

IN THE HIGH COURT OF JUSTICE
(FAMILY DIVISION)

Case No: 2014 EWHC 1626 (Fam)

The Royal Courts of Justice
Strand
London

17th January 2014

Before

THE HONOURABLE MR. JUSTICE HAYDEN

LS

(Applicant)

-v-

AS

(Respondent)

APPROVED JUDGMENT

APPEARANCES:

For the Applicant:

MR JARMAN

For the Respondent:

MR EDWARDS

Transcribed from a digital audio recording by
J L Harpham Limited
Official Court Reporters and Transcribers
55 Queen Street
Sheffield S1 2DX

MR. JUSTICE HAYDEN:

1. This is the father's application for summary return of three children to Hungary, pursuant to the Articles of the Hague Convention. The children are: X, who, having been born on the 17th April 1998, is now 15 years and nine months; Y, who was born on the 12th November 2005 and who is therefore eight, and the youngest child, Z, who was born on the 14th September 2011 and who is two years of age.
2. The Applicant father is LS, who is today represented by Mr. Jarman of counsel, and the mother is AS, who is represented by Mr. Edwards of counsel.
3. The parents have one other child, M, who is 18 and who remains living in Hungary with his maternal grandparents.
4. Both parties are Hungarian Nationals. They were married in 1995 when they were both very young. The father was 17, the mother was 16 and very shortly, a matter of weeks after the marriage, M was born.
5. Their relationship has been characterised by many separations and reconciliations. On any view, it is, as Mr. Jarman terms it, a marriage with a very unhappy history. The mother makes complaint of domestic violence; the father complains of the mother's infidelity.
6. A striking and quite unusual feature of this case is that many of the salient background facts are agreed or uncontentious. In particular, it is agreed that domestic violence has indeed characterised the marriage and characterised it throughout. It is agreed that on at least one occasion, the Police were called in relation to an incident of domestic violence against the mother. It is agreed that the children witnessed domestic violence and it is agreed that X was herself subject to violence by the father on two separate occasions. In his statement the father says of this "I have no justification for this and deeply regret it". It is hardly surprising, therefore, that it is also agreed that the marriage has been an unhappy one.

7. It is clear, and again it is agreed that the mother's abduction of the children in June of last year was carefully planned, though it was not communicated to Y until the day of the mother and children's departure for the UK. It is common ground that at least initially on the separation, Y missed her father. It is agreed that the children were, as of June last year, habitually resident in Hungary and that the father has rights of custody in relation to the children. It is a fact that the children have only been living here, therefore, in the UK, for five-and-a-half months. It is plain, certainly as far as Y is concerned, that she has relatively limited command of English.
8. During the course of submissions, it was also recognised by Mr. Jarman on behalf of the father that the analysis of the CAFCASS officer, Mr. John Power, was largely impregnable and that his conclusions were, therefore, difficult to displace. Mr. Power concluded that what the children told him about their family life in Hungary is more likely to be true than not true, and that a return to Hungary could be potentially intolerable, because historically Mother has proved unable to safeguard them whilst in situ there. Her description of the violence shown to her by her husband is “he would regularly hit me, grab me by the throat and push me against the wall when he got angry”. On my evaluation of the evidence I consider this is likely to have occurred frequently in consequence of the Father’s volatility.
9. All this, it seems to me, is sufficient to identify the factual matrix of the case. The Respondent mother defends the application for the children's summary return on the basis of the Article 13(b) defence of ‘grave risk of harm’, and secondly on the basis of the children's objections, which it is contended are rational, strong and based on genuine conviction.
10. The two experienced advocates in the case have drawn my attention to a number of authorities, and have both acknowledged that the Court is here engaged in a discretionary exercise. Particular reliance is placed by the mother on the Judgment of Baroness Hale in *Re M (Abduction Zimbabwe)*, [2007] 1 UKHL 551, which it is contended provides the most cogent guidance to the Court as to the exercise of its discretion. I have also been referred to

the Supreme Court case of *Re E (Children) (Abduction: Custody Appeal)*, [2011] UKSC 27 at 758, and to *Re S (A Child) (Abduction: Rights of Custody)*, [2012] 2 FLR 442. I have had the benefit of detailed and carefully written arguments. There has been no live evidence, the conclusions of Mr. Power being, as I say, essentially unchallenged.

11. How, then, do I approach the exercise of my discretion in this case? It is undoubtedly the position that in Convention cases there are general policy considerations which have frequently to be considered alongside the individual interests of the particular children in the case. The philosophy of the Hague Convention has been rehearsed in many of the authorities and is well-known. It is predicated on the swift return of children who have been abducted. Intrinsic to this, is the principle of comity between contracting states and the mutual respect for the contracting states' respective judicial processes. As Baroness Hale observed in *Re M*, the Convention is also there to deter abduction in the first place, in order that the message should go out to potential abductors that there are no safe havens among the contracting states.
12. I approach the discretionary exercise on the basis that within the framework of the convention philosophy my discretion is at large and unfettered. There is no principle of Convention policy that should be given greater weight than any other or indeed of the principles of children's rights and welfare.
13. At Paragraph 44 of *Re M*, Baroness Hale observed that,

"As is clear from the earlier discussion, the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose is to protect the interests of children by securing the swift return of those who had been wrongly removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter, the weight to be given to Convention considerations and to the interests of the child will vary enormously. The

extent to which it will be appropriate to investigate those welfare considerations will also vary, but the further one gets away from the speedy return envisaged by the Convention, the less weighty those general considerations may be".

14. She goes on at Paragraph 46 to observe,

"In the child's objections cases, the range of considerations may be even wider than in the other exceptions. The exception itself is brought into play when only two conditions are met. First, that the child herself objects to being returned, and secondly, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of Article 12 of the United Nations Convention on the Rights of the Child, 1989, Courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the Court may have to consider the nature and strength of the child's objections, the extent to which they are 'authentically owned' or are 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 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".

15. In *Re E*, Baroness Hale and Lord Wilson concluded with a reminder that the whole of the Hague Convention is designed,

"...for the benefit of children, not of adults. The best interests not only of children generally but also of any individual child involved are a primary concern in the

Hague Convention process. The exceptions to the obligation to return are by their very nature restricted in their scope and they do not need any extra interpretation or gloss. It is now recognised that violence and abuse between parents may constitute a grave risk to children. Where there are disputed allegations which can neither be tried nor objectively verified, the focus of the enquiry is bound to be on the sufficiency of any protective measures which can be put in place to reduce the risk. The clearer the need for protection, the more effective the measures will have to be".

16. I deal with each objection in turn. In his report, which reveals his considerable experience, Mr. Power observes that X a was, as he terms it, "Up-front" about their removal from Hungary. She and M, she told him, had been aware of the plan since December of 2012. Y confirmed that she was only made aware of the intention to relocate to the United Kingdom on the day.
17. She told Mr. Power that she had cried, but only on the day she left. She was asked why, and she said she was missing her Dad quite a lot. She was taken by surprise by the relocation. In the fullness of time, she now says that she does not like her Dad. She was asked why and she said, through the interpreter, that he was "Fighting a lot with everybody". When asked to specify with whom, she said, "Mum, M and X".
18. X was also not uncritical about her mother. She says that at one point her mother had left her father for another man. This may have been at a time when she and M were living with their father and their mother was living with Y in a women's refuge, to which on at least one occasion in Hungary, the mother had resorted. On other occasions when she had fled the home, she had gone to the home of her own parents.
19. X tellingly, to my mind, observed that, at present, despite the uncertainty and with these proceedings hanging over her head, it had been "the happiest time she had experienced as a family".
20. Y was asked what she would look forward to if she were summarily returned to Hungary.

Mr. Power records that tears welled in her eyes and she replied, "Nothing". She was asked to explain, and she said that if they were ordered to return, she would be most worried about their father "Fighting everybody and calling everybody names". She said his friends were bad, and most of all, she said, "I would be very sad".

21. When asked to be more specific, in an inquiry which I agree with Mr. Jarman is characterised by sensitivity as well as skill, she told Mr. Power that she remembered seeing Mum and Dad have a physical fight on one occasion, and she remembered that it was an occasion when the family had been due to visit the Natural History or Science Museum in Hungary. It is recorded that she responded fluently, without hesitation and with just one fleeting look towards her elder sister.
22. Encapsulating a welter of case law in an enviably succinct way, Mr. Power observed that the simple test for assessing objection is conviction, rationality and strength. If what the children say is true about life at the hands of their father, they are, he says, rational about not wanting to return. He observes that they spoke with 'compelling conviction' in the way that he had set out in the selections I have cited, but which are seen in a number of illustrations within his report. Y, given her age, "hardly looked", he says, at her elder sister when delivering the whole of her story to him. "There was little pause for thought; she simply poured out what was in her heart". The strength of their wishes and feelings, Mr. Power observed, was written in their body language. Even more so with Y, he thought, than Johanna, who is, it emerges, a sophisticated young person for her relatively tender years, and who no doubt, as Mr. Power analyses, has learned, as he puts it, "developmentally to codify her objections".
23. In the case of X aged 15 years, in respect of whom the Convention will only apply for a further twelve weeks, there can be no doubt that her objections must be listened to. They are cogent, they are eloquently expressed; to fail to give substantial weight to them would be to disrespect her maturity and autonomy. This does not mean that I should allow her objections automatically to incorporate those of the younger two. What is so striking from the

assessment of the children is that whatever her initial feelings, Y has very quickly come to express her views independently, with conviction and with rationality. She has enjoyed a period of unprecedented respite which has enabled her to achieve a perspective on her past.

24. Mr Jarman in both his written and oral submissions anticipated (realistically) that the court would find that the children's objections were genuine. He also recognised that the Hague Convention jurisprudence does not exist in an isolated sphere but that these cases draw upon the Family Court's wider knowledge and experience of child welfare issues. Pertinently, all those involved in the family justice system have long recognised the profound and corrosive impact of domestic violence on children, both its immediate consequence and its insidious repercussions for children in late adolescence and adulthood. See *Re L, Re V, Re M, Re H* [2000] 2 FLR 334, to which I will return below.
25. I do not need expert evidence here for me to identify that these children are at grave risk of harm from their father in Hungary. Though she has plainly tried to separate on many occasions from the father in the past the mother has, in the complex dynamic of victim and perpetrator, consistently been dragged back into his orbit. The clear inference I draw is that only by leaving Hungary could she finally free herself from this long standing abuse from which she had been unable to protect either herself or her children. I emphasise that the impact on the children is not only emotional, itself serious enough, but in X's case she was physically abused by her father. It is a voluble and eloquent critique of their past lives that the children have emphasised the last few months as the happiest of times.
26. In exercising my discretion here I am clear that the clarity and force of the children's wishes should not be artificially separated from the fact of what, I conclude, has been their seriously abusive past home life. I note that the eldest child M escaped his father at the earliest opportunity. Judicial discretion is incorporated into the framework of the law here because there will always be cases where risk of harm to children and/or the authentic and cogently expressed wishes of children will outweigh the principles of international comity that I have

referred to above.

27. Mr Jarman has harnessed every point that could be made in support of the father's contention that the children should be returned. He emphasises:

- (i) This is a 'hot pursuit case' the mother and the children have only been in England 5 ½ months;
- (ii) These are Hungarian children who have who have up until their removal lived all their lives in Hungary;
- (iii) Y missed her father 'quite a lot' at the early stages of separation;
- (iv) Z's wishes, aged 3, have little relevance and therefore, it is said, cannot be subsumed by those of his siblings;
- (v) The education of the older children might be adversely effected by linguistic challenges;
- (vi) The mother is a qualified social worker is able to engage with the Hungarian Court and has in the past sought the help of the Police and Refuges.

28. Mr Jarman sets out further points at para 35 of his skeleton argument. Collectively these features, it is submitted, override both the risk of harm and Mr Power's analysis of the welfare features of the case. Sufficient protective measures can be put in place to protect the children. The risk whilst it may be 'real' Mr Jarman submits is not 'grave' as contemplated in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC27. He refers me to the judgment of Baroness Hale at Para 33-35.

[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, 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 13(b) 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. Mr Turner accepts that if the risk is serious enough to fall within Art 13(b) the court is

not only concerned with the child's immediate future, because the need for effective protection may persist.

29. I have these passages very much in mind and the fact that Mr Power believes the children and mother would return to Hungary if compelled to, an important factor, it is said, in contemplating 'the future' as Article 13 (b) requires.
30. Important and well made though these points are, they do not eclipse the fact that the Convention ultimately exists for children, not adults or, more amorphously, contracting States. I have here, as I have commented, the unusual advantage of a clear substratum of facts from which I draw inferences predicated on evidence, case law and experience. I conclude that these children are at grave risk of harm on their return to Hungary, primarily emotional harm but also physical. They have been provided here with a shelter from that abusive environment, which this mother has, despite her efforts, simply not been able to achieve in Hungary. The CAFCASS report shows the children to have blossomed.
31. History, over many years in these children's lives, shows that the protective measures the mother has sought to put in place in Hungary have been ineffective. The father is simply not constrained by the interventions of the State, he is to use the children's own and I believe authentic language 'unpredictable', 'violent' and 'tyrannical'.
32. In *Re L, Re V, Re M, Re H*, [2000] 2 FLR 334 the Court of Appeal considered what was in many ways, a ground breaking report assessing the impact of domestic violence on children, prepared by two highly respected Consultant Child Psychiatrists. Dr Claire Sturge and Dr Danya Glazer. The report was commissioned by the Official Solicitor (acting as Amicus) at the request of the Court of Appeal. The conclusions of that report are now so much a part of conventional child protection thinking and understanding that it is unnecessary to rehearse them. What does however bear revisiting are the recommendations in the report concerning the need to respect the wishes of the child in the context of domestic violence.
33. At paragraph (h) of the report, set out in the judgment in the prefacing remarks of Dame

Elizabeth Butler –Sloss (P) as she then was, it is recorded:

“In domestic violence , where the child has memories of domestic violence we would see their wishes as warranting much more weight than in situations where no real reason for the child’s resistance appear to exist...”

The authors of the report were considering contact with a perpetrator, but the recommendations have clear resonance in the context of this case.

34. I draw from the evidence that domestic violence both physical and verbal has been so much a part of the life experience of these children that its cessation has overwhelmed them and set both their sense of the past and of the possibilities for the future in perspective. The father expresses no understanding of the reasons for his behaviour and his violence is so entrenched (including a conviction for assaulting a nephew) that it is unlikely to be addressed effectively or at all within the timescales of these children. Their wish to remain in the U.K. is expressed loudly and clearly. Furthermore I believe that failure to afford it determinative weight, on the facts of this particular case would in and of itself be so disempowering that it would also be harmful, adding to the wider picture of harm that I have identified above.
35. Properly analysed therefore I believe these children face a grave risk of serious harm were they to be returned to Hungary. Moreover I find Y and X’s expressed wishes and feelings contemplate precisely the risks I have identified and require to be respected. The extensive history of violence throughout this marriage shows, as I have said, that preventative measures have been woefully ineffective. For this combination of factors, specific to this case, I decline the Father’s application for summary return.