



Neutral Citation Number: [2020] EWHC 491 (Fam)

Case No: FD19P00473

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2020

Before :

MR DAVID REES QC

Between :

AB
- and -
CD

Applicant

Respondent

Re E (Child Abduction: Child's Objections)

MR J ROSENBLATT (instructed by **Switalskis Solicitors**) appeared on behalf of the
Applicant Father

MR R POWELL (Bar Pro Bono Unit) appeared on behalf of the Respondent Mother

Hearing dates:

Approved Judgment

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

.....
MR DAVID REES QC

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their

family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Introduction

- 1 Before I give my reasons for doing so, I will let you know what I have decided, which is that I am going to dismiss this application and that E should remain in England and Wales.
- 2 This application concerns a child, E, who is now ten years old. Her parents are married, and she is their only child. The parents and E are all British citizens.
- 3 The application, which is dated 5 September 2019, has been brought by the father under the Child Abduction and Custody Act 1985 incorporating the Convention on the Civil Aspects of International Child Abduction 1980 (“the Convention”), and under Article 11 of Council Regulation EC 2201/2003 (“Brussels IIa”). By the application, the father seeks the summary return of the child, E, to Lanzarote in Spain, which is where he lives, and where the mother and E were also living until April 2019.
- 4 The mother originally opposed the application on four grounds:
 - (a) That the child is habitually resident in England and Wales so that the Convention does not apply;
 - (b) That the father consented to the permanent removal of the child from Lanzarote to England;
 - (c) That there was a grave risk that a return to Lanzarote would cause E physical or psychological harm, or otherwise place her in an intolerable situation; and
 - (d) That E objects to returning to Lanzarote.
- 5 At the start of the hearing this morning, the mother abandoned her objections on the basis of habitual residence and consent. Two ground of opposition remain: the child’s objection to returning to Lanzarote and the assertion that there is a grave risk that a return would cause physical or psychological harm or otherwise placing the child in an intolerable situation.

Legal Background

- 6 The application falls to be determined by reference to the provisions of the Hague Convention. As Article 1 makes clear, one of the objects of the Convention is:

“to secure the prompt return of children wrongfully removed to or retained in any Contracting State.”

The wrongfulness of a removal or retention is governed by Article 3, which provides that:

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

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

“The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.”

- 7 The substantive obligation to return is provided for by Article 12 of the Hague Convention. This provides that:

“Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.”

- 8 There are limited exceptions to the obligation to return. These are set out at Article 13, which provides that:

“Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –”

Sub-paragraph (a) deals with consent and is no longer relevant in this particular case. Article 13 continues:

“(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.”

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

“In considering the circumstances referred to in this Article, the judicial and administrative authority shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child’s habitual residence.”

- 9 Because this is a case to which Brussels IIa also applies, the Article 13(b) defence is qualified by Article 11(4) of Brussels IIa, which provides:

“A court cannot refuse to return a child on the basis of Article 13(b) of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.”

- 10 I will begin by summarising the factual background to this application. The father is forty-eight years old; the mother is forty-five. They were married in 2002 and E was born in October 2009. Neither parent has any other children.
- 11 At the time of their marriage, both parents were living in the north of England, where they own a house. The father was an engineer; the mother had run a number of restaurants. By 2014, the father was suffering from depression and had left his job and the family was in debt. There is a dispute, which I am not in a position to resolve, and do not need to resolve for the purposes of today, as to whether those debts arose from the failure of the mother's businesses or whether they had been generated by the father, with the consequence that the mother had to discharge them by selling her businesses. In any event, in 2014, the parents decided to move to Lanzarote.
- 12 Again, there is a dispute on the evidence as to their reasons for the move. The father describes the momentum for the move as having come from the mother, who he describes as having wanted to buy a café in the sun. The mother, on the other hand, places the impetus for the move on the father, who began suggesting that a move to Lanzarote would "get him well again", and because he kept telling her that it was what he needed. I have seen a text message from the mother which describes her subsequent decision to leave Lanzarote as the toughest decision of her life because it was her dream too. It does seem to me that the decision to move to Lanzarote was very much a mutual one.
- 13 The parents lived together in Lanzarote from 2014 to April 2019. The mother was the principal breadwinner whilst they were living there. There is a dispute as to the extent to which the father worked or contributed to the family finances, although, as I explain below, in light of the manner in which this case has developed today, and in particular the evidence I have heard from Ms Magson, the CAF/CASS officer, I do not now need to deal with some of the allegations that are made in the parties' evidence to the extent which I might otherwise have had to do so.
- 14 For present purposes, it is sufficient to record that the relationship between the parents deteriorated significantly. The mother sustained what she describes as a breakdown in or about 2017, as a result of which she was prescribed diazepam by her doctor. There then followed a period by the mother of her taking strong addictive medication and combining this with heavy drinking of alcohol. This led, unfortunately, in 2018, to a conviction in Spain for drink driving and a resulting driving ban for eight months. It appears that this was a wake-up call to the mother as, subsequently, and to her great credit, she has weaned herself off both those prescription drugs and alcohol.
- 15 There are also allegations of drinking and drug-taking by the father. I do not consider those to be particularly relevant now to the issues I need to resolve today. However, I do need to record that one of the points of contention within the marriage was the use by the father of the matrimonial home to grow cannabis plants. I am told that the growth of cannabis is legal in Lanzarote, although its sale is not.
- 16 In April 2019, the mother decided she could not live with the father anymore and unilaterally decided to return to England with E. She only told the father that they were going for a short break. It is clear from the text messages that I have seen that the father did not consent to any form of permanent move, and this is accepted today

by the mother, who has dropped her argument that the father consented to E returning to England.

- 17 The mother and E came to England and moved in with the maternal grandmother. E is now in school here and, by all accounts, is doing well and is settled. She is, for example, a member of the local Brownie pack.
- 18 In or about mid-May of 2019 the father became aware that the mother was not intending to return or to return E to Spain. In June, he came to England and was eventually able to have brief contact with E. There then followed proceedings in both the Spanish courts, brought by the father, and in England where the mother sought a prohibited steps order in the family court. Those family court proceedings are currently stayed pending the outcome of this application. The current application was issued on 5 September 2019.
- 19 Among the evidence before me is evidence from the mother about her health. I am told she is on a waiting list for counselling and she has stated, “I cannot return to Lanzarote as my health (mental and physical) would deteriorate to the extent I would become seriously ill and unable to care for E.” I have also seen two GP letters in relation to the mother. The first is dated 1 November 2019 and states that the mother is suffering from sufficient anxiety problems that she is current unfit to travel back to Lanzarote, and this would exacerbate her mental health problems. This letter was accompanied by a statutory sick note indicating that Mother was unfit for work. The second letter, dated 2 January 2020, states that:
- “If she is compelled to return to Spain by the courts, in my opinion, it would lead to severe mental stress, with a marked adverse effect on her condition.”
- 20 I was told that she had a panic attack on the last occasion this matter was before the court. Today, I have given permission for a friend to accompany her in court to lend her moral support.
- 21 At the outset of the hearing today, Mr Powell, for the mother, made clear that the mother did not wish to return to Lanzarote. Whilst he did not completely rule it out if the court ordered E’s return, he made clear that even if such a return was ordered, Mother reserved the right to review her position and may well still not go herself, notwithstanding an order for E’s return, having regard to her own health.
- 22 For the father, Mr Rosenblatt, in his submissions, vividly described the position as the mother “putting a bullet to the court’s head”. However, he accepted that, in the circumstances, I should deal with the application (if I, myself, were so satisfied on the evidence) on the basis that the mother would not be returning to Lanzarote with E. It seems to me that there is a very real prospect that Mother will indeed refuse to accompany E to Lanzarote, and I am satisfied that, on the balance of probabilities, she would not do so. My analysis of the grounds of objection must therefore be seen through that prism.
- 23 I turn then to the grounds of opposition to a return and begin with the final paragraph of Article 13, namely that the judicial and administrative authority may 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. Both counsel agree that the leading case in this area is that of *Re M (Republic of Ireland)(Child's Objections)(Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26, and particularly I have been drawn to the judgment of Black LJ, as she then was, in that case.

- 24 Essentially, it is a two-step test. Firstly, there is a gateway stage which requires me to consider whether E has objected in Convention terms to her return to Lanzarote and whether she has attained an age or degree of maturity at which it is appropriate to take account of her views. Lady Justice Black, in *Re M*, at para.76, described the test thus:

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

- 25 So, as Black LJ indicated there, if the gateway of objection and age and maturity is passed, I have a discretion whether or not E should be returned to Lanzarote, and the parties are agreed that in those circumstances the discretion is at large. In this context, E's views are not determinative, but clearly they are matters to which I should have regard. I have also been referred to other factors which I should take into account and, specifically, those that are set out in the judgment of Hale LJ, as she then was, in the case of *TB v JB (Abduction)(Grave Risk of Harm)* [2000] EWCA Civ 337. I will outline those factors in a little more detail later on in this judgment.

- 26 A CAFCASS report has been prepared in these proceedings by Ms Lynn Magson, a High Court CAFCASS Officer. I am extremely grateful to her for that report, and for her oral evidence to the court this morning. E's wishes are summarised in the CAFCASS report at a number of places. The report records, at para.21, that E expressed that she missed her father; at para.22, that E wondered if she would be able to visit her father in Lanzarote and hoped that this would be possible; at para.23:

“At this point, E queried if I was going to ask her where she wished to live. E detailed she would prefer to live in England as all her family are here, except for her father, and it is more fun there being more to do.”

- 27 And then, at para.24:

“Exploring further E's response if her return were ordered to Lanzarote, she stressed again she wished to remain in England, but it

would be ‘fine’ if her mother returned with her but ‘not fine’ if her mother did not accompany her.”

28 Paragraph 27 then summarises E’s wishes as follows:

“E’s expressed wishes are detailed above, describing she would prefer to remain living in England along with her mother and provided reasons for her position. She firmly expressed that she would not wish to return to Lanzarote without her mother, but it would be “fine” to return with her mother. She wished to have more regular direct contact with her father.”

29 At para.30, the CAFCASS officer also referred to E having a “preference” to remain living in England.

30 Case law suggests that a preference in itself is not enough to amount to an objection within the terms of the Convention, but as Balcombe LJ explained in the case of *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716, in a passage that is quoted by Black LJ in *Re M* at para.43 of her judgment in that case, Balcome LJ said:

“The second principle to be deduced from the words of the Convention itself, and particularly the preamble, as well as the English cases, is that the objection must be to being returned to the country of the child’s habitual residence, not to living with a particular parent. Nevertheless, there may be cases ...where the two factors are so inevitably and inextricably linked that they cannot be separated.”

31 The extent of E’s views and whether they amount to an objection within Convention terms were explored further with the CAFCASS Officer in her oral evidence this morning. She made very clear that E was - and I quote - “very firm” in her view that she would not want to return to Lanzarote without her mother. She described E as being more nuanced in relation to other matters that were canvassed with her and being able to balance advantages and disadvantages. For example, Ms Magson described E as recognising her parents were saying different things, and she described E as understanding that there were balanced issues on which decisions had to be made. However, on the question of whether she would be willing to return to Lanzarote without her mother, E was very firm that she would not wish to do so.

32 In my view, this is capable of amounting to an objection on E’s behalf in the terms of the Convention and, in the course of argument, when I pressed Mr Rosenblatt on this point, he very properly accepted that, having heard Ms Magson’s evidence, I would be entitled to reach such a conclusion. I therefore find that E is indeed objecting in Convention terms to returning to Lanzarote, or at least objecting to returning to Lanzarote in circumstances where her mother will not be accompanying her.

33 An objection on its own does not surmount the gateway I have described, as I also have to consider E’s age and degree of maturity. Having regard to Ms Magson’s report and her oral evidence, I am also satisfied on this point. E is aged ten. Ms Magson describes her as a bright, thoughtful young girl whose development was consistent with her chronological age, and that she had an age-appropriate

understanding of the decisions to be made by the court. Given E's understanding, described by Ms Magson, of the need for the court to balance different issues and points of view, and her description of the "three houses" exercise in which E exercised independent initiative and suggested that, in an ideal world, she would like her father to live in close proximity to her mother, I am satisfied that E is of sufficient age and maturity to pass the gateway test that I have outlined.

34 I now have to consider how I should exercise my discretion in this regard. As I have already indicated, some guidance as to factors I should take into account were set out in the judgment of Hale LJ in the case of *TB v JB* at paragraph 54. These were summarised by Mr Powell at para.36 of his skeleton argument, and he relies particularly on the following:

- “(a) the comparative suitability of the forum to determine the child's future in the substantive proceedings;
- (b) the likely outcome (in whichever forum) of the substantive proceedings;
- ...
- (d) the situation which would await the absconding parent and the child if compelled to return;
- (e) the anticipated emotional affect upon the child of an immediate return (a factor which is to be treated as significant but not paramount); and
- (f) the extent to which the purpose and underlying philosophy of the Hague Convention would be at risk of frustration if a return order were to be refused.”

35 In this context, Mr Powell relies on the following factors:

- (a) E is currently living in a village where she grew up, where she has a wide extended family.
- (b) E's needs are currently met and she is thriving in England (which Mr Powell argues is relevant to the likely outcome of the substantive proceedings);
- (c) The mother is willing to offer regular staying contact in England, which has already commenced;
- (d) If a return order is made and the mother did return to Lanzarote, it would lead to severe mental stress, with a marked adverse effect on the mother's condition, which itself would impact on her ability to meet the needs of E. E herself would suffer psychological and emotional harm from witnessing her mother's ill-health;
- (e) The father is unable to meet the practical needs for accommodation and financial support for the child; and
- (f) Neither parent can speak or write Spanish and cannot effectively engage in the Spanish legal system to resolve their dispute, a point that is particularly relevant to the identification of the most suitable forum for resolving the dispute.

36 I have taken those factors into account. All of them carry weight. I accept that if neither parent can speak or write Spanish (and this appears to be the case), that will significantly limit both their abilities to engage with the Spanish legal system to resolve their dispute in Lanzarote. However, what seems to me by far the most important factor here is the situation that would await E if I compelled her to return to Lanzarote, particularly when coupled with her own clear objection to returning without her mother.

37 The father's proposal that he has set out in his evidence is that the mother and E should return together and live in the former matrimonial home. The father has

indicated he would give an undertaking to vacate the property. The father has also offered to provide financial support for E. However, he has disclosed his bank account details and it is clear he has no savings and is overdrawn. His bank accounts do not demonstrate any regular income. The father has filed evidence that he is currently working, however, in reality, the sum of this evidence is three brief typed letters, all in essentially identical form, which simply indicate that he is currently doing work for three individuals. They are certainly not formal evidence of regular jobs, with tax, national insurance, or the Spanish equivalent, being paid. They suggest that perhaps, at best, the father is involved in casual work in which he most likely receives cash in hand.

- 38 The proposal that the father will provide a home and financial support for E is clearly predicated upon the father being available to work, and this simply would not be possible if E returned to live with him alone; that is to say without being accompanied by her mother. I am not satisfied that he would be in a position to provide care for E whilst, at the same time, holding down the three jobs that he is apparently doing. I am extremely concerned that to order a return in such circumstances, that is to say, circumstances where E returns to Lanzarote alone, without her mother, would be to place E in an intolerable situation.
- 39 Moreover, I am also concerned that taking E away from her mother would also aggravate what I have already described as an intolerable situation. Whilst I have no doubt that the father is capable of providing care for E, it is clear from the CAFCASS report and E's own views, that were I to insist on her returning to Spain without her mother, this would cause grave upset to her.
- 40 As I have already explained, having found that E objects in convention terms to a return to Lanzarote and that her age and maturity is such that these objections should be taken into account, it is a matter for my discretion whether I should order a return. Taking into account all of the matters which I have set out above, I consider that the balance is clearly in favour of E remaining in England and I accordingly refuse the father's application for her return to Lanzarote.
- 41 Whilst not strictly necessary for the purpose of my decision, I now turn to the objection under Article 13(b). I remind myself that it provides that the judicial authority is not bound to order the return of a child if I am satisfied 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. In *Re E (Children)(Custody Appeal)* [2011] UKSC 27, Baroness Hale and Lord Wilson, in their combined judgment in that case, explained the meaning of Article 13(b) at paragraph 34 thus:

“... 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* [2007] 1 AC 619, 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 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: e.g. where a mother’s subjective perception of events leads to a mental illness which could have intolerable consequences for the child.”

- 42 I consider that to order a return, such that E was required to return to Lanzarote without her mother in circumstances where:
- (a) she is clearly objecting to such a return; and
 - (b) the father’s support is predicated on him being available for work rather than to care for her
- would place her in a situation which it is not reasonable to expect her to tolerate. Accordingly, I consider that there is a grave risk that a return would place E in an intolerable situation and I find that the objection under Article 13(b) is also made out.
- 43 I have had regard to Article 11(4)(b) of Brussels IIa. It seems to me the proposed undertakings, which have only been formulated in the most general terms, could only have been capable of amounting to adequate arrangements within the meaning of that Article if the mother was returning to Lanzarote with E as well. If E returns alone, I am not satisfied there would be adequate arrangements in place. Indeed, I do not see how that can be the case. If the father is doing three jobs, he will not be available to provide care for E.
- 44 Given that I am satisfied that on the balance of probabilities, the mother will not be returning with E, I summarise my conclusions as follows.
- (a) E is, I am satisfied, objecting within Convention terms to a return order being made.
 - (b) I am satisfied she is of an age and of a sufficient degree of maturity to do so.
 - (c) Therefore, I am satisfied that the gateway test is satisfied, and I have a discretion as to whether or not to order E’s return.
 - (d) Having regard to the various factors I have outlined above, I am satisfied that I should exercise that discretion not to return E to Lanzarote.
 - (e) In any event, I am also satisfied that the objection under Article 13(b) has also been made out. I am satisfied that separating E from her mother and requiring E to live with the father alone in Spain in circumstances where he needed to work to provide financial support would be to place her in an intolerable situation; that is to say a situation which is not reasonable to expect her to tolerate.
- 45 Accordingly, the application is dismissed.

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital*

**** This transcript has been approved by the Judge****