to conclude that the undertakings offered by the father would afford protection against the risks of harm where it was expressly accepted in the judgment, consistent with the expert evidence, that the undertakings are unenforceable in Korea.

(iv) The court was wrong to make assumptions about what the effect would be on a court in Korea of breach of an undertaking which has no legal effect in that jurisdiction.

20. The fourth ground in respect of which permission has not yet been granted is that:

> "the decision was procedurally unfair in that the learned judge materially amended or supplemented her ex tempore judgment in the perfected judgment after the order was sealed, and having already given a supplementary judgment, in the absence of an invitation to do so or strong reasons for doing so."

21. I shall consider the grounds for which permission has been given under two headings: (1) habitual residence and (2) Article 13(b). In doing so I shall also consider the

argument that there was procedural unfairness. Consideration of the issues will take longer than it normally should because it involves comparing and contrasting the three judgements – the ex tempore judgment, the supplemental judgment and the approved judgment.

Habitual residence

22. The preamble to the Hague Child Abduction Convention sets out its aims as including:

> "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".

Under Article 3 of the Convention:

> "The removal or retention of a child is to be considered wrongful where
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention, and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention…."

Under Article 4:

> "The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights…."

23. In her first ground of appeal, the mother contends that the judge was wrong to conclude that the child lost his habitual residence in England on or soon after his arrival in Korea, and that he subsequently acquired a habitual residence in Korea and was habitually resident there on the date of his removal from Korea to the UK.

24. It is unnecessary in this judgment to embark on another lengthy exposition of the law relating to the habitual residence of children. The following summary will suffice.

25. As the judge recognised, the starting point is the judgment of the ECJ in *Mercredi v Chaffe* C-497/10, [2012] Fam 22, paragraph 56:

> "The concept of 'habitual residence' must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a member state – other than that of her habitual

> residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that member state and for the mother's move to that state, and second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that member state. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case."

26. Following that decision, the law relating to the habitual residence of children was considered by the Supreme Court on no fewer than five occasions between 2013 and 2016, the last two being *AR v RN (Habitual Residence)* [2015] UKSC 35, [2016] AC 76, [2015] 2 FLR 503 and *Re B (A child) (Habitual Residence: Inherent Jurisdiction)* [2016] UKSC 4, [2016] AC 606 ("Re B"). Thereafter, the principles to be derived from those authorities were summarised into thirteen sub-paragraphs by Hayden J in *Re B (Habitual Residence)* [2016] EWHC 2174, [2016] 4 WLR 156. That summary was subsequently endorsed by this Court in *Re M (Children) (Return Order: Habitual Residence)* [2020] EWCA Civ 1105, save that Moylan LJ disapproved of one of the principles (sub-paragraph (viii)). The remaining twelve are as follows:

> "(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….
>
> (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….
>
> (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'….
>
> (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….
>
> (v) A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her…. 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….
>
> (vii) It will be highly unusual for a child to have no habitual residence. Usually a child loses a pre-existing habitual residence at the same time as gaining a new one.
>
> (viii) ….
>
> (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….
>
> (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….
>
> (xi) The requisite degree of integration can, in certain circumstances, develop quite quickly. It is possible to acquire a new habitual residence in a single day….
>
> (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….
>
> (xiii) …[I]f 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….."

27. Of the many other judicial observations on this topic in recent years, it is probably only necessary to refer to one passage from the judgment of Lord Wilson in <u>*Re B*</u>, which was briefly mentioned without citation by the judge but quoted by both counsel in their submissions to this Court. At paragraphs 45 and 46, Lord Wilson said:

> "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 see-saw.

> 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. 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 fact-finder may well find to be unfulfilled in the case before him:
>
> (a) 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;
>
> (b) 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
>
> (c) 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."

28. I turn to consider the judge's analysis of the issue of the child's habitual residence in this case. As noted above, there are a number of differences between the ex tempore and approved versions of her judgment, to an extent which the mother asserts amounts to a procedural irregularity and thereby gives rise to the proposed fourth ground of appeal. In considering the judge's analysis of the issue of habitual residence, I shall start by looking at the approved judgment.

29. Having set out some of the legal principles, the judge proceeded (from paragraph 14 onwards) to consider the mother's evidence and argument on the issue. She accepted the submission that the UK was the mother's home country, that she had been in South Korea temporarily when IG was conceived, that the father at that stage wanted to live in England, that as a result the parties took active steps to find out how he could obtain an English spousal visa, and that when they travelled to this country prior to the birth their plan was to live here as a family. The judge concluded that IG had become habitually resident in England at birth. She noted that after, leaving this country in December 2019, the mother retained bank accounts here and continued to claim child benefit, and IG remained registered with a GP. The judge took into account the submissions that it was a late decision that the mother should accompany the father back to Korea when his tourist visa here expired, that there had been no pre-planning, and that the mother had entered Korea on a tourist visa. She continued (at paragraph 18):

> "The mother contended that the purpose of the trip was ambiguous and undefined and for an unclear period of time. She

> said considerations included a desire not to separate the family and to see if the marriage could work; the unhappiness of the father living with the maternal family; the desire for [IG] to get to know the paternal family; the possibility that money might be raised sufficient for the father to obtain an English spousal visa. The return to the UK remained the goal of the parents. It was not clear how long that would take or whether the family would remain in South Korea in the meantime."

30. The judge then recorded the mother's case that her situation in South Korea deteriorated very quickly after her arrival, that by January 2020 she was sending text messages to the maternal grandmother saying that a return to England in June 2020 would be stopped by the father and that she was trapped there, and that the decision to stay was not made by the mother of her own free will but because the father was refusing to allow her to leave. It was argued that by 7 January 2021, IG was being unlawfully retained in Korea. It was also contended that the father had prevented the mother travelling to see the maternal grandmother in Seoul when she arrived for a visit in March 2020. The evidence on which the mother relied in support of these arguments included a series of text messages exchanged between the mother and maternal grandmother, which the judge described as the "high point" of the mother's case that the father was abusively controlling her. The judge cited examples of these messages at paragraph 23 of the approved judgment.

31. The judge then set out the father's case on habitual residence. He agreed that there had been discussions about his moving to England, but asserted that this had become impossible because of a requirement for him to have a substantial sum in savings (said to be around £65,000) for immigration purposes. The parties therefore agreed what the judge described as a "back-up plan" to live in South Korea and save money to enable them to move to England at a later date. In support of his case, the father pointed to the fact that the mother had started asking in January 2020 about a spousal visa to stay in Korea; that he had applied for a university course in Korea that would last four years; that the parties received benefits for IG from the Korean government; and that the mother had left a number of her belongings in Korea when she travelled to England for the birth and later arranged for more of her belongings to be sent out to Korea when she and the baby travelled there in December 2019. It was his case that the reason for his objections to the mother visiting the grandmother in Seoul were the risks from Covid and the pandemic restrictions which were in place by March 2020. Like the mother, the father also relied on text messages to support his case on this issue and the judge quoted examples at paragraph 28 of the approved judgment.

32. The judge then observed that the text messages adduced in evidence confirmed that the mother had started to say she was very unhappy and that the marriage was not working. She did not speak Korean, she was living in the paternal grandparents' home where everything was done by the paternal grandmother leaving her with nothing to do. The Covid restrictions limited her opportunity to leave the house. At paragraph 32, the judge cited further passages from the text messages demonstrating the mother's unhappiness.

33. At paragraph 33, the judge quoted further text messages between the parties which she found indicated their intentions when they travelled to Korea in December 2019. For example, on 9 January, the father had said that "we don't have to worry about going back now", to which the mother replied "good, now we just need my visa", referring to

the spousal visa which would enable her to remain after the expiry of the tourist visa. In another message, the mother had responded positively to the father's suggestion that they should build a house to run an English teaching academy. In a later message, the mother discussed how she was looking for a job. In a message sent on the day after the mother and IG had left Korea, she told the father:

> "It's uncomfortable in South Korea. All those ideas of staying there for a few years went out of my mind and no longer seemed a good idea for [IG]. That's how I felt about it … when we would return to the United Kingdom he wouldn't know anything or anyone. Who knows what his English would be like."

The judge observed that it was clear from this message that the plan had been to stay in South Korea for a few years.

34. Her conclusions on the issue of habitual residence are set out in paragraphs 35 to 39 of the approved judgment:

> "39. Although the mother said all her actions regarding [IG] were fully controlled by the father and his family whilst she was in a relationship with the father, I do not find that is reflected in the text messages exhibited. They reveal a more nuanced picture. There is very little evidence of any weight, in my view, which shows that this father exerted abusive or manipulative control over the mother. The mother's unhappiness was because she felt isolated in a country where she did not speak the language spoken in the family home, and she felt she had no role to play.
>
> 36. I accept, as the mother said, that there would have been any number of conversations between the couple which were not put down in writing. Nevertheless, having considered every text message exhibited, from when the parties were living together and by piecing together evidence from messages the mother sent to the maternal grandmother before she left and to the father after leaving South Korea, on balance, I do not find there is evidence sufficient for me to conclude that the father was preventing the mother from leaving South Korea between January and March 2020. The mother had not said she wanted to leave at that time, the conversations and the father's refusal were in relation to a visit in the summer of 2020. There was no unlawful retention. The father's concerns about travel were clearly about the dangers faced by the mother and their small baby from Covid.
>
> 37. In my judgment, having considered the evidence, the young couple could not afford the £62,000 of savings required for the father to be able to obtain a spousal visa in the United Kingdom and their plan B was for the family to spend a few years in South Korea to gather the money together for the father's spousal visa before moving either back to England or, if they did not raise that money, moving to another country. The mother's own text

> messages of 10th March and 24th June 2020 are particularly relevant when considering the parents' intentions.
>
> 38. Applying the legal principles to the evidence, I find the father, mother and baby became immediately integrated into the paternal family life in South Korea. [IG] had no life independent of his father and mother. As he was not of school age, his life would have revolved around his parents who lived in the paternal family's home. The home he went to in South Korea was a stable and permanent one and, as I find, the intention was for the family to live there not in the long term necessarily but until they could raise sufficient sums to move back to the United Kingdom or to another country. The father was looking for jobs. The mother was thinking of the sort of work she could do in South Korea when she was ready. I find [IG] lost his habitual residence in the United Kingdom soon after his arrival in South Korea and certainly by 9th March 2020 when he was removed by his mother.
>
> 39. The guidance given in *Re B (A Child) (Abduction: Habitual Residence)* [2020] EWCA (Civ) 1187 is very helpful. Whether the degree of integration is sufficient will vary from case to case, and I have carried out above a child-focused assessment where the intentions of the parents are just one part of the picture. I find that in this case habitual residence will have moved very quickly to the new state. The habitual residence of [IG] immediately before his wrongful removal was in South Korea."

35. As noted above, in approving her judgment the judge extensively redrafted the transcript of what she had said when delivering her judgment ex tempore. For example, in the ex tempore judgment some of the quotations from the text messages were placed after the judge's conclusion on the habitual residence issue and before the section dealing with Article 13(b), whereas in the approved version they are all set out early in the judgment. Having compared the two versions, however, I conclude that, save in one potentially important respect, there was no material alteration of the reasoning on the issue of habitual residence. The exception is the last sentence of paragraph 38 of the approved judgment. As noted above it read:

> "I find IG lost his habitual residence in the United Kingdom soon after his arrival in South Korea and certainly by 9th March 2020 when he was removed by his mother."

The equivalent sentence in the ex tempore judgment (paragraph 16) reads:

> "The child was integrated into the father's family and I find lost his habitual residence in the United Kingdom on his arrival."

One other alteration should be mentioned. As noted above, the judge's ultimate conclusion in her approved judgment was:

> "I find that in this case habitual residence will have moved very quickly to the new state. The habitual residence of [IG] immediately before his wrongful removal was in South Korea."

Both of these last sentences are found in the ex tempore judgment albeit at separate points.

36. It should also be noted that, in the course of the exchanges with counsel after judgment, when giving her reasons for refusing permission to appeal, the judge said:

> "This case has been very interesting because it is quite an unusual case about habitual residence and when habitual residence moved. Did I say that it was on the day the child arrived? It was by 7th January is what I should have said. I certainly did not mean to say by the day the child arrived. The child arrived obviously on a particular date, but it was not obtained immediately …."

37. Ms Allman's submissions on the issue of habitual residence, as set out in the grounds of appeal, skeleton argument and oral argument, can be summarised as follows:

(1) The differences in the various observations by the judge in the ex tempore judgment, the subsequent exchanges with counsel, and the approved judgment give rise to a lack of clarity in her finding as to precisely when IG lost habitual residence in England and acquired it in South Korea.

(2) The judge failed to carry out a comparative exercise looking at the child's circumstances in each of the relevant countries. Although the judge referred to *Re B* and described the guidance given in it as "very helpful", she did not follow it when reaching her decision. Having set out the mother's arguments about the child's circumstances earlier in the judgment (from paragraph 14 onwards), she did not bring them into her final analysis at paragraph 38.

(3) This was a complex case in relation to habitual residence given the age of the child at the time of his arrival in and departure from Korea, the short duration of his stay, the difficulties in the parents' marriage, their lack of financial independence, their different nationalities, and the problems that each faced over immigration. The judge's reasoning did not adequately reflect these complexities nor the subtleties of the family's circumstances. The judge gave excessive weight to the parties' intentions as she found them to be. Although she said that the decision was to be taken on its facts, and asserted that she had carried out a child-focused assessment in which parental intention was only one of the factors to be taken into account, in the event the judge reached a firm conclusion as to the parents' intentions and then gave them excessive weight in reaching her conclusion.

(4) In her analysis of the parties' intentions, the judge failed to have regard to all the relevant evidence. She relied on some of the messages passing between the parties while in Korea and after the mother had left, but failed to consider them alongside other messages passing between the mother and the maternal

grandmother which demonstrated that the mother felt trapped and afraid while living in the paternal family home.

(5) In considering whether the father's actions were tantamount to an unlawful retention in Korea from early January 2020, the court failed to survey the evidence as whole and placed excessive weight on communications between the parties after the child's arrival in the UK. The judge failed to appreciate the extent of the father's coercive control and its impact on the mother's thinking and intentions. In fact, the mother quickly decided that she did not want to stay in Korea and only remained because the father refused to allow her to leave. The court erred in law in treating this as a case in which habitual residence could have been acquired in a short period of time in the face of the mother's opposition.

38. The central point in these submissions was that, given the comparative circumstances in England and South Korea, the judge was wrong to say that IG had lost his habitual residence in the United Kingdom "on arrival in South Korea" (as she did in her ex tempore judgment). The judge was also wrong to say that IG lost his habitual residence in the United Kingdom "soon after his arrival in South Korea" (in the approved judgment), or that "habitual residence will have moved very quickly to the new state" (in both the ex tempore and approved judgments), or that "habitual residence moved … by 7th January" (during exchanges with counsel after the ex tempore judgment). Ms Allman submitted that, given the lack of clarity as to the parties' intentions, the deterioration in the parties' relationship, the father's coercive behaviour, and the fact that the mother quickly decided that she did not want to stay in Korea, IG never achieved the degree of social integration necessary for habitual residence to be established before the mother removed him from South Korea on 9 March 2020.

39. In reply on behalf of the father, Mr Jarman, who did not appear in the court below, submitted that the judge carried out a careful analysis of the evidence and was entitled to find that the mother's actions were not controlled by the father to the extent alleged and that she and IG were not retained in Korea. The issue over which the parties were arguing in the early months of 2020 was as to the date when the mother and IG should return to England to visit her family. The mother wished to travel in June whereas the father, concerned about the Covid pandemic, proposed that the trip should be postponed to December. There was no suggestion of the mother returning to England before June. Having considered the mother's evidence in support of her assertion that she was controlled abusively and manipulated by the father, the judge concluded that this was not reflected in the text messages and that there was very little evidence to support the assertion.

40. Mr Jarman further submitted that the judge was equally entitled to find that the parties' plan was to live in South Korea for a few years. They did not have savings of £65,000 which would have enabled the father to apply for leave to remain in England. For that reason, they decided on a back-up plan to live in South Korea for a few years while they saved money to enable them to return to England. Mr Jarman cited various aspects of the evidence on which the judge relied in support of this conclusion, including the mother's application for a spousal visa, the references in messages to the parties' intention to build a home and run a tutoring academy, and the fact that the mother was looking for a job. Mr Jarman submits that the judge was entitled to find that IG "became immediately integrated in paternal life in South Korea" for the reasons given at

paragraph 38 of the approved judgment, including the fact that that he had no life independent of his parents and was living with them and the paternal family in a stable and permanent home.

41. Applying the considerations identified in *Re B* by Lord Wilson at paragraph 46, Mr Jarman submitted that the judge had been entitled to find that:

(a) IG was an infant with little integration in England before he travelled to Korea aged 3 months with his parents, who were, in Lord Wilson's phrase, the "central members" of his family;

(b) on arrival there, he and his parents lived in secure accommodation with the paternal family;

(c) the joint plan of the parents was to live in Korea for a few years, with the mother applying for a spousal visa, and both parents working to save money for an eventual return to England.

In those circumstances, the judge was right to conclude that IG's habitual residence moved quickly from England to South Korea.

42. I shall set out my conclusions on these arguments later.

Article 13(b)

43. Under Article 12 of the Convention:

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of 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 …."

44. There are a number of exceptions to this provision. In this appeal, we are only concerned with Article 13(b), which provides:

> "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 … 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."

45. Article 13(b) has been the subject of extensive judicial analysis, including in a number of recent appeals to this court. The broad principles identified in case law are clear and not in dispute. But it is plain from the number of appeals coming to this Court that judges have found it challenging to apply those principles in the often complex factual circumstances that arise.

46. The leading authorities remain the decisions of the Supreme Court in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 and *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 AC 257. The principles set out in those decisions have been considered by this Court in a number of authorities, notably *Re P (A Child) (Abduction: Consideration of Evidence)* [2017] EWCA 1677, [2018] 4 WLR 16 and *Re C (Children) (Abduction: Article 13(b))* [2018] EWCA Civ 2834, [2019] 1 FLR 1045. Since the hearing of the present appeal, this Court has handed down judgments in another appeal involving Article 13(b), *Re A (A Child) (Article 13(b))* [2021] EWCA Civ 939 in which Moylan LJ carried out a further analysis of the case law. I do not intend to add to the extensive jurisprudence on this topic in this judgment, but merely seek to identify the principles derived from the case law which are relevant to the present appeal.

47. The relevant principles are, in summary, as follows.

(1) The terms of Article 13(b) are by their very nature restricted in their scope. The defence has a high threshold, demonstrated by the use of the words "grave" and "intolerable".

(2) The focus is on the child. The issue is the risk to the child in the event of his or her return.

(3) The separation of the child from the abducting parent can establish the required grave risk.

(4) When the allegations on which the abducting parent relies to establish grave risk are disputed, the court should first establish whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then establish how the child can be protected from the risk.

(5) In assessing these matters, the court must be mindful of the limitations involved in the summary nature of the Hague process. It will rarely be appropriate to hear oral evidence of the allegations made under Article 13(b) and so neither the allegations nor their rebuttal are usually tested in cross-examination.

(6) That does not mean, however, that no evaluative assessment of the allegations should be undertaken by the court. The court must examine in concrete terms the situation in which the child would be on return. In analysing whether the allegations are of sufficient detail and substance to give rise to the grave risk, the judge will have to consider whether the evidence enables him or her confidently to discount the possibility that they do.

(7) If the judge concludes that the allegations would potentially establish the existence of an Article 13(b) risk, he or she must then carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to the risk.

(8) In many cases, sufficient protection will be afforded 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.

(9) In deciding what weight can be placed on undertakings, the court has to take into account the extent to which they are likely to be effective, both in terms of compliance and in terms of the consequences, including remedies for enforcement in the requesting State, in the absence of compliance.

(10) As has been made clear by the Practice Guidance on "Case Management and Mediation of International Child Abduction Proceedings" issued by the President of the Family Division on 13 March 2018, the question of specific protective measures must be addressed at the earliest opportunity, including by obtaining information as to the protective measures that are available, or could be put in place, to meet the alleged identified risks.

48. In his judgment in the recent case of *Re A*, Moylan LJ (at paragraph 97) gave this warning about the failure to follow the approach set out above in paragraph (4):

> "if the court does not follow the approach referred to above, it would create the inevitable prospect of the court's evaluation falling between two stools. The court's "process of reasoning", to adopt the expression used by Lord Wilson in *Re S*, at [22], would not include either (a) considering the risks to the child or children if the allegations were true; nor (b) confidently discounting the possibility that the allegations gave rise to an Article 13(b) risk. The court would, rather, by adopting something of a middle course, be likely to be distracted from considering the second element of the *Re E* approach, namely "how the child can be protected against the risk" which the allegations, if true, would potentially establish."

In that case, this Court concluded that the judge had indeed fallen between two stools.

49. When analysing the judge's treatment of the Article 13(b) defence in the present case, it is instructive to start by considering the ex tempore judgment, then the supplemental judgment, and finally the approved judgment.

50. At the start of the section of the ex tempore judgment dealing with Article 13(b), the judge recorded the mother's case that the risk of harm to which IG would be exposed if returned was "the very strong likelihood that he would be separated from his mother pending a court's decision in South Korea as to his long term welfare" and that "the separation from his primary carer would expose him to an intolerable situation". The judge then summarised Ms Allman's arguments in support of the defence. She then summarised the expert evidence provided by Ms Kim. At paragraph 31, the judge said:

> "An important strand of the mother's argument is that the father will ensure the court removes [IG] from the care of his mother on their arrival in Korea. I need to consider the evidence that the father was controlling and is the sort of person who will remove a breastfed baby from his primary caregiver. I do not make any

> findings of fact, but I note that there is little evidence that the father was controlling."

There then follows some references to text messages. As noted above, in the approved transcript, the extensive quotations from the text messages are all set out in the section dealing with habitual residence. In the ex tempore judgement, however, they are divided between the habitual residence section and the Article 13(b) section. In the Article 13(b) section, after quoting from the text messages, the judge concluded:

> "I have no impressions from the texts that the father is aggressive or out to remove IG from his breastfeeding mother."

51. The judge's conclusions on the Article 13(b) defence are set out in paragraph 34 of the ex tempore judgment which reads:

> "34. Having read the expert's statement I find the mother will be able to remain on one visa or another in South Korea whilst the family go through the courts. The father will assist her with money, which will be topped up by benefits. He will pay for a deposit on a flat and assist with rent for up to a year. I accept the undertakings are not enforceable as a court order, but nothing I have read about the father and his family gives me reason to believe that he would not abide by the undertakings given to this court. He will bear in mind I know that in the years to come IG will come to this country either to live or to visit, and the father will come too in the years ahead. It would be very unfortunate and short-sighted if he were not to comply with solemn undertakings that he has given to this court. The court system in Korea has similar protections to those we have here. There is legal aid based on means, a welfare checklist similar to our own, and protection to those suffering domestic abuse, including shelters and websites which offer advice. The decision about who will be the primary carer in this case is based on very similar principles to those we have in this court. I do not find that [IG] will be separated from his primary caregiver in the way that Miss Allman suggests. There is no grave risk of harm in this case or evidence that [IG] will be placed in an intolerable situation. The undertakings will ensure that there is a soft landing on the mother's return to South Korea, and I order her summary return to that country."

52. In her supplemental judgment, delivered after further oral and written submissions, the judge recited in some detail the parties' respective evolving positions about the protective measures required to address the risk under Article 13(b). She then set out a further summary of the legal principles by reference to the case law, including *Re E*, supra, *Re C*, supra, and a further decision of MacDonald J, *Uhd v McKay* [2019] EWHC 1239 (Fam). In her discussion of the issues beginning at paragraph 43, she began by reminding herself that the efficacy of any proposed protective measures must be addressed with care and that, when considering the efficacy of the proposed undertakings, the court has to take into account the extent to which they are likely to be

effective, both in terms of compliance and in terms of the consequences in the absence of compliance. At paragraph 47 of the supplemental judgment she said:

> "I had made it clear that IG would find it intolerable to be separated from his mother. She is his primary carer, he is very young (he is now aged 18 months) and he is still breastfeeding. I accept that separation would be intolerable even though he has regular unsupervised contact with the father, four times a week in this country. My concerns in this case also relate to whether the mother would have somewhere to live in South Korea and some money to live off."

53. The judge then set out the father's latest offer about accommodation costs and continued (at paragraph 50):

> "The mother's argument is that up to £400 per month pays for a bedsit or studio and this is not big enough. The issue is that it is all the father can afford when taking into account the other financial support he is offering. [Father's counsel] made it clear that he had savings of about £10,000 and he would be using his savings to make these payments as well as flying IG over from England. In my judgment a bedsit or studio for a single mother with a small child is sufficient for the sort of time that is envisaged, for up to two years at worst."

After considering further submissions about the location of accommodation, she concluded that she was satisfied that the father's undertaking to pay a £3000 deposit and up to £400 rent a month would ensure that she had accommodation "in a nice part of Chuncheon".

54. The judge continued (at paragraph 54):

> "The next issue is about maintenance. The mother says she needs it all paid up front. The father just cannot afford it. He agreed to pay £600 upfront and then will pay up to £600 per month if she is not receiving the state benefits she received before she left with IG in March 2020. If she receives as expected £400 per month benefits, he will pay £200 to bring it up to £600. That amount of maintenance is appropriate in my judgment. The father is being realistic in making undertakings that he can meet. He has told the court he cannot afford the £15,000 the mother wants in advance, and I have no reason to doubt that this is an accurate assessment of his financial position (and it was confirmed by the mother). A payment upfront followed by a promise to pay up to £600 a month or to top up the benefits she will get to £600 is sufficient to ensure that the mother will have enough money to care for IG."

The mother had wanted undertakings to from the father as the financial provision after April 2022, but the judge concluded that this was a matter for the Korean court.

55. The judge continued:

> "56. The next concern for this court is to ensure that the father does not remove IG from his mother's care on her arrival in South Korea. On occasions, he has told the mother that because of the money his parents have spent on IG that they will get custody of him. He has also said that the mother is not caring appropriately for IG and that she has mental health problems. It is hardly surprising that this has frightened the mother and that she feared the father may remove IG on her arrival in South Korea.
>
> 57. In response to the mother's fears, the father has given an undertaking to the effect that he will not remove IG from the care or control of the mother, save for contact, pending any order of the Korean court. It is particularly important that I consider carefully the weight I can give to this undertaking and whether it is likely to be effective in South Korea."

56. The judge then noted the father's further undertaking to assist the mother in making any applications for a visa. She set out the expert evidence and concluded that she had no reason to believe that the mother will not be able to extend her visa. She recorded the father's additional undertakings including that he would not bring proceedings against the mother or maternal grandmother and would assist the mother to obtain state benefits. She then continued:

> "60. The questions for this court are what weight do the undertakings have and do they lessen the grave risk to IG. In my judgment they do. I bear in mind the Guide to Good Practice in respect of Article 13(b) recognises the issue that arises when dealing with civil law jurisdictions and says the following:
>
> > 'It should be noted that voluntary undertakings are not easily enforceable, and therefore may not be effective in many cases. Hence, unless voluntary undertakings can be made enforceable in the State of habitual residence of the child, they should be used with caution, especially in cases where the grave risk involves domestic violence.'
>
> 61. Although interim orders are not recognised in the Korean court as they are not a final and conclusive decision of this court, if filed with the Korean court as an attachment to an application the order made by this court 'may be considered by the Korean court in making their own decision' … In other words, the Korean court will take this court's order into account when making its own decision.
>
> 62. The father's solemn undertakings given to this court therefore will be before the Korean court in that way and if the father were to breach his undertakings given to the High Court in England and Wales, the Korean court, like any other family

> court, would take that into account. In particular, any family court would have a strong view about a parent removing a young child from his mother having given a different court an undertaking that he would not do so."

The judge added that the mother should be comforted by the fact that the Korean courts applied a welfare checklist "not dissimilar to our own" and had the power to make early decisions on matters such as child support and parenting.

57. At paragraph 66 of the supplemental judgment, the judge set out her conclusion:

> "In my judgment, the undertakings put forward by the father are measures which address the risks I have set out above. I consider they are an appropriate response to the mother's concerns, and I accept them. A substantial amount of money will be paid to the mother before she leaves the country. The undertakings have weight as they can be taken into account in the Korean court. The mother has early access to the Korean court system which applies similar welfare principles to those we apply in this jurisdiction and can consider ancillary matters before a substantive application. The combination of these protective factors lead me to the view there is not a grave risk of IG being placed in an intolerable situation within Article 13(b) on his return to South Korea."

58. In her approved judgment the judge's treatment of the Article 13(b) defence is more detailed than in the ex tempore judgment. She identified *Re E* as the leading authority and quoted the summary of the principles set out by MacDonald J in *MB v TB* [2019] EWHC1019 (Fam). She started her analysis of the issue at paragraph 42:

> "I must take the mother's complaints at their highest but at the same time I should evaluate them. Ms Allman argues that the risk of harm that IG would be exposed to in this case if returned which would represent an intolerable situation is the very strong likelihood that he would be separated from his mother pending a court's decision in South Korea as to his long-term welfare. The separation from his primary carer would expose him to an intolerable situation."

She then recited Ms Allman's submissions about the mother's difficulties over immigration and visas, and her submissions that interim orders and undertakings would not be recognised by the Korean courts, the fact that the father had made allegations about the mother's poor care of the child, and regarding the cost of her accommodation in Korea. She summarised Ms Allman's case as being that the likely consequence of IG's summary return to Korea would be that he would be removed from his mother's care for an indeterminate time almost immediately on arrival and that she would not have the immigration status or financial wherewithal to remain in the country beyond the period of 90 days.

59. The judge then summarised the expert's evidence about immigration and visas and concluded (at paragraph 48):

> "I could not see why an application would be refused as the mother would be involved in court proceedings considering the parents' divorce and IG's welfare and she is IG's primary carer. I did not consider the mother's immigration position to be a risk to IG."

She then summarised the information from the lawyer about recognition of interim orders and undertakings in South Korea, other remedies available to the mother, and the approach of the courts of that country to parental disputes over children.

60. The judge then considered the mother's concern that IG would be removed from her care. The first sentence of paragraph 31 of the ex tempore judgment is now found at paragraph 53 of the approved judgment:

> "An important strand of the mother's argument is that the father will ensure the court removes IG from the care of his mother on their arrival in Korea."

In the approved judgment, the judge then continued:

> "I accept that the mother fears the father will remove IG from her care as he has said so on one or two occasions. He has been critical of her care for IG and on one occasion during an argument has said he would get IG because his parents have more money."

At paragraph 54, the judge observed:

> "The question when looking at grave risk is whether the father would remove a breastfed baby from the mother, his primary caregiver. Part of the question is whether the father can be trusted in relation to the undertakings."

The judge briefly referred to the evidence, including text messages, that the father had been controlling. As noted above, in the approved judgment the detail of the text messages is set out in the earlier section dealing with habitual residence. The passage dealing with the text messages in the Article 13(b) section of the approved judgment is very brief and ends with this finding:

> "I have no impression from the text messages exhibited that the father wants to make life difficult for the mother if she were to return to South Korea or that he is aggressive."

61. The judge's conclusion that the Article 13(b) defence was not made out is then expressed in more detailed terms than in the ex tempore judgment:

> "61. The father is willing to give the undertakings currently before the court, he says he will not remove IG from her care, he will assist her with money, which will be topped up by benefits. He will pay for a deposit on a flat and assist with rent for up to a year. He is freely giving these undertakings and prepared to give further ones. I accept the undertakings are not enforceable as a

> court order, but nothing I have read about the father and his family gives me reason to believe that he would not abide by the undertakings given to this court. He will bear in mind I know that in the years to come IG will come to this country either to live or to visit, and the father will come too in the years ahead. It would be very unfortunate and shortsighted if he were not to comply with solemn undertakings that he has given to this court.
>
> 62. The court system in Korea has similar protections to those we have here. There is legal aid based on means, a welfare checklist similar to our own, and protection to those suffering domestic abuse, including shelters and websites which offer advice. The decision about who will be the primary carer in this case is based on very similar principles to those we have in this court. Although the undertakings do not have separate force in South Korea, they 'may be considered' by the court.
>
> 63. In all the circumstances, I do not find that IG will be separated from his primary care giver in the way that Ms Allman suggests. There is no grave risk of harm in this case or reliable evidence that if returned IG will be placed in an intolerable situation by the removal from his mother's care. If there is such a risk, the father's undertakings ensure that the risk is minimised. The undertakings which are still being finalised will ensure that there is a soft landing on the mother's return to South Korea and thereafter this court can rely on the South Korean court to protect IG once he is there."

62. The second and third grounds of appeal are that the judge erred in her application of the law relating to Article 13(b) and in concluding that there was not a grave risk that a return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

63. It was Ms Allman's case that the Article 13(b) defence was advanced on the basis of three scenarios likely to result in IG's separation from his mother on a return to Korea:

(1) IG being removed from her care without an order;

(2) the mother being arrested for child abduction, or

(3) the mother being unable to remain in the country because of (a) her immigration status and/or (b) not having accommodation or the financial means to support herself.

64. Ms Allman argued that an understanding of the judge's reasoning in relation to the defence was significantly complicated by that reasoning being spread across the three judgments and the post-hearing discussion. She identified a number of inconsistencies between the judgments which she contended made it difficult to discern what the judge decided and the reasons for her decision. For example, in the approved judgment at paragraph 63 the judge stated:

> "There is no grave risk of harm in this case or reliable evidence that if returned IG will be placed in an intolerable situation by the removal from his mother's care."

In the supplemental judgment, however, at paragraph 60, the judge said:

> "The questions for this court are what weight do the undertakings have and do they lessen the grave risk to IG."

Thus the supplemental judgment, which as described above was distributed before the approved judgment, seemingly found that there was a grave risk and then considered whether it was addressed by the undertakings whereas the later approved judgment concluded that there was no grave risk at all. Ms Allman submitted that it is impossible to know in the circumstances whether the court concluded that there was a grave risk or not.

65. A further inconsistency identified by Ms Allman related to the question whether there was a risk of IG being removed from his mother's care. In the ex tempore judgment at paragraph 32, the judge said:

> "I have no impression from the texts that the father is … out to remove IG from his breastfeeding mother."

In the supplemental judgment at paragraph 56, however, she said:

> "he has told the mother that because of the money his parents have spent on IG that they will get custody of him. He has also said that the mother is not caring appropriately for IG and that she has mental health problems. It is hardly surprising that this has frightened the mother and that she feared the father may remove IG on her arrival in South Korea."

Then in the approved judgment there are found the second and third sentences of paragraph 53 which do not appear in the ex tempore version:

> "I accept that the mother fears the father will remove IG from his care as he has said so on one or two occasions. He has been critical of her care for IG and on one occasion during an argument has said he would get IG because his parents have more money."

Ms Allman submitted that, despite having accepted in the supplemental and approved judgments that the father had threatened to remove the child, it is not apparent from any of the judgments that the judge gave any or any sufficient weight to this threat when considering whether the defence was made out. Consequently, it is unclear whether she accepted this was a grave risk which merited the implementation of protective measures.

66. Ms Allman contended that, in the ex tempore judgment, the judge had failed to address the question of whether a grave risk to the child arose by reason of a lack of adequate financial and practical support to ensure that the mother had somewhere to live and the means to support herself. For that reason, she was asked to address material omission

after the judgment. Ms Allman submitted that it is clear from the transcript of the exchanges between the judge and counsel after the ex tempore judgment that the judge had failed to consider this aspect before reaching her decision. On several occasions during those exchanges, after Ms Allman made a submission about the adequacy of the proposed undertakings, the judge seemed to accept the submission, (acknowledging that they were "good points") and subsequently decided to prepare the supplemental judgment. Ms Allman submitted, however, that the analysis in the supplemental judgment still failed to examine in concrete terms or sufficient detail the position that the child would be in after returning to Korea. For example, the judge's conclusion that financial support offered by the father would be sufficient to enable the mother to obtain accommodation in "a nice part of Chuncheon" was unsupported by any evidence save for a short letter from the father containing property details in Korean without a translation. Furthermore, there was no concrete evidence as to the benefits to which the mother would be entitled, merely unsupported assertions, and no analysis of the implications for the child if the mother did not in fact receive benefits in the sum of £400 as asserted by the father.

67. Ms Allman further argued that, when deciding whether the protective measures were adequate to meet the risks, the judge's conclusions are inconsistent with, and go beyond, the expert evidence without giving reasons for doing so. In particular, Ms Allman submitted that the judge wrongly concluded that the expert evidence demonstrated that the mother would be able to remain in Korea on one visa or another when in fact that evidence was much more circumspect. It was not established that the mother would definitely be able to enter the country on her current visa. Rather, it demonstrated that she would have to apply for an extension, without evidence as to how long that process might take. Furthermore, it was clear from the expert's response to supplemental questions that the grant of a visa is discretionary. The judge's conclusion (at paragraph 48 of the approved judgment) that she could not identify any reason why a visa would be refused was therefore unsupported by the evidence. The judge made assumptions about the exercise of discretion by the immigration authorities which she was not entitled to make. Ms Allman also submitted that the judge said that the mother will be able to apply for ancillary orders promptly so that the Korean court would be seised of issues about the child's welfare. Ms Kim's evidence was that the Korean court would only become seised of interim matters within a substantive suit for divorce. Although Ms Kim had advised that the mother would be able to initiate proceedings before she arrived back in Korea, there was no evidence before the judge that the Korean court would entertain such proceedings or make interim orders while divorce proceedings are still pending in this country. Ms Allman also contended that the judge had wrongly interpreted the expert evidence as indicating that the mother would qualify for legal aid in Korea. Finally, she submitted that the judge had attached excessive weight to Ms Kim's statement that any undertakings to the English court "may be considered" by the Korean court when making its decisions. The weight given to the impact of the undertakings, or breach thereof, being "considered" by the Korean court exceeded the evidence before the judge. Undertakings to an English court are not enforceable in Korea and, in placing significant weight on the undertakings offered by the father, the judge completely failed to take into account the consequences for the child if they were not complied with.

68. It was in the context of the alleged inconsistencies between the three judgments that Ms Allman sought to rely on her fourth ground of appeal. It was her contention that the

inconsistencies are sufficient to amount to a serious procedural irregularity and unfairness to the mother.

69. In reply, Mr Jarman submitted that the judge had been entitled to conclude, as she said in the approved judgment at paragraph 63, that there was "no grave risk of harm in this case or reliable evidence that if returned IG will be placed in an intolerable situation by the removal from his mother's care". This conclusion was based on (1) her finding that the father had not been controlling towards the mother, (2) her assessment of the mother's evidence and the text messages, from which she concluded that she had "no impression … that the father wants to make life difficult for the mother if she were to return to South Korea or that he is aggressive", and (3) the father's undertaking not to remove IG from the mother's care save for contact pending proceedings in South Korea. In the absence of reciprocal recognition and enforcement of English orders in Korea, the judge had to assess the father's reliability. She concluded: "nothing I have read about the father and his family gives me reason to believe that he would not abide by the undertakings". Mr Jarman submitted that her conclusion about risk, and the findings on which it was based, were open to her on the evidence and there was no basis on which they could be set aside by this Court.

70. Mr Jarman argued that the intention and remit of the father's proposed undertakings were clear before the judge came to give her judgment on 9 March. But because the mother had failed to respond to his proposed undertakings in her statements, the judge was left in the unhappy position of having to deal with the undertakings in the absence of any clarity as to the mother's position on the protective measures. There had been a failure to address the specific protective measures at the earliest opportunity, as required by case law and the President's Guidance. In the circumstances, the judge's decision to deal with the details of the undertaking by requesting further written submissions and delivering a supplemental judgment was a sensible course and not inconsistent with the overall summary approach of the Hague Convention. Mr Jarman submitted that there is no material inconsistency between the judgments. The court's overall decision is abundantly clear. The amendments made between the ex tempore judgment and the approved version were limited. Accordingly, there was no serious procedural irregularity.

71. In the event, Mr Jarman submitted, the undertakings offered by the father were well in excess of what is normally proposed in abduction proceedings. In contrast, the mother's demands had been excessive and disproportionate. Standing back and looking at the judgments as a whole, the judge was clear in her findings on the mother's allegations and also as to the need for protective measures, including undertakings, to ensure that the mother and IG were properly provided for when they returned to South Korea.

Discussion and conclusions

72. I deal first with the criticisms of the process adopted by the judge of delivering a supplemental judgment and then amending the transcript of the judgment delivered ex tempore.

73. There are several circumstances in which the first version of a judgment may be amended. First, in the case of a *reserved* judgment, it is now the almost invariable practice in the civil and family courts, including this Court, for a reserved judgment to be sent to the parties' legal representatives in draft a few days before it is formally

handed down. The purpose of doing so is to enable the lawyers to identify typographical or factual errors. Judges normally warn the parties that this process does not provide an opportunity to re-argue the merits of the case, and usually the lawyers comply with this warning. Secondly, the judge may be asked to clarify or amplify his or her reasons for the decision. This process was endorsed by this court in *English v Emery Reimbold and Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409, and is commonly, perhaps too commonly, used in family cases, following the decision of this court in *Re B (Appeal: Lack of Reasons)* [2003] EWCA Civ 881, [2003] 2 FLR 1035. Thirdly, the judge may have omitted to deal with an issue in the case. In those circumstances, a supplemental judgment addressing that issue may be appropriate, perhaps after receiving further submissions. Fourthly, the judge may himself or herself conclude that an amendment is required. On some rare occasions, the judge may on further reflection change his mind about the decision. A judge has jurisdiction to change his or her mind, at least until the order carrying the judgment into effect is drawn up and perfected: *Re L-B (Children) (Preliminary Finding: Power to Reverse)* [2013] UKSC 8, [2013] 1 WLR 634. Finally, when a judgment is delivered ex tempore, a judge may amend the transcript when it is delivered for approval. In most cases, such amendments are confined to typographical errors or changes in wording. The judge may take the opportunity to rephrase what he or she has said to add greater clarity. It is unusual, however, for a judge to undertake an extensive rewriting of the transcript of the judgment.

74. None of these courses of action is objectionable and each of them may be appropriate in order to meet the overriding objective to deal with the case justly. In some cases, however, amending or amplifying a judgment may obscure rather than clarify the judge's reasoning. Ms Allman submits that this is what has occurred in this case. There are inconsistencies between the three judgments on both issues under appeal which make it harder to discern the reasons for the decisions. As to her decision about habitual residence, I think it is still possible to identify the judge's reasons. I have more difficulty, however, with identifying her reasons for rejecting the Article 13(b) defence.

75. I turn next to consider the judge's treatment of habitual residence.

76. I have looked at the differences in the various observations by the judge in the ex tempore judgment, the subsequent exchanges with counsel, and the approved judgment. I do not accept Ms Allman's argument that these differences give rise to a lack of clarity in her finding as to precisely when IG acquired habitual residence in South Korea. It is correct that, in the ex tempore judgment the judge said:

> "The child was integrated into the father's family and I find lost his habitual residence in the United Kingdom on his arrival."

In the discussion that followed immediately after the judgment was delivered, however, she quickly corrected herself, observing she should have said that habitual residence was acquired by 7 January, adding that she "certainly did not mean to say by the day the child arrived". In her approved judgment, she did not specify a date. Instead she said at paragraph 38:

> "I find IG lost his habitual residence in the United Kingdom soon after his arrival and certainly by 9 March 2020 when he was removed by his mother"

and at paragraph 39:

> "I find that in this case habitual residence will have moved very quickly to the new state."

Although the judge did not identify a precise date on which IG acquired habitual residence in South Korea, it is clear to my mind that her conclusion was that it was acquired "soon after" or "very quickly" after his arrival in South Korea.

77. The judge's analysis of the factors relevant to determining habitual residence is set out in some detail in paragraphs 13 to 37 of her approved judgment, and her summary of the reasons for her conclusion that he had acquired habitual residence in south Korea at paragraphs 38 to 39 quoted above. I do not agree with Ms Allman's submission that the judge failed to carry out a comparative exercise of IG's circumstances in the two countries, or that the reasoning did not adequately reflect the complexities of the case. The judge considered the parents' intentions but, in line with the authorities she cited, did not in my view attach excessive weight to them. I do not agree with Ms Allman's criticism that, having set out the mother's arguments and evidence about the child's own circumstances, she failed to bring them into consideration in her final analysis. The judge asserted that she had carried out a child-focussed assessment, and I see no reason to doubt that she did. This is illustrated by her conclusions she reached at paragraph 38:

> "IG had no life independent of his father and mother. As he was not of school age, his life would have revolved around his parents who lived in the paternal family's home. The home he went to in South Korea was a stable and permanent one …."

78. Similarly, I do not agree with Ms Allman's submission that, in analysing the parents' intentions, she failed to have regard to all the evidence. The judge said that she had considered all of the text messages, and cited them extensively. This presented her with some difficulties when structuring her judgment, because some of the texts were relevant both to habitual residence and to Article 13(b), and this led her to redraft the passages dealing with the texts when she came to approve the transcript of what she had said. I am satisfied, however, that she did analyse the texts carefully and have their contents in mind when considering the habitual residence issue. It was plainly open to the judge to conclude on the evidence that the parties travelled to South Korea with the intention of staying there for a few years.

79. In oral submissions, Ms Allman developed a further argument. If it was the case that the child did not acquire habitual residence immediately upon arrival in South Korea, the fact that the mother became extremely unsettled very quickly thereafter prevented IG from ever achieving the required degree of integration. It is clear from the approved judgment, however, that the judge looked very carefully at the mother's unhappiness in South Korea, and at its causes and consequences, as part of her overall evaluation of the habitual residence issue. Those matters were mentioned earlier in the judgment, and as Lewis LJ observed in the course of the hearing, it is difficult to think that she had forgotten about them when reaching her conclusions at paragraphs 38 to 39. I agree with Mr Jarman that, as part of her analysis of the habitual residence issue, the judge carried out a careful evaluation of the evidence about the father's conduct, restricted as it inevitably was in the context of the summary procedure. She dismissed the allegation that the mother and child had been retained in South Korea against the mother's will.

Her rejection of the mother's allegation of coercive control was plainly open to her on the evidence, and is not a conclusion with which this Court should interfere.

80. I accept Mr Jarman's analysis of the application of the considerations at paragraph 46 of Lord Wilson's judgment in *Re B*. IG was a child aged three months with limited integration in England before travelling to South Korea. The joint plan was to live there for a few years, the mother on a spousal visa, and both parents working to save money for an eventual return to England. On arrival there, he and his parents lived for ten weeks in secure accommodation with the paternal grandparents. In those circumstances, I conclude that the judge was entitled to conclude that IG acquired habitual residence in South Korea shortly after he arrived.

81. I turn finally to the judge's treatment of the Article 13(b) defence.

82. The mother contended that returning IG to South Korea would give rise to a grave risk that he would be separated from her and thereby suffer psychological harm or placed in an intolerable situation. The risk of separation arose from the following factors. (1) The father had threatened to remove IG from her care. (2) There was a possibility that he will instigate or support civil or criminal proceedings against her for child abduction. (3) The mother's immigration status would be precarious and she could be refused permission to enter or remain in the country. (4) The mother would be unable to afford the cost of accommodation or meeting the needs of herself and the child.

83. It is evident from the various transcripts before this Court – the three judgments and the exchanges with counsel after the ex tempore judgment – that the judge tried to address the Article 13(b) defence in a way that was consistent with the guidance provided by previous authorities. Regrettably, however, I have concluded that she failed to do so.

84. In paragraph 34 of the ex tempore judgment, the judge first concluded that the mother would:

> "be able to remain on one visa or another in South Korea whilst the family go through the courts."

She then set out in two short sentences the contents of the undertakings which the father was proposing to offer.

> "The father will assist with money, which will be topped up by benefits. He will pay for a deposit on a flat and assist with rent for up to a year."

The judge acknowledged that undertakings would be unenforceable in South Korea but added:

> "nothing I have read about the father and his family gives me reason to believe that he would not abide by the undertakings given to this court."

She observed that the father wished to return to England at some point when he would then be at risk if he had failed to comply with his undertakings. Having noted similarities between the Korean and English family court systems, the judge concluded:

> "I do not find that [IG] will be separated from his primary caregiver in the way that Miss Allman suggests. There is no grave risk of harm in this case or evidence that [IG] will be placed in an intolerable situation."

Finally, the judge added:

> "The undertakings will ensure that there is a soft landing on the mother's return to South Korea…"

85. It would seem from the ex tempore judgment, therefore, that at the end of the hearing on 9 March 2021, it was the judge's conclusion that there was not a grave risk within the meaning of Article 13(b). That is what the judge said at the end of paragraph 34. Her treatment of the proposed undertakings was very perfunctory and certainly not on a scale which would equate with the type of careful consideration required by the authorities before concluding that an identified grave risk is ameliorated.

86. The supplemental judgment, however, delivered only six days later after receiving further oral and written submissions, seems to proceed on a different basis. The judge began by setting out in full the parties' respective positions on the proposed undertakings as elaborated in the supplemental written submissions. She then set out in much greater detail than she had in the ex tempore judgment the case law on Article 13(b), focusing in particular on dicta relating to protective measures. It is clear from her observations at the start of the "discussion" section of the supplemental judgment at paragraph 43 that she was considering the proposed undertakings not simply as steps to be taken to facilitate the return of the mother and child to South Korea – to "ensure that there is a soft landing" – but rather to protect IG against the risk of grave harm or an intolerable situation were he to be separated from his mother.

87. Having considered the competing arguments relating to the undertakings requested by the mother and offered by the father, the judge then said:

> "The questions for this court are what weight do the undertakings have and do they lessen the grave risk to IG."

In that sentence it seems that the judge was proceeding on a different basis from that set out in the ex tempore judgment. She was now apparently of the opinion that there was a grave risk to the child if he was returned to South Korea, and the question was whether the undertakings and other measures would be sufficient protect him from that risk. That sentence is consistent with the way the judge had cited passages from the case law a few paragraphs earlier in the supplemental judgment, focusing in particular on protective measures, but inconsistent with the conclusion she had expressed in the ex tempore judgment.

88. The judge then expressed her conclusion that the undertakings did lessen the grave risk to IG and set out her reasons. In particular, she concluded that, although the undertakings were not enforceable in South Korea, they would be taken into account by the court in that country when the mother brought proceedings, which according to the expert evidence she would be entitled to start before she returned. The judge then set out her conclusion in paragraph 66, as quoted above, to the effect that:

> "The combination of these protective factors lead me to the view there is not a grave risk of IG being placed in an intolerable situation within Article 13(b) on his return to South Korea."

The overall tenor of the supplemental judgment is that there was a grave risk of harm if the child was separated from his mother on return to South Korea but that this could be ameliorated or avoided by the undertakings and protective measures which could be put in place.

89. The approved judgment seems to be an attempted synthesis of the ex tempore judgment and the supplemental judgment. In the conclusion at paragraph 63, the judge said that:

(1) she did not find that IG would be separated from his primary care giver;

(2) there was no grave risk of harm in this case or reliable evidence that if returned IG will be placed in an intolerable situation by the removal from his mother's care;

(3) if there was such a risk, the father's undertakings ensure that the risk would be minimised;

(4) the undertakings ("which are still being finalised") would ensure that there is a soft landing on the mother's return to South Korea;

(5) thereafter this court can rely on the South Korean court to protect IG once he is there.

90. Throughout all three judgments, there seems to be a conflation of the question whether there was a grave risk of harm to IG and, if there was, the efficacy of the proposed protective measures. To my mind, it is unclear whether or not the judge concluded that there was in fact an Article 13(b) grave risk to IG. At the conclusion of the approved judgment, the judge reiterated what she had said in the ex tempore judgment – that there was no Article 13(b) risk – but added in the alternative that if (as she had said in the supplemental judgment) there was such a risk, it was "minimised" by the father's undertakings. Standing back and looking at the three judgments together, it could be said that what the judge was deciding was that there would be a grave risk to IG if he was separated from his mother but that the risk would be averted by the undertakings and protective measures proposed by the father. At no point in any of the judgments, however, did the judge put her conclusion in those terms. Furthermore, there is the fact that the approved judgment includes the remark that at that stage the undertakings "are still being finalised". The judge was correctly stating the position as it had been at the point she delivered the ex tempore judgment. But if there was a grave risk, the fact that undertakings were still being finalised meant that the judge could not be satisfied at that stage that the Article 13(b) defence was not made out.

91. The difficulty in understanding precisely what the judge was deciding about the risk is illustrated by her various conclusions about the mother's allegation that the father would remove IG from her care on her return to Korea. In the ex tempore judgment, having identified the mother's argument that "the father would ensure that the court removes IG from his mother on arrival in Korea", the judge continued (at paragraph 31):

> "I need to consider the evidence that the father is controlling and is the sort of person who will remove a breastfed baby from his primary caregiver."

She reminded herself that she was not making findings of fact, but added that there was little evidence that the father was controlling. She then considered a number of text messages and concluded (at paragraph 32):

> "I have no impression from the texts that the father is aggressive or out to remove IG from his breastfeeding mother."

In the corresponding section of the approved judgment (at paragraph 54), however, she identified the issue in a different way which again suggested that she was conflating risk and protective measures:

> "The question when looking at grave risk is whether the father would remove a breastfed baby from the mother, his primary caregiver. Part of the question is whether the father can be trusted in relation to the undertakings."

Having referred to the texts, she expressed her conclusion in slightly different terms (at paragraph 56):

> "I have no impression from the text messages exhibited that the father wants to make life difficult for the mother if she were to return to South Korea or that he is difficult."

She did not expressly find that the father would not remove the child. Instead, she noted that he was willing to give undertakings including that he would not remove IG from her care. Whilst accepting that undertakings were not enforceable, she concluded that nothing she read about the father and his family gave her reason to believe that he would not abide by the undertakings.

92. After extensive study of the two judgments, I am unclear whether the judge was finding that there was no risk of the father removing IG from his mother's case or alternatively that there was a risk but it was ameliorated by his undertaking not to do so, notwithstanding that it was unenforceable in the Korean court. I am left in the position of being unclear as to precisely what the judge found about the risk. Rather like the judge in *Re A*, it seems to me that she fell between two stools.

93. In addition, I find that in several respects the judge's analysis of the protective measures was flawed. There are difficulties with the judge's conclusion in the supplemental judgment about whether and how the mother's costs of accommodation and living expenses would be met. There was insufficient evidence that the sums the father was suggesting would be sufficient. There was insufficient evidence to support the judge's finding that the sum offered for accommodation would be sufficient to enable her to rent a property in "a nice part of Chuncheon". Similarly, there was no independent evidence of the level of benefits that would be available to the mother, and there was insufficient consideration of whether the sums proposed by the father would be sufficient, nor of the consequences for IG if they were not paid.

94. Finally, although the judge concluded that the father would comply with his undertakings to the court, she did not in my judgment give sufficient consideration to the consequences if he did not. Her observation that

> "nothing I have read about the father and his family gives me reason to believe that he would not abide by the undertakings"

did not absolve her from considering how compliance with the undertakings could be enforced. Although the expert evidence showed that undertakings to a foreign court "may be considered" by a Korean court, the fact is that they are not enforceable in that jurisdiction. The mother would have to start proceedings in that court and the expert Ms Kim advised that a party could only seek relief such as residence or interim maintenance in a substantive suit. Although Ms Kim suggested that it would be possible for divorce proceedings to be started in Korea before the mother and IG returned, there was no consideration of whether that was feasible, given the difficulty, which Ms Allman raised in submissions, that there were ongoing proceedings in this country. There was thus a risk that that the mother might find it difficult to obtain relief from a Korean court in the event that the father failed to comply with his undertakings. I agree with Mr Jarman that there seems to have been a failure to address the specific protective measures at the earliest opportunity, as required by case law and the President's Guidance and there is some force in his submission that the judge was left in the unhappy position of having to deal with the undertakings in the absence of any clarity as to the mother's position on the protective measures. That may be so, but I am concerned that the judge did not give sufficient consideration to the risk of a failure to comply with the proposed undertakings and the difficulties the mother would face in enforcing compliance, and the consequences for the child if that happened. The judge's conclusion at the end of the approved judgment that after the mother's return "this court can rely on the South Korean court to protect IG once he is there" – by which she plainly meant to protect him from being removed from his mother – went further than the evidence allowed.

95. For these reasons, I conclude that the judge's assessment of the Article 13(b) defence was flawed. I would therefore allow the appeal on grounds two and three. In those circumstances, I do not think it necessary to go on to consider whether the process adopted by the judge was procedurally unfair or amounted to a procedural irregularity. The inconsistencies in and uncertainties arising from the judgments have contributed to my conclusion that the judge's treatment of the Article 13(b) defence was flawed and that the appeal should be allowed. Accordingly, if my Lady and my Lord agree, I would refuse permission to amend the grounds to add the proposed fourth ground.

96. As nearly 18 months have passed since the child was abducted from South Korea, it would plainly be preferable for this Court to reach a conclusive decision on the application under the Convention. But it seems to me that this would be to exceed our powers. The issue is plainly finely balanced, and requires careful reconsideration by a judge sitting at first instance. Accordingly, if my Lady and my Lord agree, I would remit the question of whether the mother can establish a defence under Article 13(b) to be determined by another judge of the Family Division, to be allocated by Theis J, the Senior Family Liaison Judge.

LORD JUSTICE LEWIS

97. I agree.

LADY JUSTICE KING

98. I also agree.