

Case No: FD18P00788 NC: [2019] EWHC 649 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

The Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 14 February 2019

BEFORE:

MR JUSTICE WILLIAMS

IN THE MATTER OF A (A CHILD)
(Hague Abduction; Art 13(b): Protective Measures)

MR M TURNELL (instructed by Lyons Davidson) appeared on behalf of the Applicant
Father
The Respondent mother appeared in person

JUDGMENT
(As Approved)

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(Official Shorthand Writers to the Court)

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1. MR JUSTICE WILLIAMS: I am dealing with an application made by the father under the 1980 Hague Child Abduction Convention for the return of his daughter, A, who was born on 27 December 2014, so who is now therefore 4 years and 2 months of age. The father is represented by solicitors and counsel. He has the benefit of non-means, non-merits legal aid in accordance with the obligations we have undertaken in relation to the 1980 Hague Convention.
2. The respondent is the mother of A. She is not represented in court and is being assisted by an interpreter organised by the court service.
3. The application is for the summary return of A to Latvia. The mother, the father and A are all of Latvian origin and the application arises out of the fact that A was brought to the United Kingdom in the summer/early autumn of 2018 without the agreement of the father. The mother has been living here ever since with her mother.
4. A was habitually resident in Latvia prior to the summer of 2018, and because, according to the documentation from the Latvian Ministry of Justice, parental responsibility for A was shared between the mother and father, the removal of A from Latvia by her mother was wrongful within the meaning of the 1980 Hague Convention as being in breach of the father's rights of custody. And because A was habitually resident in Latvia immediately prior to her removal, that means the provisions of the 1980 Hague Convention are engaged.
5. The obligation on this court pursuant to Article 12 of the 1980 Hague Convention is to order the return of A forthwith to Latvia, unless the mother establishes that an exception applies. In this case, the mother has put before the court evidence which raises a potential defence under Article 13(b) of the Convention.
6. The proceedings commenced on 22 November last year which followed from a request made by the Latvian Ministry of Justice, the central authority for Latvia, to the English central authority, which was dated 15 November 2018. Proceedings first came before this court on 26 November when Newton J made an order which provided for the tipstaff to locate A's whereabouts and listed a hearing on 14 December.
7. On 14 December, Cohen J made an order. On that occasion, the father was represented by Mr Turnell, who appears again today, and the mother appeared in person. On that occasion, the mother accepted that she had removed A from the jurisdiction of Latvia without the father's consent, but I think it was indicated on that day that not only did she oppose the application, but she alleged she had been subjected to domestic abuse in Latvia. She was provided with some information about possible lawyers who might help her but, given that she is here alone today, that obviously did not lead anywhere. The order also urged the parties to use the Reunite mediation scheme. I have not heard anything further about what happened in that regard, but given we are here today, that also made no progress.
8. Cohen J made provision for the mother to file her answer and witness statements by 15 January. He provided that the father should respond. At paragraph 10, he said that each party's statement must include any details of any protective measures sought or

offered in the event of a return. Somewhat unusually, he provided that the father might attend today's hearing via video-link. Mr Turnell explained that the court was unclear on 14 December of precisely the nature of the mother's defence, so provision was made for the father to be available to give evidence if I decided that was necessary at the final hearing. The final hearing was listed by Cohen J to take place on 14 February with a time estimate of one day.

9. The mother complied with the order to provide a statement. I have seen her statement written in English and exhibiting certain I think texts or Instagram or other exchanges with the father. The general nature of the account in that statement is an account of domestic abuse amounting to or including physical violence, threats and controlling behaviour.
10. She has also today produced further evidence to me which includes statements from I think her mother, an answer to the father's statement, a statement from an aunt, a statement from a work colleague of the mother's grandmother, further exchanges on social media, a translation of a medical report, a couple of reference letters from the mother's employers, one of which says she has been employed since 24 July 2018 as a member of the housekeeping team, and another which says she has been employed since 12 October on the housekeeping team. As an aside, that refers to her as a hardworking, trustworthy and reliable employee.
11. Also within the documents is a tenancy agreement in the mother's name which commenced on 28 September 2018 for a period of six months. I have also been provided by the mother with some documents which show that A has been registered with a doctor, and there are a series of photographs of the child I am concerned with, A, who looks like a very engaging and smiley child and who is most unfortunate to be at the centre of an argument between her parents.
12. The father has filed his evidence in response to the mother's. In general terms, he denies the allegations of domestic abuse and he has offered a series of protective measures which he says could be put in place and which would ensure that A was protected from any risk of harm were she and her mother to return to Latvia. Mr Turnell on the father's behalf filed a position statement setting out the father's stall. That asserted that the mother's allegations did not in any event meet the Article 13(b) threshold. This was primarily on the basis that the mother had not intended to flee Latvia by reason of the alleged domestic violence – Mr Turnell relying on the closing words of the mother's statement saying 'I want to stay in with my child in the UK [sic] because my family resides here. Also, it is very important to note that I think my child would be much better off living, growing up and studying in this country'. More significantly, perhaps, it was submitted that even if the allegations did meet this threshold, the protective measures which the father proposed would reduce any risk of harm to A to such an extent that the court could not possibly say that there would be a grave risk of harm to A if she were to return to Latvia.
13. The protective measures which the father offered initially were:

- a. A promise to this court that he would not instigate or support any civil or criminal proceedings against the mother arising from the wrongful removal of A from Latvia.
- b. He undertook to pay for A's airfare for her to return to Latvia, and he has added that he will pay for the mother's airfare, assuming that she would return with A.
- c. He offered not to attend at the airport upon their return, he undertook not to remove A from the mother's care pending a hearing in the Latvian courts.

He has in addition today offered an undertaking that he will initiate proceedings in the Latvian courts so that if A and the mother return, there will be a hearing before a judge who will be able to discern what the arrangements should be for A, and he has in addition undertaken to register any order this court makes insofar as it is necessary and covers protective measures with the courts in Latvia, the effect of which would be to give the mother equivalent protection in Latvia to that which she would get in England.

- d. He has offered in terms of ensuring the mother and A are protected from domestic abuse that he - I think there must be a typing error in the undertaking because it does not include an undertaking not to assault her - I am assuming it should read the standard form of undertaking that he will not assault the mother, harass, threaten, interfere or molest the mother, whether by himself or any third party. As is usually the case in relation to such undertakings, he makes that promise without accepting that he has ever behaved that way in the past.
 - e. He also undertakes to vacate the property where he and the mother and A at the time lived, and he says he will vacate it and allow the mother and A to reside there until there is a hearing in the Latvian courts, and he says he will not go back to that address save for the purpose of any contact which he and mother agree in relation to A. He has clarified that he will pay the rent on that property so the mother and A will have a secure home available to them until such time as the Latvian court is able to consider the situation with both the mother and father present in court.
14. The mother's general position today is that she confirms she has been subjected to domestic abuse and some of the additional documentation she has put from family corroborates her evidence. Much of the evidence she has put in suggests that she and A are settled and making a life in England. She says the father has made promises to her in the past. I think she said she had listened to his promises for six years but she says he has not kept his promises, so she clearly does not believe that any promise he gives to this court will be stuck to if she returns to Latvia. So in legal terms, I suppose she would say that these protective measures the father offers would not be adequate to secure her protection in Latvia.

15. The law which I have to apply is the law relating to the 1980 Hague Convention. By my decision, I am not deciding whether A should live in England or in Latvia; I am not deciding whether A should live with her mother or her father. That is the job of the Latvian courts who retain jurisdiction over A by operation of Article 10 of the Council Regulation 2201/2003 (BIIA). What I am called upon to decide is an application under the Child Abduction Convention as supplemented by Article 11 of BIIA, so Articles 13 and 12 of the Hague Convention are engaged.
16. As I have already referred to, Article 12 requires this court to return A to Latvia unless a defence under Article 13 is established. Article 13(b) of the Hague Convention says:

"The requested state is not bound to order the return of the child if the person ... which opposes its return establishes that there is a grave risk that ... her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."
17. The House of Lords and the Supreme Court of the United Kingdom have considered how that article works in a series of cases:
 - a. *Re D (Abduction: Rights of Custody)* [2006] UKHL51
 - b. *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2011] 2 FLR 758
 - c. *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 FLR 442
18. From those cases, the following principles can be derived.
19. Article 13(b) is of restricted application, the words are plain and need no further elaboration or gloss. The burden lies on the person opposing return; it is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities, but in evaluating the evidence the court has to be mindful of the limits on its ability to assess evidence within a summary hearing of this sort. The courts usually will not hear oral evidence from the parties, and usually documentary material before the court will be fairly limited.
20. In this case, as in so many others, most of the material about the mother and the father, A, and the lives they have led exists in Latvia, not here, which is part of the reason why BIIA provides for Latvia to retain the substantive jurisdiction over A.
21. So looking at the risk to the child, it must be a grave risk. It is not enough just for the risk to be real, it must have reached such a level of seriousness that it can be characterised as grave. The word "grave" characterises the risk, not the harm, but there is a link between the two. The words "physical or psychological harm" are not qualified, but they do gain colour from the alternative "or otherwise placed in an intolerable situation". Intolerable is a strong word, but when applied to a child must mean a situation which this particular child in these particular circumstances should not be expected to tolerate.

22. Article 13(b) looks at the future, the situation as it would be if the child were returned forthwith to her home country. The situation which the child will face on return may depend on the protective measures which can be put in place to ensure that the child will not be placed in an intolerable situation or grave risk of harm when she gets home. Where the risk is serious enough, the court will be concerned not only with the child's immediate future because the need for protection may persist.
23. Where allegations of domestic abuse are made, the courts would ask if, whether they were true, there would be a grave risk that the child would be exposed to physical or psychological harm, or whether the child would be placed in an intolerable situation. If they would, then the court must ask how the child can be protected from such risk. If the protective measures could not ameliorate the risk, the court might have to try to resolve disputed issues of fact.
24. Article 11.4 of BIIA rules out a non-return where it is established that adequate protective measures are available. The Practice Guide makes clear that this is intended to address the situation where authorities have made or are prepared to make such arrangements. The Court of Appeal has recently confirmed that protective measures include all steps that can be taken, including housing, financial support, as well as more traditional measures such as non-molestation injunctions (see *Re C* [2018] EWCA Civ 2834).
25. Protective measures may include undertakings, and undertakings accepted by this court or orders made by this court pursuant to Article 11 of the 1996 Hague Child Protection Convention are automatically recognised by operation of Article 23 in another Convention state (see *Re Y (A Child) (Abduction: Undertakings Given for Return of Child)*). To be enforceable they must be declared enforceable pursuant to Article 26. The 1996 Hague Convention Practical Operation handbook provides examples of measures which might be covered by Article 11. European Regulation 606/2013 on the Mutual Recognition of Protection Measures in Civil Matters sets up a mechanism allowing for direct recognition of protection orders issued as a civil law measure between member states, thus a civil law protection order such as a non-molestation order or undertaking issued in one member state, can be invoked directly in another member state without the need for a declaration of enforceability but simply by producing a copy of the protection measure, an Article 5 certificate and where necessary a transliteration or translation.
26. A protection measure within that is defined as any decision, whatever it is called, ordered by an issuing authority of the member state of origin. It includes an obligation imposed to protect another person from physical or psychological harm. Our domestic law provides this court can accept an undertaking where the court has the power to make a non-molestation order. Thus it seems that a non-molestation undertaking given to this court could qualify as a protection measure within the European Regulation on protection measures.
27. So with that summary of the law, what of the evidence? The mother's statement contains an account of various forms of abuse which she alleges the father perpetrated on her. She describes being forced into a cold shower, she describes shouting, abuse, spitting, twisting of her arm, pushing, choking, all clearly forms of physical abuse. She

alleges that he threatened to kill her family, that he threatened to take her daughter away, and that he would commit suicide and harm himself, all of which clearly would fall into the category of emotional abuse, at least.

28. She also alleges various forms of coercive or controlling behaviour; following her to work, tracing phone calls, surreptitiously taking intimate videos of sexual activity between them. She refers in particular to one incident where in 2017 she says he hit her head with a door and as a result of which she received four stitches to her head. I have seen a photograph of her thereafter and I have also seen a medical report which confirms that she presented herself to hospital and a wound was stitched. The medical report although does say that it happened accidentally and does not refer to it as being deliberate. The mother says that during this incident, A was present.
29. She gives further detail of other allegations, including the father abusing alcohol and becoming aggressive, and has alleged he suffered some form of mental health problems and has taken medication. Although she concludes her statement by saying, "I want to stay with my child in the UK because my family resides here, also it is very important to note that, I think my child would be much better off living and growing up and studying in this country", she does not specifically say there that she fears returning to Latvia. But I think it is implicit in the whole of her statement that she says she is scared of returning to Latvia, and she has confirmed that in court today.
30. These proceedings are no doubt stressful and she is here without legal support. It is clear that not only is she anxious, but also upset. So I approach her case on the basis that she not only is fearful of returning to Latvia, but that also she considers for other social and economic reasons that life would be better here for her than in Latvia. It seems fairly clear that she has family in this country, I think her mother and possibly her sister, who are part of her support network here.
31. The father's evidence in response is almost diametrically opposed to the mother's. He denies behaving aggressively, he denies assaulting her in almost any form, save that he admits on one occasion he did put her in the shower. He says this was because she had become aggressive and he did it in order to calm her down. He denies other forms of abuse, whether threats to commit suicide, following her, or surreptitiously recording sexual activity. He accepts there was an incident when the mother suffered a cut to her forehead when he says he pushed open a door and she was behind it and it caught her on the head.
32. He also gives a different account to her in terms of the nature of their relationship. There seems to be a considerable difference in their perception of how long they lived together for, and indeed even where, because the father says that for a period of time before A's birth, they lived in England. None of those disputes are ones which I can resolve. All of those events which are narrated by the mother and by the father took place in Latvia. There may be one or two events which took place in England or otherwise, but it is plainly the Latvian courts which would be better placed to resolve the question of whether the mother has been subjected to the sort of abuse described or not.

33. The limited window into the possible truth or otherwise of the allegations which I have been provided with is the social media exchanges between the parties, and perhaps the medical report which I previously referred to. The social media exchanges are, I suspect, only a very limited selection of probably a far greater range of exchanges between the parties. They made for unpleasant reading. The father at times expresses himself in abusive language, the mother might respond in colourful language at times. But I cannot say from looking at them that there is clear evidence which points to the truth or otherwise of the mother's allegations. Both the mother and the father might like to remind themselves that they have what appears to be a beautiful little girl, and the idea that at some point in the future she might read what her father said to her mother and what her mother said to her father should embarrass them. They owe it to their daughter to behave better. But I cannot say from what I have read that the exchanges go beyond commonly encountered acrimonious, ill-tempered recriminatory language between two parents who are dealing with the fallout of a separation.
34. The other piece of evidence which I have already referred to is the medical report. That says -- it must have come from the mother -- that the cut to her head was caused accidentally by a door. That sort of explanation might be given when somebody hit their head accidentally on a door; experience also tells us that sometimes victims of abuse give false accounts of how they suffered injuries. But insofar as the objective evidence sheds any light on the allegations of abuse, it happens to fit more easily with the father's explanation than the mother's. So ultimately, I am not in a position to say whether the mother's allegations are true or not. That may be something a Latvian court may have to determine.
35. What I can say though is that if those allegations are true, they would amount to domestic abuse at a relatively high level. These courts have long accepted that domestic abuse perpetrated by one parent on the other can have a profound and harmful impact on a child, either through the child directly witnessing the abuse or because of the impact that the abuse has on the parent.
36. Thus, taking the mother's allegations at their highest, as I have to do, given that I cannot make a finding as to their accuracy, the Article 13(b) threshold certainly is met, but do the protective measures which are offered by the father address the risk which is identified. Clearly the majority of the allegations of abuse take place within the context of an ongoing relationship and the parties sharing a property together. Thus, if they are living separately and are longer in a relationship, the opportunity for incidents will be reduced. In terms of other forms of abuse, whether it is attempting to snatch A from the mother on the street or sending abusive messages or making threats, they would all be addressed by measures which would prevent the father from communicating with the mother, or measures which would prevent him from removing A from her care without an order of the Latvian courts.
37. In terms of where the mother and A would live and the harm which might arise if they had no home, that would be met by provision of accommodation. The mother's case is that any promise made by the father is worthless because whatever his promises, he will break. I have to assess whether the protective measures would be adequate, ie that they would actually have the effect which is intended so that they are real and not theoretical.

38. Because Latvia is a fellow member state of the European Union, there are legal instruments which give the force of law in Latvia to protective measures that I could make here. The intention of the European instruments is to create a situation where a protective measure made by this court will be as effective in Latvia as it is here. The same is true of the 1996 Hague Convention; an application made to the Latvian court to register protective measures made by this court should have the effect of making them bite in Latvia.
39. It seems to me that when one takes account of the range of protective measures which are now offered by the father and the availability of forms of registration in Latvia, they would amount to an adequate form of protection for the mother and A were they to return. That means that the risk which arises, taking the allegations at their highest is ameliorated to a very significant degree sufficient to reduce it below the Article 13(b) threshold. In practice, that means the mother cannot establish the defence under Article 13(b). That means that I am obliged by Article 12 of the Convention to order the return of A to Latvia.
40. There has been no suggestion from the mother that she will not return with A, so I am assuming that if I order A to return within the next three weeks, the mother will return with her. I will order that return on the basis that the undertakings offered by the father are put in writing, that they will become part of the order I am making, and that they will be the subject of an application to the Latvian court to register them so they become enforceable there. So if anything were to happen in Latvia, the mother would have the protection of the courts there in the same way she would have the protection of the courts here. So subject to those all being committed to writing in the form I have identified, I will order the return of A to Latvia.
41. Ultimately, it is for the mother to elect whether she wishes to return to the flat. If she does, it will be available for her exclusive occupation with A until such time as the Latvian courts hold an on-notice hearing. If she prefers to stay with family or friends, that is a matter for her. I note that the tenancy she has in England is due to expire on 28 March. Three weeks from today takes us to something like 7 March, so it will be slightly before her tenancy expires. Arrangements will have to be made to purchase tickets for the mother and A, and arrangements will need to be made very rapidly by the father to seise the Latvian court both of an application in relation to A but also, more importantly, in so far as is necessary, to register the undertakings with that court to give them teeth in Latvia.
42. I hope that that process will be complete by 7 March. If it is not for whatever reason, then I will need to be notified and if necessary a further hearing will take place in order to chart a way ahead.

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This transcript has been approved by the Judge