[2025] JMSC Civ 108

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. SU2025FD00511

BETWEEN	**DW**	**CLAIMANT**
AND	**CH**	**DEFENDANT**

IN CHAMBERS VIA VIDEO-CONFERENCE

Ms. Kimberly Blackwood, Attorney-at-Law instructed by The Jamaica Central Authority for the Claimant

Ms. J'Nae Peart, Attorney-at-Law instructed by Knight, Junor & Samuels, Attorneys-at-Law for the Defendant

FAMILY LAW - RETURN OF CHILD - THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 1980 - ARTICLE 3, 11, 12 - HABITUAL RESIDENCE – AGREEMENT – CONSENT – WHAT CONSTITUES INFORMED CONSENT - GRAVE RISK - CHILD'S OBJECTION TO BEING RETURNED – WHETHER THIS OBJECTION SHOULD BE THE DETERMINING FACTOR - THE CHILDREN (GUARDIANSHIP AND CUSTODY) ACT, S. 7C AND 7N

HEARD ON: JULY 11 AND 28, 2025

REID, ICOLIN J.

THE APPLICATION

[1] The Claimant, DW, a Lead Highway Engineer, resides in the United States of America ("USA"). The Defendant, CH, is a Receptionist and resides in Jamaica. The Claimant and the Defendant share 1 child together, MW, born on October 29, 2011, in Jamaica.

[2] MW resided with the Defendant in Jamaica up until August 2022 when the Defendant agreed to have MW migrate to Florida, USA to reside with her father, DW. It is disputed whether this arrangement was to be temporary or permanent. On June 30, 2024, MW travelled to Jamaica to visit her mother, CH. MW was scheduled to return to the USA on August 4, 2024, however the Defendant refused to allow her to return.

[3] The Claimant therefore made an Application under The Hague Convention on the Civil Aspects of International Child Abduction ("The Hague Convention") with the Jamaica Central Authority (JCA) for the return of MW to the U.S.A. The JCA thereafter, on the Claimant's behalf, filed a Fixed Date Claim Form on February 13, 2025, seeking the following orders:

> 1. *An Order for the return of [MW] born on the 29th day of October 2011 at the University Hospital of the West Indies to her place of habitual residence in the United States of America.*
>
> 2. *An Order that the Defendant, within twenty-four (24) hours of being notified of the confirmed date of return to the United State of America, hands over [MW] to the Claimant or his personal representative.*
>
> 3. *An Order directing that the Defendant surrenders to the Central Authority all travel documents in her possession belonging to [MW]*
>
> 4. *An Order for travel expenses to be borne by the Claimant.*
>
> 5. *Such further and other relief as this Honourable Court deems fit.*

[4] The following grounds were included as the reasons for the application:

> 1. *The wrongful retention of [MW] by the Defendant as per section 7C (1) of the Children (Guardianship and Custody) Act;*
>
> 2. *The Court may make an Order for the return of [MW] as per section 7M of the Children (Guardianship and Custody) Act;*
>
> 3. *The surrender of all travel documents are necessary to ensure that [MW] is returned to her habitual place of residence.*

ISSUES

[5] The issues to be determined are as follows:

i) Whether there was an agreement between the Claimant and the Defendant for MW to reside permanently in the USA?

ii) Whether the USA is the country in which MW is habitually resident?

iii) Whether MW would be at grave risk if returned to the USA?

iv) Should MW's objection be taken into consideration in deciding whether she should be returned to the USA?

LAW AND ANALYSIS

[6] Jamaica became signatory to **The Hague Convention on the Civil Aspects of International Child Abduction 1980** ("The Hague Convention") on February 24, 2017. **The Children's (Guardianship and Custody) Act** ("The Act") was thereafter amended on May 2, 2017, to give effect to the provisions of The Hague Convention. This allows for the prompt return of children who were wrongfully removed from or retained outside of their country of habitual residence.

[7] Section 7C of the Act which mirrors Article 3 of The Hague Convention states:

> *For the purpose of this Act, the removal to, or retention of a child in, a Contracting State is considered wrongful, where-*
>
> *(a) Such removal or retention is breach of rights of custody or rights of access of an individual or institution or other body, whether attributed to the individual, institution or body either jointly or solely; and*
>
> *(b) At the time of such removal or retention, those rights were actually exercised either jointly or solely, or would have been so exercised, but for such removal or retention"*

[8] Section 7K speaks to timelines that should be considered under the Act. It states:

> *7K. Notwithstanding sections 7I and 7J,*

a) Where, at the date of commencement of Court proceedings, a period of less than one year has elapsed from the date the child was wrongfully removed or retained, the Court shall order the return of the child; or

b) Where the Court proceedings are initiated after the expiration of one year from the date of the wrongful removal or retention of the child, the Court shall order the return of the child, unless it is demonstrated to the Court that the child is now settled in his new environment.

ISSUE 1: *Whether there was an agreement between the Claimant and the Defendant for MW to reside permanently in the USA*

[9] It is clear that there was no written agreement based on the evidence presented by both parties. The court will therefore have to analyse the actions of the parties and determine whether there was an implied agreement.

[10] As it relates to whether there was an agreement between the parties as to the custody and care of the minor child which encapsulates the issue of where the child should permanently reside, the case of **JG v ST** [2022] JMSC Civ 64 is instructive. Shelly-Williams J at paragraph 25 opined:

> *[25] In deciding the agreement or understanding relating to custody and or care of a minor, the court would take into consideration court orders and/or verbal agreements between the parties. In the absence of any such agreements, the actions of the parties would have to be analysed.*

[11] There is much disparity between the evidence presented by both parties. The evidence of the Claimant is that the Defendant agreed to have him "file" for MW, and she would relocate to reside with him in the USA permanently. The Defendant's evidence, to the contrary, is that she was misled by the Claimant when she consented to the child residing overseas during the immigration process.

The Evidence

[12] The Claimant, in his evidence stated that he and the Defendant agreed for MW to migrate to the USA and that the Defendant facilitated the process by ensuring that all MW's documents were prepared and that embassy visits as well as any other process which needed to be completed were done. He further added that he and the Defendant agreed unconditionally that MW would live in the USA and would

visit the Defendant, CH, and family in Jamaica on the holidays. He indicated that at MW's request, she spent the first 2 holidays with him in Florida (that is Christmas 2022 and Summer 2023) to experience the holidays in her new home and to get acclimatized to holidays in Florida. Thereafter, the agreement was for MW to spend all holidays with the Defendant. The Claimant added that the agreement was evident in the fact that MW visited the Defendant in December 2023 for Christmas and was returned to the USA in January 2024.

[13] The Claimant further stated that the Defendant was fully aware that the USA was never meant to be a temporary home for MW. He also pointed out that based on the length of her stay in the USA she was now eligible for US Citizenship.

[14] The Claimant stated that both parties agreed MW would also integrate into the American school system, and later acquire U.S. citizenship, as this would provide greater educational and personal development opportunities. He said all decisions regarding MW's relocation and residence in the USA were made jointly. He said that the arrangement was unconditional, and acknowledged their shared belief in God, although they had different religious convictions.

[15] The Defendant, however, in her evidence indicated that in or around 2020, the Claimant unexpectedly expressed an intention to initiate immigration proceedings for MW. Due to the Claimant's prior history of limited involvement in MW's life and unfulfilled promises, the Defendant stated that she was sceptical but indicated that if the process for U.S. citizenship were to begin, MW should remain in Jamaica until she completed high school. She further indicated that the Claimant did not mention the matter again until 2022, when he stated that the immigration papers had been processed and that MW now needed to participate actively in securing a green card. The Defendant stated that she reiterated her condition that MW finish school in Jamaica, and the Claimant assured her that MW would only need to travel to the USA for a few weeks during the summer of 2022. Based on this assurance and given that the Claimant was in the U.S.A., the Defendant said that she trusted his advice and agreed to assist with the process.

[16] She stated that approximately one week before MW was scheduled to travel, her first time leaving Jamaica, the Claimant disclosed that he had unilaterally enrolled MW in a U.S.A. school. She stated that the Defendant further indicated that failure to attend could jeopardize MW's eligibility for citizenship. Alarmed by this late development, but concerned about harming MW's immigration prospects, the Defendant stated that she allowed MW to travel under strict conditions. These conditions were:

(1) that MW's presence in the USA would be temporary and solely for immigration purposes.

(2) that MW would continue to be raised in accordance with her Seventh Day Adventist faith, including church attendance, modest dress, religious dietary restrictions, and no body modifications.

(3) that MW would return to Jamaica during each school holiday; that if she could not adjust to her new environment, she would return to Jamaica.

(4) that the Claimant would assume full responsibility for MW's physical, emotional, and financial well-being; and

(5) that the Defendant would have regular, liberal, and unsupervised communication with MW.

[17] The Defendant said that after MW travelled to the USA, the behaviour of the Claimant and the Claimant's partner, BW, changed drastically after late 2022 when they refused to return MW to Jamaica.

[18] Contrary to their agreement, the Claimant did not return MW to Jamaica for the December 2022, Spring 2023, or Summer 2023 school holidays. MW was eventually returned to Jamaica in December 2023, only after persistent requests and pressure from the Defendant and her daughter, who purchased the plane ticket.

[19] The Defendant indicated that during the two-weeks stay in Jamaica MW reintegrated smoothly with family and friends. She also ensured that MW resumed medical check-ups, as her asthma had reportedly worsened while in the USA due to a lack of medical attention. MW then returned to the USA in January 2024 to continue the immigration process.

[20] The Defendant further stated that while in Jamaica in December 2023, MW expressed that she was uncomfortable with her living conditions in the USA. Although she was reluctant, she allowed MW to return, hoping the situation would improve. However, MW's social media activity suggested ongoing distress, and the Defendant remained concerned for MW's well-being.

[21] The Defendant stated that in 2024, she learned that it had not been necessary for MW to travel to the USA or be enrolled in school there to complete the immigration process, and she therefore concluded that the Claimant had misled her.

Submissions

[22] Counsel for the Claimant submitted that the Court ought to give due consideration to the dictum of Black J in the case of **Re N (Abduction: Habitual Residence)** [2000] 2 FLR 899 regarding the statement that habitual residence can be lost in a single day if a person leaves a country with the settled intention not to return but to take up long-term residence elsewhere.

[23] Counsel further submitted that the affidavit evidence of the Defendant, filed on the 7th of March 2025, attempted to mislead the Court into believing that she was unaware that the USA would become MW's place of habitual residence. Counsel argued that a proper evaluation of the evidence shows that the Defendant knew that the Claimant was 'filing' for MW and the Defendant not only supported the Claimant in words but in actions, by getting all the child's documentation together and assisting to complete the immigration process for MW to become a Permanent Resident of the USA. Counsel further indicated that if there was no intention to

settle in the USA, then there would have been no need for MW to migrate to the USA as she could have acquired a normal visitor's visa.

[24] Counsel for the Defendant submitted that, by virtue of the decision in **B v D (Abduction: Inherent Jurisdiction)** [2008] EWHC 1246 (Fam), consent to a child's relocation must be informed, voluntary, and free from misunderstandings. Counsel highlighted that at paragraph 23 of the judgment, the court held that the mother's purported consent had been obtained on a false premise and therefore lacked validity. The Court emphasised at paragraph 47, that the only basis upon which a child could change habitual residence was through true voluntary consent.

[25] Counsel submitted that in the case at Bar, the Defendant's consent to MW's relocation to the USA was not based on full disclosure. Counsel drew the Court's attention to the Defendant's evidence which stated that the Claimant informed her that MW would only be in the USA for a few weeks during the summer of 2022. Based on this representation and trusting the Claimant's advice the Defendant assisted with MW's immigration paperwork. Counsel further submitted that had the Defendant known that the relocation was not temporary, she would not have agreed.

[26] Counsel further submitted, that the Claimant subsequently informed the Defendant that MW needed to be enrolled in school in the USA to secure citizenship, presenting this as a mandatory requirement. Counsel argued that the Defendant, having limited access to reliable information, felt compelled to proceed, fearing negative consequences for MW's immigration process. Counsel argued that this was a classic example of consent given under a misapprehension, lacking the qualities of voluntariness and informed agreement.

[27] Council argued that as MW was sent to the USA for a particular purpose, and on specific conditions, and the specific conditions and the particular purpose no longer being relevant, the child was then to retain her place of habitual residence, which is Jamaica. Counsel submitted that, like the mother in **B v D** (*supra*), the Defendant in the case at Bar withdrew her consent in 2024 upon realising the

misrepresentations regarding the necessity and duration of MW's stay in the USA. Counsel noted that in 2025, during these proceedings, the Defendant discovered an alternative pathway to USA citizenship, a Form N-600K, that would not have required MW's relocation. Counsel asserted that had the Defendant been seized of this information earlier, she would not have agreed to send MW abroad.

[28] Counsel further submitted that MW had been sent to the USA for a particular purpose, namely, to obtain USA citizenship, and under specific conditions. Citing paragraph 30 of ***B v D*** *(supra)*, Counsel argued that MW's habitual residence remained in Jamaica and as such, the Claimant had no basis to have brought a Hague Convention claim.

[29] Counsel further relied on paragraph 43 of ***B v D*** *(supra)*, which stated that a child sent abroad merely for educational purposes does not change his habitual residence. Counsel submitted that this principle was affirmed in **RR v ZW** [2022] JMSC Civ 43, where the child was found not to have acquired habitual residence in Jamaica despite an extended stay in the island, because the relocation was for a specific purpose.

[30] Counsel also relied on ***RR v ZW*** *(supra)*, where a child had been sent from the USA to Jamaica for behavioural reasons. Despite being in Jamaica for over two years, the court found the child remained habitually resident in the USA. The mother had exercised and not abandoned her custodial rights by consenting to the temporary relocation. Counsel argued that by analogy, the Defendant in the case at Bar, had not abandoned her rights but was exercising her custodial rights by permitting MW's travel for the narrow purpose of the acquisition of USA citizenship.

[31] Counsel submitted that, as in ***RR v ZW*** *(supra)*, the agreement between the parties in the present case contained specific terms, including religious upbringing, regular visits to Jamaica, and liberal communication with the mother. The Claimant having breached these terms by piercing MW's ears contrary to the Defendant's religious beliefs; feeding her prohibited foods; dressing her immodestly; failing to return her to Jamaica for holidays; restricting her communication with the Defendant; and

neglecting MW's medical care, vitiated the agreement and justified the Defendant's decision to withhold further consent.

[32] Counsel concluded that MW's presence in the USA was conditional and for a defined purpose that had since lapsed. Accordingly, her habitual residence remained in Jamaica. Alternatively, counsel submitted that if the court did not find Jamaica to be MW's habitual residence, it should exercise its discretion under section 7N of the Children (Guardianship and Custody) Act to refuse to return her, based on grave risk (section 7N(1)(a)(ii)) and/or the child's objection (section 7N(1)(b)).

Analysis

[34] It is clear on the evidence of both parties that there was an agreement for MW to travel to the USA. The question is whether this agreement was meant to be a temporary relocation or a permanent one.

[35] On an assessment of the evidence, I find that certain pieces of the evidence as it relates to the Defendant's conduct undermines her claim that the arrangement was merely temporary. The Defendant said that the Claimant contacted her "*out of the blue*" stating that he wanted to "*file*" for MW. She also said that the Claimant had previously assisted her in trying to obtain a USA visitor's visa. I believe this was an indication that there was some sort of ongoing relationship between the parties. In any event, whether it was "out of the blue" or not, is of no relevance to the issue at hand.

[36] On several occasions, counsel for defendant has compared the case at Bar to ***RR v ZW (supra).*** However, I find this case to be distinguishable. In the ***RR v ZW*** *(supra)* the court found that the actions of the Claimant pointed to the fact that the agreement was of a temporary nature. Shelly-Williams J at paragraph [51] opined:

> *I find that although there was no written agreement, the Claimant's approach to PW's travelling and staying with the Defendant is in keeping with her seeking to address the behavioural issues of PW. I find that the agreement was for PW to reside with the Defendant on a temporary basis.*

> *I find the Defendant's attitude towards the education of PW is in keeping with PW residing with him on a temporary basis. I find that the Claimant in having PW travel to, and reside in Jamaica for one year, was not abandoning her custodial rights. In fact, what she was doing was exercising these custodial rights.*

[37] I find that in the case at Bar; the evidence does not support the Defendant's assertions that MW's relocation was of a temporary nature. In particular, I note the conversations between the Defendant and the Claimant's spouse (BW) regarding the Claimant and his family moving to a bigger residence to accommodate MW. In my mind this denotes a situation contemplating long term planning anticipating some level of stability for MW. There was no hesitation or note of concern in the conversation as to why was there the necessity to move to a bigger place. The tone of the conversation strongly supports the conclusion that the child's relocation to the USA was meant to be a permanent one. The conversation went as follows:

> *[6/2/22,1:06:11 PM] [BW] : I was trying to find a new place*
> *[6/2/22, 1:07:58 PM] [CH]: So, where you at now what it's too small?*
> *[6/2/22, 1:10:02 PM] [BW]: It's fine*
> *[6/2/22, 1:10:16 PM] [BW]: It's a big place but want them to have they own*
> *[6/2/22, 1:12:56 PM] [CH]: Oh, I see*
> *[6/2/22, 1:14:20 PM] [BW]: I just went to the leasing office to see if we can transfer to another apartment*
> *[6/2/22, 1:15:59 PM] [CH]: So they will do that*
> *[6/2/22, 1:16:41 PM] [BW]: It's gonna be a little more expensive they said we can but the guy suggested I waited cause they rated May go down [sic]*
> *[6/2/22, 1:16:54 PM] [BW]: Or lease is up on Oct*
> *[6/2/22, 1:18:49 PM] [CH]: OK things will go well don't worry because you have a good heart*

[38] The above conversation occurred in June 2022, before MW travelled overseas. I find that this supports the conclusion that at the time of MW's departure, preparations were being made to permanently relocate the child. In contrast to the case of ***RR v ZW*** *(supra),* there is no evidence before this Court, of any conduct, on the part of either the Claimant or the Defendant, which would point to the move being a temporary one.

[39] As it relates to the last-minute enrolment of the child in school, the Defendant indicated that she was misled into believing that this was necessary for the immigration process. Whilst this may have explained her initial consent, her subsequent actions demonstrate that there was some permanence in the

agreement for the child to relocate. An analysis of the evidence does not reveal any communication, either between the parties or between the Defendant and BW, which would be indicative of any protest or apprehension on the part of the Defendant as it relates to the child being enrolled in school or relocating.

[40] Furthermore, counsel for the Defendant's submission referring to the fact that the Defendant's consent was not informed is rejected by this court. I note that the Defendant has asserted that her decision to prevent MW from returning to the USA stemmed from the fact that she had been misled by the Claimant regarding the necessity of MW residing in the USA for the immigration process to proceed. She stated that she later discovered that an alternative route, specifically the N-600K application, which could have facilitated the immigration process without the necessity for MW's relocation.

[41] This assertion, however, is directly undermined by the Defendant's own evidence. It was apparent from her affidavits and submissions of counsel that she only became aware of the N-600K form and the possibility of completing the immigration process without MW residing in the USA, after these court proceedings had commenced, around June 2025. Therefore, her justification for withholding the child on the grounds that the relocation was unnecessary cannot explain her actions in August 2024, when the

[42] child was retained by her in Jamaica.

[43] This contradiction significantly weakens the credibility of her evidence. It suggests that the decision to retain MW was not based on any newly discovered information at the time of the retention, but rather, was a unilateral act that only later sought justification through information allegedly obtained during the litigation process. I note that no documentary proof was provided of these alternative methods of obtaining permanent residence though great reliance was placed on them. There is no disclosure as to where the Defendant obtained the new information concerning the child's immigration procedure. As such, the Court is entitled to infer that the withholding of the child was not initially grounded in misinformation being

given by the Claimant about the immigration process, but was a decision made independently of any such information on which she now seeks to rely. In any event, it was reasonable for the Defendant to have conducted her due diligence in verifying the information provided by the Claimant, he not being the repository of the procedure to obtain permanent residence in the USA.

[44] The Defendant stated that the relationship between the parties changed when the Claimant refused to return MW to Jamaica. However, based on the conversations exhibited between the Defendant and BW, there is no evidence indicating that the Defendant would have communicated her discomfort with the child remaining in the USA to either the Claimant or BW. The Defendant has exhibited conversations between herself and MW, but I am yet to find any text message(s) or communication between herself and the Claimant or BW which would have been indicative of any protest or disagreement on her part concerning any of the issues now being complained of.

[45] I further note that, in relation to the conversations exhibited between the Defendant and BW, the Defendant did not dispute their authenticity or provide any further conversation which would indicate that the agreement was temporary. Although the Defendant filed several affidavits in response, she did not refute the contents of those conversations, which were damaging to her case. The tenor of those conversations pointed to plans and events of a permanent nature, thereby providing strong support to the Claimant's case that the intention of both parties was for MW to permanently reside in the USA.

[46] The permanence of the parties' agreement for MW's relocation is further underscored by the Defendant's conduct following MW's visit to Jamaica in December 2023. Despite the Defendant's current assertion that MW's presence in the USA was intended to be temporary, her decision to return MW to the USA, two weeks after her arrival in Jamaica, is inconsistent with that claim. Notably, this return occurred after the Defendant had regained physical custody of MW and had

an opportunity to reassess the situation, including MW's alleged reported discomfort with her living conditions abroad.

[47] The Defendant's chose to return MW to the USA in January 2024 despite having expressed concerns about her well-being and dissatisfaction with how the agreement had been honoured. This strongly suggests an acceptance that MW's residence in the USA was not merely a temporary measure for immigration processing, but part of a permanent relocation. When one looks at the evidence objectively, this action was more consistent with a parent continuing to honour a long-term arrangement for relocation rather than a parent asserting that such relocation was never agreed to or had been undermined by material breaches.

[48] In ***B v D*** (*supra*), relied on by the Defendant, the evidence showed that the mother (a UK national) only consented to the children's temporary move to Portugal with the paternal grandmother for the holiday and to be educated there for a short time, while both herself and the father (a Portuguese national) attempted to resolve their differences in the UK. The mother finally realised that the marriage was over when the father informed her that unless she co-operated with him, she would not see the children at Christmas. The court held that the mother had not agreed to a permanent move to Portugal and any consent beyond consent to short-term education had been obtained on the false premise that the marriage had a long-term future and had been vitiated because of the father's failure to make full disclosure of his underlying motivation.

[49] In the case at Bar, while the Defendant claims that the Claimant misled her about the immigration process, there is no evidence that the Claimant withheld any information with the intent to mislead the Defendant contrary to ***B v D*** *(supra)*. In contrast, the Defendant had regular contact with the child and the Claimant's partner and was included and updated on aspects of MW's life in the USA.

[50] I note too that the Defendant was actively involved in the immigration process. She filed documents, took the child to the interview, and so there was nothing that prevented her from acquainting herself with the procedure to be followed in respect

of the immigration process. There is no evidence presented before this court as to the information or where the Defendant obtained information indicating the alternative procedures to obtain citizenship without residing in the USA or alternatively attending school there. This would have assisted the Court in determining whether the Defendant was indeed misled by the Claimant.

[51] It is to be noted that the Claimant exhibited 2 letters, one (unsigned) purporting to be from the Defendant to the St. Francis Primary & Infant School indicating that MW would be withdrawing from the school. Another letter purporting to be from the school signed by the principal dated June 23, 2025, indicating that the Defendant had verbally indicated to the school her intentions to withdraw the child from the institution. However, the Defendant also exhibited a letter purporting to be from the same school dated June 26, 2025, indicating that the school was not in receipt of a withdrawal letter from the Defendant in relation to the child. This letter was also purportedly signed by the principal of the school.

[52] The authenticity and evidential value of both letters are questionable, since the author of neither letter gave evidence. In any event, whether these letters are authentic or not, they offer little assistance in resolving the central issue, namely, whether there was an agreement between the parties that MW's relocation to the USA was to be permanent. At best, the letters suggest that some form of communication regarding MW's withdrawal occurred, but this, in and of itself, is not determinative of the nature of the arrangement. Further, no evidence has been presented on the part of the Defendant which would show that the agreement was meant to be temporary.

[53] Therefore, on a balance of probabilities, I find that the evidence points to an agreement between the parties for MW to permanently relocate to the USA to reside with her father, BW and her sister. There is no evidence which points to the Defendant being misled or of any material non-disclosure which would vitiate this agreement.

ISSUE 2: *Whether the USA is the country in which MW is habitually resident?*

[54] In the **Halsbury's Laws of England 2024**, at 262 Habitual Residence of Children, the author sets out several propositions addressing the habitual residence of children as follows:

> *A series of Supreme Court judgments[1], delivered since 2013, yield a number of propositions addressing the habitual residence of children and which have been summarised as follows:*
>
> > *(1) **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;***
> >
> > *(2) **the test is a factual one which must be centred on the circumstances of the child's life that is most likely to illuminate their habitual residence;***
> >
> > *(3) **the meaning of habitual residence needs to be shaped in the light of the best interests of the child, in particular on the criterion of proximity, which means the practical connection between the child and the country concerned;***
> >
> > *(4) 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;*
> >
> > *(5) a child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her;*
> >
> > *(6) parental intention is relevant to the assessment, but not determinative;*
> >
> > *(7) ….*
> >
> > *(8) **in assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which they resided before the move;***
> >
> > *(9) it is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not*

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[1] *A v A (Children: Habitual Residence)* [2013] UKSC 60, [2014] AC 1; *Re L (A Child) (Custody: Habitual Residence)* [2013] UKSC 75, [2014] AC 1017; *Re LC (Children)* [2014] UKSC 1, [2014] AC 1038; *Re R (Children)* [2015] UKSC 35, [2016] AC 76; *Re B (A child) (Habitual Residence: Inherent Jurisdiction)* [2016] UKSC 4, [2016] 2 WLR 557.

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;

*(10) **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;***

*(11) **the requisite degree of integration can, in certain circumstances, develop quite quickly, so it is possible to acquire a new habitual residence in a single day;***

*(12) habitual residence is a question of fact focused upon the situation of the child and the stability of the residence, with the purposes and intentions of the parents being merely among the relevant factors; (**emphases are mine**)*

[55] The Hague Convention does not define habitual residence; the court usually applies a facts-based approach looking at factors such as those listed above. The court, in the case of **Re B (A Child) (Reunite International Child Abduction Centre and others intervening)** [2016] 2 WLR 557 stated thus in relation to habitual residence:

A child's habitual residence is also the thread which unites the provisions of The Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the 1980 Convention"). This Convention applies to a child habitually resident in a contracting state immediately before his wrongful removal or retention: article 4. It is the law of that state which dictates whether his removal or retention was wrongful: article 3(a). It is that state to which, subject to exceptions, other contracting states must order the child to be returned:

[56] In defining habitual residence in **Re B (A Child)** *(supra)*, the court stated at paragraph 36:

In Proceedings brought by A, the issue for determination in Finland was whether children taken into care in November 2005 had then been habitually resident there. They had lived with their mother in Sweden for four years until the summer of 2005, when they had returned to Finland, where they had lived on campsites and not been sent to school. The court's ruling, at p 69, para 2, was as follows:

"The concept of 'habitual residence' under article 8(1) of [Regulation B2R] must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the

> *duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration."*

Evidence

[57] The Claimant's evidence reveals that since the child has relocated to the USA, she has been fully integrated there. The evidence is that MW attended Franklin Academy in the Broward County School District and actively participated in Leadership Club, Anime Club, Spanish Club, Chess Club and other activities. The Claimant also exhibited a copy of MW'S school report which showed that she attained good grades in school. He also stated that the child was also an active member of her local community and her local church, Temple of Restoration Outreach Ministries, where she participated in the Junior Youth Choir and assisted in the Children's Ministry with the toddlers and other children. The evidence revealed that MW lived with her father, his spouse and her sister.

[58] The Defendant's evidence is that since MW has returned to Jamaica, she has been enrolled in Kingsway High School. She further stated that some of MW's previous friends are also at the same school, and she has seamlessly transitioned into her normal Jamaican life and participates in Cheerleading and Netball. She added that MW is part of the Pathfinders programme in the Seventh Day Adventist Church which she has been a member since 2019. The Defendant exhibited a letter from the Pastor of the church, wherein he stated that when MW arrived in Jamaica, he noticed that she was withdrawn and in the subsequent months she has been behaving the way she did before she left Jamaica.

Submissions

[59] Counsel for the Claimant relied on **JG v ST** [2022] JMSC Civ 64, wherein Shelly-Williams J accepted the dictum of Lord Hughes in the case of **Re C (Children)** [2018] 3 All ER 1 which reiterated the fact that a parent, in consenting to a child travelling abroad, is exercising and not abandoning his right of custody. Lord Hughes opined as follows:

> *"when left behind parent agrees to the child travelling abroad, he is exercising not abandoning his rights of custody. Those rights of custody include the right to be party to any arrangement as to which country the child is to live in. It is not accurate to say that he gives up a right to veto the child's movement abroad; he exercises that right by permitting such movement on terms. He has agreed to the travel only on terms that the stay is to be temporary and the child will be returned as agreed. So long as the travelling parent honours the temporary nature of the stay abroad, he is not infringing the left behind parent's right of custody. But once he repudiates the agreement, and keeps the child without the intention to return, and denying the temporary nature of the stay, his retention is on longer on the terms agreed. It amounts to a claim to unilateral decision where the child shall live..."*

[60] Counsel submitted that prior to the child's retention in Jamaica she was habitually resident in the state of Florida, in the USA, which recognizes unmarried parents as having equal parental rights. Counsel referred to the Claimant's evidence and asserted that both parents maintained joint custody over MW until the Defendant failed to return her to the USA on August 4, 2024. Counsel referred to the Defendant's evidence where she indicated that she was exercising her "*full parental rights to returning [MW] to Jamaica*". Counsel argued that the Defendant failed to acknowledge that such a major decision to retain MW in Jamaica without her father's consent was a breach of his rights to custody, which therefore makes MW's retention in Jamaica, wrongful.

[61] Counsel argued that since it has been established that the USA was MW's place of habitual residence, retaining her in Jamaica without her father's consent, was unlawful. Counsel further argued that the Claimant did not relinquish his rights to custody but has since been prevented from exercising those rights by the Defendant.

[62] She further submitted that MW became fully adjusted to living in the USA and was settled there until she was wrongfully retained in Jamaica by her mother. Counsel pointed out that through the Claimant's evidence it was obvious that MW, in the initial phase of being in Jamaica after July 2024, had a longing to return home to the USA but was prevented from doing so by the Defendant. Counsel argued that

the conversations via WhatsApp that were exhibited were proof of this, and MW admitted as much in the social inquiry report.

[63] Counsel for the Defendant, on the other hand, submitted that habitual residence requires more than physical presence; it includes emotional and psychological integration, as affirmed in authorities such as **Cannon v Cannon** [2005] 1 WLR 32 and adopted by the Jamaican courts in ***RR v ZW*** *(supra)* and ***JG v ST*** *(supra)*. Counsel asserted that MW's habitual residence at all material times remained Jamaica. Despite her entry into the USA in 2022, Counsel submitted that MW had spent the first eleven years of her life in Jamaica, where she was raised by her mother alongside her sisters.

[64] Counsel emphasized that MW's relocation was purpose-driven and conditional, facilitated solely for immigration purposes, and not indicative of a settled life in the USA. Counsel argued that the Defendant's evidence outlines MW's deep connection to Jamaica and her treatment of this country as her habitual residence.

[65] Counsel further argued that MW's brief stay abroad did not cause an emotional or psychological disengagement from Jamaica and therefore could not extinguish her strong ties to her home country. Additionally, it was submitted that administrative status, such as permanent residency or USA citizenship, is insufficient to establish habitual residence, as it does not reflect a child's lived experience or actual integration. Therefore, counsel contended that MW's habitual residence remained Jamaica, and that no change occurred within the meaning of The Hague Convention or section 7C of the *Children (Guardianship and Custody) Act*.

Analysis

[66] I will first note that a child is able to obtain a new habitual residence in as little as one day as per the case of **Re B (a minor) (habitual residence)** [2016] EWHC 2174 where the court outlined the principles relating to habitual residence. One of the principles was outlined as follows:

> *(xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (article 9 of Brussels IIA envisages within three months).* ***It is possible to acquire a new habitual residence in a single day*** *(A v A; In re B). In the latter case Lord Wilson JSC referred (para 45) to those "first roots" which represent the requisite degree of integration and which a child will "probably" put down "quite quickly" following a move. (emphasis mine)*

[67] Counsel's submission as it relates to the fact that MW was born and lived in Jamaica approximately 11 years before she went overseas to reside with her father is of no moment as habitual residence does not necessarily coincide with the place in which a child was born. What is of importance is whether the residence of the child reflects some degree of integration in a social and family environment (see **Re M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)** [2021] 2 All ER 1227).

[68] The Defendant's evidence is that even though MW at the time when she was sent to Jamaica was attending Franklin Academy, she had been attending Bear Middle School until the Claimant unilaterally transferred her to Franklin Academy. This evidence however is a little difficult to accept as on an examination of the conversations between the Claimant's spouse, BW and the Defendant, it showed that on May 2nd 2023, the following exchange occurred:

> *[5/2/23, 4:31:35 PM] [CH]:* ***[BW] good day did you get the girls in the other school***
> *[5/2/23, 4:41:25 PM] [BW]: Hello*
> *[5/2/23, 4:41:32 PM] [BW]: I didn't we are still waiting*
> *[5/2/23, 4:42:52 PM] [CH]l: Oh because I want to know if I should buy the black pants for her*
> *[5/2/23, 4:43:26 PM] [BW]: I don't know yet. It's a little too early as well.*

[69] This, I believe is cogent evidence that the Defendant was not only aware of, but at minimum, had acquiesced, to the transfer to another school. The tone and content of the messages indicated cooperation and involvement, rather than objection or exclusion. At no point in this interaction does the Defendant express concern or disapproval about the school transfer, which undermines her claim that the decision was made unilaterally and without her knowledge.

[70] The Defendant also had issues with MW's absence from church, the choice of church that MW attended, and the contrary religious practices that breached the Defendant's Seventh Day Adventist beliefs. The Defendant in her evidence denied that MW was an active member of a church in the USA indicating that the church she attended in the USA was a Church of God which was against the conditions agreed between herself and the Claimant. However, it should be noted that the Claimant has denied any such agreement between the parties.

[71] The Claimant admits that he believes in the same God as the Defendant and that the family attends church regularly. As a matter of fact, MW in the Social Enquiry Report stated:

> *While in the U.S., the family would have dinner together, attend church every Sunday, and go on outings. She particularly appreciated attending Sunday church services, describing them as an interesting change from the Seventh-Day Adventist traditions she was accustomed to.*

[72] This statement not only contradicts the Defendant's position but also suggests that MW derived value from her new religious experiences. There is no indication that she was harmed by the change in denomination. On the contrary, MW's statement suggests openness to new traditions and appreciation for the time spent attending church services with her family in the USA. It should also be highlighted that MW's revelation that she attended church every Sunday contradicts the Defendant's evidence that she went infrequently.

[73] The Defendant has relied on the re-integration of MW into the Jamaican school system and with her friends at Kingsway High. However, the pastor's observation that MW was initially withdrawn upon her return also revealed that her connection to Jamaica may have been disrupted during her time living abroad. This behavioural shift suggests that MW had, to some degree, adapted to life in the USA. While her re-engagement with familiar routines is notable, it does not negate the fact that she had spent a significant period living, attending school, and integrating socially in the USA and I am of the view that this does not advance the Defendant's position.

[74] In assessing MW's habitual residence, I took into consideration her familial, educational, religious and social environment. I find that based on the evidence presented, the Claimant and the Defendant made an agreement to have MW reside permanently in the USA with her father (who became the child's primary caregiver), BW and her sister. The Defendant facilitated this arrangement by assisting with the immigration process and actively participated in the child's life and had a cordial and cooperative relationship with the child's stepmother who kept her up to date on the child's welfare and daily activities.

[75] I find that the child had been attending school for over a year and that whilst there was a change in the child's educational institution, there is no evidence to suggest any disruption in the child's academic progress. MW also participated in extracurricular activities and had been attending church regularly with her family in the USA. These factors demonstrate integration into the new environment in the USA.

[76] MW has been residing in Jamaica since she was unlawfully retained on August 4th, 2024, for a period of 11 months. During this time, she has been enrolled in school and was re-engaged in activities that she formerly pursued while living in Jamaica. I am of the view that such participation does not equate to a re-establishment of habitual residence, particularly considering the temporary nature of her presence in Jamaica, as had been agreed between the parties.

[77] I find that MW's habitual residence at the time of her retention remained in the USA. There is no evidence that her stay in Jamaica resulted in the necessary degree of integration to effect a change in her habitual residence. Accordingly, I find that MW was habitually resident in the USA and that her retention by the Defendant as of 4 August 2024 was wrongful within the meaning of section 7C of the *Children (Guardianship and Custody) Act*.

ISSUE 3: *Whether MW would be at grave risk if returned to the USA?*

[78] Article 13 of The Hague Convention states:

> *Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -*
>
> *a) …*
> *b)* ***there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. (emphasis mine)***

[79] In **Halsbury's Laws of England 2023**, the author stated thus in relation to grave risk:

> *The courts have been cautious in giving effect to these exceptions. In particular, it has been held that '**grave risk**' is not to be equated simply with considerations that the child's welfare should be paramount, though the best interests, not only of children generally, but also of any individual child involved, were a primary concern in the Hague Convention process.*

Evidence

[80] In her evidence, the Defendant raised the defence of grave risk which she stated should prevent the child from being returned to the USA. The Defendant argued that MW had been physically abused by both the Claimant and her stepmother, BW. She stated that the child was also verbally abused and was neglected as it relates to medical treatment.

[81] The evidence as contained in the Social Enquiry Report ("the Report") is that MW reported being emotionally and physically mistreated by her father and stepmother in the USA. She stated that they frequently criticized her appearance, calling her "fat," saying she "ate too much," and that her "forehead was big," which damaged her self-esteem and led her to believe these comments were true. She described being beaten repeatedly with hands, a belt, a brush, and a comb, leaving her with red hands, welts, and on one occasion a bruise. She recalled that the first time her stepmother hit her was after she became frustrated over a math problem, asked for help, and raised her voice; and BW responded by slapping her.

[82] MW also stated that she was sometimes left at home without supervision or prepared meals. On one occasion, she had to miss school because her sister had

"pink eye," and she was required to stay home and care for her until her stepmother returned from work to take her sister to the doctor. MW expressed frustration over this, as she felt it was unfair to be placed in a caregiving role beyond her age.

[83] She further reported feeling overburdened with chores, including cleaning the kitchen, living room, her father and stepmother's bedroom and bathroom, and maintaining her own spaces. She said she often prepared meals for the entire family and did tasks like passing items, even when her sister was present but unoccupied.

[84] MW recalled a significant health episode where she woke up one morning in severe pain, wheezing, coughing, vomiting, and experiencing intense chest pain. She said her father gave her an asthma pump, but it was empty. Despite her distress, she was not taken to the doctor, and over the following days, her condition gradually improved on its own. She recalled another occasion when both she and her sister were ill, at which point they were taken to a doctor.

[85] The Claimant in the Report admitted that he had disciplined MW twice by hitting her. He stated that the first incident occurred when MW disobeyed instructions not to play a specific game that both he and the Defendant had prohibited. He emphasized that this was the first time he had ever physically disciplined her. The second incident happened after MW received a grade of 25 out of 100 on a test, despite being repeatedly reminded to study.

[86] The Claimant noted that MW has difficulty managing her anger. He shared that she becomes visibly upset when losing games and once broke her tablet in frustration. He explained that both he and the Defendant advised MW to stop playing certain games. He also stated that MW's stepmother has never physically disciplined or insulted her but does raise her voice when MW fails to respond appropriately to instructions.

Submissions

[87] On the issue of grave risk, the Claimant's Counsel, in her submissions relied on the case of **Re E (Children) (Abduction: Custody Appeal)** [2011] UKSC 27 and **DJ v MB** [2020] JMSC Civ 230. The Court in **Re E** *(supra)* opined:

> *[31] Both Professor Pérez-Vera and the House of Lords referred to the application, rather than the interpretation, of art 13. We share the view expressed in the High Court of Australia in DP v Commonwealth Central Authority [2001] HCA 39, (2001) 206 CLR 401, paras 9, 44, that there is no need for the article to be "narrowly construed". By its very terms, it is of restricted application. The words of art 13 are quite plain and need no further elaboration or "gloss".*
>
> *[32] First, it is clear that the burden of proof lies with the "person, institution or other body" which opposes the child's return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of The Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under art 13b and so neither those allegations nor their rebuttal are usually tested in cross-examination.*
>
> *[33]* ***Second, the risk to the child must be "grave". It is not enough, as it is in other contexts such as asylum, that the risk be "real". It must have reached such a level of seriousness as to be characterised as "grave". Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm.***
>
> *[34] Third, the words "physical or psychological harm" are not qualified. However, they do gain colour from the alternative "or otherwise" placed "in an intolerable situation" (emphasis supplied). As was said in Re D, at para 52 "'Intolerable' is a strong word, - 19 - but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'." Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: eg, where a mother's*

subjective perception of events leads to a mental illness which could have intolerable consequences for the child.

[35] Fourth, art 13b is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. ***More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home.*** *(emphases mine)*

[88] Counsel for the Claimant submitted that, even taken at its highest, the Defendant's case does not satisfy the threshold for the grave risk defence under The Hague Convention. It was argued that, even if concerns existed, the availability of child therapists and mental health professionals in the USA meant that protective measures could be implemented to address any potential emotional or psychological harm. Further, no evidence was provided to show that MW's circumstances in the USA were intolerable.

[89] In response, Counsel for the Defendant submitted that MW had been subjected to physical abuse by the Claimant, resulting in visible bruising and prolonged pain, which cannot be regarded as lawful or acceptable parental discipline. Additionally, the Defendant raised concerns about medical neglect, particularly the Claimant's refusal to manage MW's asthma properly, despite repeated pleas from the Defendant. This pattern of disregard, counsel argued, demonstrates the Claimant's untrustworthiness in caring for MW.

[90] It was further submitted that the Defendant, as a Jamaican citizen with no USA visa, would be unable to accompany MW or protect her if she returned. Moreover, it was contended that MW's experience of abuse and neglect was psychologically linked in her mind with the environment of the USA itself, such that any return would be deeply traumatic. Counsel added that no protective measures available in the U.S. would be sufficient or immediate enough to neutralize the grave risk posed, especially in light of the Defendant's inability to be present and advocate for MW's well-being there.

Analysis

[91] In **Re AB (a child) (grave risk defence: domestic violence)** [2022] IEHC 627 the Court in dealing with the issue of protective measures as part of the assessment of the grave risk defence, stated at paragraphs 26 and 27 that:

> *26. As appears from this judgment, an appraisal of the availability and effectiveness of protective measures in the country of habitual residence forms an integral part of the overall assessment of a "grave risk" defence. Rather than attempt to reach any findings, even on an interim basis, on the allegations of sexual abuse made against the left-behind parent, the Supreme Court instead considered whether protective measures were in place which would ensure that the child would not be exposed to physical or psychological harm on their return. The Supreme Court made the return order conditional on an undertaking by the left-behind parent that he would not exercise rights of access to or contact with the child other than in accordance with the order of the family court of the country of habitual residence. The Supreme Court, in response to a specific argument raised by the abducting parent, considered the legal procedures in the country of habitual residence and concluded that they were sufficient to protect the child.*
>
> *27. This approach of directing the inquiry on a return application to the availability and effectiveness of protective measures has been consistently applied by the Irish Courts. An authoritative statement of the approach is provided by the judgment of the High Court (Finlay Geoghegan J.) in I.P. v. T.P. [2012] IEHC 31, [2012] 1 I.R. 666 as follows (at paragraphs 41 to 43 of the reported judgment):*
>
> *"There are limitations imposed on a court in evaluating evidence on an application for summary return pursuant to the Hague Convention. It is rare to hear oral evidence or even cross-examine deponents and a court will not normally attempt to resolve factual disputes. There was no oral evidence and no cross-examination in this application and the court, as already stated, should not and will not attempt to resolve the dispute as to whether the alleged incidents did or did not occur.*

[92] At paragraph 29 the court went on to highlight the approach to be taken:

> *29. A very useful statement of the proper approach is provided by the recent judgment of the High Court (Gearty J.) in* ***the Matter of OA and OB, Minors (Child Abduction: Rights of Custody and Habitual Residence)*** *[2021] IEHC 849 (at paragraph 6.12):*
>
>> *"Where grave risk is properly raised, as it is here, and there is no cross-examination of the parties, the Court should approach the evidence as though it were true in its initial assessment of the situation. It would be impossible for this Court, without detailed*

> *cross-examination, to decide if the allegations were true.* ***What this Court can assess, however, is the level of risk involved if the allegations were true. In other words, whether such conduct would be sufficient to establish that the children, if returned, would be at grave risk of harm such that they could not be protected in England****. In this case, the answer to that question must be no. Not only is there no allegation of violence against the children by their father, there is no other evidence of grave risk to the children which cannot be assessed and addressed by the courts and social services in England." (emphasis mine)*

[93] Based on the approach adopted in ***Re AB (a child)*** *(supra)*, it is clear that in order for the grave risk defence to succeed under Article 13(b) of The Hague Convention, the evidence must show conduct of such a serious nature that, if the child were returned, they would face a grave risk of physical or psychological harm, or otherwise be placed in an intolerable situation. Significantly, the court must also consider whether any alleged harm is of a type that cannot be mitigated by the protective mechanisms available in the child's country of habitual residence. The threshold is not met by mere allegations or general concerns; rather, the risk must be substantial, imminent, and beyond the capacity of the country of habitual residence to manage through its legal, social, or welfare systems.

[94] The Claimant conceded that he had physically abused MW twice. This admission of the use of corporal punishment is serious but I do not believe that taken by itself, it rises to the level of grave risk. So, I proceed to consider the other issues raised under this umbrella of "grave risk".

[95] To further address the issue regarding the lack of medical treatment, there is no evidence put forward in this court which would show that there is a systemic refusal of the Claimant to provide the child with access to medical treatment. The single instance mentioned by the child, could be considered as a lapse in judgment on the part of the Claimant but it is not serious enough to meet the threshold for the grave risk defence. MW gave another instance where she was ill and the Claimant took her to receive medical attention.

[96] Additionally, while the Defendant may disagree with certain parenting choices, such as alternative remedies for MW's asthma, these disputes, without more, do

not demonstrate that MW faces a grave risk of harm within the meaning of The Hague Convention. There is no evidence that this cannot be otherwise assessed and be adequately dealt with by the social services in the USA.

[97] The availability of social services in the USA further weakens the grave risk argument. The USA has a well-developed child protection system and access to medical care where provisions are made for children with chronic conditions like asthma. If MW was indeed at risk, those systems could be activated to provide support and oversight.

[98] I further note the evidence regarding the child being overburdened with chores. I am of the view that this does not rise to level of grave risk. The following exchange occurred between the Defendant and BW in the relation to the child doing household chores:

> *[8/8/22, 6:50:19 AM] CH: Good morning and how is your morning with the girls*
>
> *[8/8/22, 6:50:34 AM] BW: Morning*
>
> *[8/8/22, 6:50:52 AM] BW: Not bad I just made them breakfast so they eating……*
>
> *[8/8/22. 6:50:58 AM] BW: I been up since 515*
>
> *[8/8/22, 6:51:13 AM] BW: Had to make [the Claimant's] breakfast …..*
>
> *[8/8/22, 6:53:34 AM] CH:* ***You need to let the girls help you in the kitchen and make sure you don't over work yourself***

[99] The above WhatsApp exchange between BW and CH demonstrates that the Claimant in fact encouraged BW to permit the children (including MW) to assist in the kitchen so as not to overburden her. While it is noted that this exchange occurred shortly after the child relocated to the USA, and it is possible that circumstances may have changed overtime, the Claimant has challenged MW's assertions that she was being given excessive household chores to do. I believe that MW was being given chores which were reasonable for her to do and not in the terms as she stated in the Report.

[100] Counsel for the Defendant relied on the case of **Baran v. Beaty** 526 F.3d 1340 (11th Cir. 2008) which I find to be distinguishable from the case at bar. In that case although there was no evidence that the father had intentionally harmed the child, he had threatened to do so. He had also exposed the child to harm and physically abused the mother while she was pregnant; and handled the child irresponsibly while drunk. The effect of those behaviours supported a finding of grave risk. No such comparable pattern of conduct has been established in the case at bar.

[101] MW stated in the Report that the Claimant and her step-mother repeatedly called her "fat", said she "ate too much", and mocked her "big forehead", damaging her self-esteem. However, I do not believe that this would trigger the grave risk defence and would thereby justify refusing her return. It is worthy of note that although the Defendant in her conversations with BW, has described MW as "*fatty*" and said that "*she [MW] loves food*", there were no mention of these by MW nor the Defendant. I believe that if this is a genuine concern of the child then social services in the USA are well equipped to deal with it.

[102] Finally, the fact that MW remained in the USA for nearly two years, with no documented intervention whether by the Defendant or any police or social services (or any form of communication by the Defendant with the Claimant highlighting her concerns), undermines the urgency and severity of the risk now being claimed. The fact that the Defendant throughout the entire period before June 30, 2024, did not raise with the Claimant nor BW, any concerns relating to MW's welfare and her decision to send MW back to the USA after the December 2023 visit, indicates a level of tolerance and trust inconsistent with a grave risk situation.

[103] Taken together, the evidence does not support the conclusion that returning MW to the USA would expose her to physical or psychological harm or otherwise place her in an intolerable situation which would trigger the grave risk defence.

ISSUE 4: *<u>Should MW's objection be taken into consideration in deciding whether she should be returned to the USA?</u>*

[104] Article 13 of The Hague Convention states that in circumstances where the child objects to being returned to their habitual place of residence:

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

[105] Baroness Hale in **Re M (FC) and another (FC) (Children) (FC)** [2007] UKHL 55 at paragraph 45 highlighted certain considerations in child abduction cases:

> *In child's objections cases, the range of considerations may be even wider than those in the other exceptions.* ***The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views****. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so.* ***Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of the influence of the abducting parent,*** *the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances. (emphasis mine)*

Evidence

[106] The evidence, both in the Defendant’s affidavits and the Report, reveals that MW has raised certain objections to being returned to the USA. She has gone as far as stating in the Report that if she is returned, she would run away so that no one could find her.

[107] The Defendant in her evidence stated that MW has indicated to her on numerous occasions that she wished to remain with her and her extended family. The Defendant stated that certain text messages sent to other family members from MW indicating her desire to return to the US were only sent by MW because she was angry and upset at everyone. She further exhibited a WhatsApp message

which she states was sent from MW to the Claimant indicating her desire to remain in Jamaica.

[108] There were WhatsApp messages exhibited by the Claimant purporting to be between MW and her sister. In these text messages, though undated, MW indicated her desire to return to the USA averring that she was sad because she was not returning. In one of her messages MW indicated that her mother was not going to allow her to return to the USA and when she asked her the reason, her mother responded that it "*apparently was her worse mistake to let me go up*".

Submissions

[109] Counsel for the Defendant submitted that this case is similar to **JG v ST (supra)** She submitted that MW's objections should not be treated lightly as the statements in the Report were not made in the heat of the moment. She stated that the child shows a clear intention and has objected to being returned to the USA. Counsel argued that the Claimant cannot in one breath acknowledge that the child's views must be considered as it relates to religion but be disregarded as it relates to her objections to being returned to the USA.

[110] Counsel for the Claimant however submitted that while the Defendant exhibited text messages to support MW's objection to returning to the USA, those objections were not authentically her own. It was argued that MW's views were shaped by the Defendant and other family members, and that there was no evidence that MW fully understood the long-term consequences of not returning to the USA, particularly concerning her residency status and future prospects.

[111] Counsel urged the Court to consider the following:

I. Text messages exhibited in the Claimant's affidavit showing that MW previously expressed a desire to return to the USA and missed her life there.

II. The Defendant's own evidence indicating that MW was withdrawn and unhappy while in Jamaica.

III. Repeated patterns of the Defendant's influence over MW's beliefs and conduct, particularly regarding religion.

IV. The tone and content of the alleged messages between MW and the Claimant, which suggest the child was echoing her mother's sentiments rather than expressing an independent view.

V. The lack of evidence that MW's objection is based on a clear understanding of the implications of remaining in Jamaica, including the impact on her legal status and relationship with her paternal family.

[112] Accordingly, Counsel submitted that MW's stated objections are not reliable or determinative, and the evidence points to the conclusion that her current position was a reflection of her environment rather than her true, informed wishes.

Analysis

[113] It is acknowledged that MW objects to her return to the USA and this was expressed through the Report. She stated that she would run away if returned. However, an analysis of the evidence has revealed that there are significant inconsistencies in the child's expressions and wishes. This was seen particularly in the WhatsApp conversations exhibited by the Claimant where the child clearly expressed sadness regarding the fact that she would not be returning to the USA. She stated that her mother was the reason she could not return, and she quoted the Defendant stating that "it was her worst mistake to let her (MW) leave in the first place."

[114] These messages sent, even though undated, are consistent with this position. The Defendant's attempt to explain those statements as being made "in anger" is a poor attempt to sway the court in her favour. This inconsistency in MW's expressed views diminishes the weight that can be attached to her current objection.

Interestingly, the Defendant did not seek to address this issue. I also note the absence in the Report, of any comments by MW concerning her earlier position of sadness being away from her sibling and family in the USA and accounting for her recent change of mind.

[115] I note too that counsel for the Defendant, in her submissions, did not address the issue of MW's change of mind over the past few months since she was in Jamaica. The fact that MW had earlier expressly stated that she wanted to return to the USA was never addressed by Counsel. I believe that it is critical for the court to delve further into the reasons for the child's objection, to determine whether it was authentically the mind of the child speaking.

[116] The case of ***Re M (FC) and another (FC) (Children) (FC)*** *(supra)* sets out the framework that the court is required to consider when deciding whether the objection raised is authentically MW's own or whether it has been influenced by the abducting parent. In these circumstances, I find that the evidence strongly suggests that MW's objection is not wholly independent. I agree with Counsel for the Claimant that there is credible evidence suggesting that MW's current view may have been shaped or influenced by the Defendant.

[117] This conclusion is further supported by the Defendant's conduct in confiscating MW's cell phone. The Defendant claimed that the Claimant had previously taken MW's phone when she was in the USA preventing her access to her; (an act which the Claimant argued was disciplinary in nature for a limited time). The Defendant stated that she took MW's phone, allegedly to prevent it from being used to track her location. She also said that MW could contact the Claimant and his family overseas through her (CH's) cellular telephone because the Claimant's number was stored therein. There is no evidence before this Court that the Claimant at any time tried to retrieve the child through the use of force or any other means except through discussions with the Defendant; and when that failed, he went to court. The Court therefore rejects this argument and finds no basis for any such behaviour. Furthermore, MW revealed that she only managed to communicate

with her sister because she had memorized her telephone number. The inference to be drawn from this is that this alternative telephone which the Defendant later gave MW did not even contain the contact information for the Claimant or BW. This evidence also serves as strong rebuttal to the Defendant's evidence that MW had access to her telephone and could call her father whenever she wanted to.

[118] The evidence points to deliberate actions by the Defendant to prevent open access via communication between the Claimant and MW during the early period after her forced retention in the island. This omission speaks volumes and contradicts the Defendant's evidence. These actions, suggest that the Defendant was deliberately isolating the child, possibly to influence her views as it relates to returning to the USA.

[119] The Court notes that the tone of MW's expressed views changed drastically after being in the custody of her mother, the Defendant, and her Jamaican family for over 11 months and having very limited contact with the Claimant and his family in the USA. This conduct on the part of the Defendant, in my view, supports my conclusion that the objections raised by the child may have been influenced by the Defendant and were not independently formed.

[120] The case of **Re M (Republic of Ireland) (Child's Objections)** [2015] 2 F.L.R. 1074, relied on by counsel for the Defendant, is distinguishable from the case at bar. In **Re M** *(supra)*, the court accepted the children's objections as the court was satisfied that "*their wishes flowed from a genuine concern or fear that a return would expose them either to a return to their father's care or a removal at his instigation from their mother or to a risk of further abuse, physical or psychological, perpetrated by him and directed towards them or their mother*". The court accepted the evidence that the children's wishes were independent. The evidence does not support such a finding in this case. In the case at Bar, I find that MW's wishes, over time, while in the custody of the Defendant, changed significantly against her father and her return to the USA. I also find that the Defendant isolated MW from her father and her overseas family in the early stages of her retention, and in the

process infiltrated her mind to the extent that MW's views and decisions were influenced by the Defendant. I do not believe that they were MW's personal views.

[121] The Court, however, does not entirely disregard MW's objection. Given her age and level of intelligence, MW's voice is a relevant consideration. The court has a discretion whether to take account of a child's views, in line with cases such as in **R*e M*** *(supra)***.** Therefore, while her objections may not be determinative, they should not be entirely dismissed.

[122] I find that while MW's objections to returning to the USA have been raised as a defence to this application and have been considered by this court, the inconsistencies in her statements however, point to the conclusion that MW's objection is not sufficiently authentic to justify a refusal to order her return. The Defendant's actions upon MW's return to Jamaica demonstrate steps taken to restrict MW's communication with her family overseas thereby exerting influence over her, in a manner that, in my view, may have contributed to the child's objections to returning to the USA.

[123] The Court therefore exercises its discretion under Article 13 of The Hague Convention and finds that her objections, while relevant, are not of such weight or authenticity as to prevent an order for return.

ORDERS

[124] The court therefore makes the following orders:

1. The United States of America is the place of habitual residence for the minor, MW.

2. The minor child, MW is to be returned to the United States of America on or before the 31st of July 2025 to reside with the Claimant.

3. The Defendant is to hand over MW to the Claimant or his representative who will accompany her to the United States of America at the Offices of the Central Authority of Jamaica on July 31, 2025, before 5:00 p.m.

4. The Defendant is to hand over MW's travel documents to the Jamaica Central Authority by July 31, 2025.

5. The Claimant is to purchase the ticket for the return of MW to the USA.

6. The Defendant is to have liberal access to the minor daily.

7. A report concerning the physical abuse and or neglect of MW is to be made to the social services department in the area where the claimant resides by September 12, 2025, so that a proper investigation can be carried out and the necessary remedial actions take on.

8. MW is to be referred for counselling immediately upon her return with the Claimant to the USA.

9. DW is referred to undergo parental training and counseling upon the return of MW to his custody.

10. The Claimant's attorney at law is to prepare, file and serve the order.