



Neutral Citation Number: [2022] EWHC 1954 (Fam)

Case No: FD22P00022

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 22/03/2022

**Before:**

**MRS JUSTICE MORGAN**

**Between:**

**YP  
- and -  
XP**

**Applicant**

**Respondent**

**Ms Anita Guha** (instructed by **Dawson Cornwell**) for the **Applicant**  
**Mr Mani Basi** (instructed by **Care Solicitors**) for the **Respondent**

Hearing dates: 21<sup>st</sup> & 22<sup>nd</sup> March 2022

**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.

.....  
**MRS JUSTICE MORGAN**

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.

**Mrs Justice Morgan:**

1. This is an application by a father for the summary return of his daughter to France under the Hague Convention. Notwithstanding the summary nature of the jurisdiction the bundle of documents before me for this 2 day hearing ran to 583 pages. It included a 329 page statement by the Mother of which 309 pages were exhibits including a large number of documents from the French Court already seized of welfare proceedings.

**Issues**

- 2 The following aspects of the case are not in dispute:
  - a) There is no dispute that the child was at the date of removal habitually resident in France
  - b) There is no dispute that the father has rights of custody
  - c) There is no dispute that the removal by the mother from France to the UK was a wrongful removal
- 3 The Mother raises a defence (article 13 b) that should the child be returned to France there is a grave risk that that would expose her to physical or psychological harm or otherwise place her in an intolerable situation. She also and despite the decision made earlier at a case management hearing by Mr Cusworth QC, seeks at this hearing to argue that I should consider the child's objections to a return.

**Background**

- 4 The Father is a French national. The mother is a British national. The Child was born in France, is a French national and lived there her entire life in France until her wrongful removal to this jurisdiction. The Mother had taken unilateral steps, without the Father's knowledge to obtain a British passport for the child prior to these proceedings. The parties are not married but were in a relationship from 2010 until 2019. Z is their only child.
- 5 Following the parties' separation in February 2019, both parents continued to live in France. The Father issued an application to determine the terms and conditions for the exercise of parental authority for Z on 8 July 2019 at the Nanterre Judicial Court. That application was made in circumstances where the Father said the Mother had cut off his

relationship with the child and refused to answer his calls or e mails. Within those proceedings and at that stage, the Father was expressing anxiety that the Mother would abduct Z to live in London.

- 6 It is not necessary to set out the full detail of the proceedings in France but of note the court in October 2019 determined that the parents should jointly exercise parental authority over the child. Her residence was fixed with her Mother. There was a schedule of contact with the father which included alternate weekend overnight contact; midweek staying contact and half of the school holidays. There was later directed, in June 2020, a shared care arrangement with alternate weeks living with each parent. In May 2020, the Court heard the Mother's application for permission to relocate to London. That was refused. The Mother's position had been that that she would not move to London if the child's residence were not to be with her and the Court continued at that hearing the alternate week arrangement.
- 7 That arrangement continued until October 2021. The Mother then made allegations that the father had sexually abused the child. She restored the matter to the Nanterre court seeking a variation to the existing orders such the child should reside with her and have supervised visiting contact with her father. Her case in support of that application was that the child had made allegations of sexual abuse when she returned to her mother in October. She had been examined immediately at the paediatric emergency room.
- 8 The allegations were investigated by the French Police, including by interviewing the child and the investigation was closed on 2<sup>nd</sup> November and the Judge in the Family court requested disclosure of the papers into the proceedings ongoing before him. It was then discovered that the child had been absent from her nursery school. The Mother had taken her to the UK. On 29<sup>th</sup> November the Mother's Lawyers within the French proceedings told the Court on instructions that she and the child were staying with family in London. On 20<sup>th</sup> December that she had extended her stay for the Christmas holidays. The father issued his Hague application and the mother was served on 15<sup>th</sup> January
- 9 On 19<sup>th</sup> January at a hearing before Mr Nicholas Cusworth QC sitting as a DCHJ , the mother through Counsel indicated first that she was contesting the Hague application on 13 b) grounds and second sought a Cafcass report to be filed in relation to the child's

objections to a return. The direction for Cafcass to report was refused. Simultaneously on that date within the French proceedings, the Mother through her French lawyers sought to mislead that court by saying that she *had not left for England definitively that she had gone to rest with her mother... had contracted COVID.... was going home as soon as she could and that her job was in France*. It was not until 25<sup>th</sup> January that her French Lawyer wrote to the Court to say that the mother would not return to France with Z unless there was a decision made in her favour as to the living arrangements. It is hard to regard those two differing positions given on the Mother's instructions by two different lawyers to two different judges in different jurisdictions as other than duplicitous.

- 10 On 28<sup>th</sup> January the French Court made a custody order to the Father.
- 11 Within these proceedings the Mother issued a part 25 application for the instruction of a child psychiatrist or psychologist. That application was heard and dismissed by Mr Justice Peel at a hearing on 9<sup>th</sup> February 2022. The matter had originally been listed for the following week. Although the dismissal of the Mother's application for a part 25 expert meant that there was no delay for that reason, the late filing of the Mother's own evidence, which as I have already observed was very lengthy meant that it was not possible to retain that fixture unless the Mother was to be denied the opportunity to have her full statement of evidence with its exhibits before the court. Mr Justice Peel took the view it would be unfair to make her 'fillet' the evidence as the father invited him to. It has in fact been illuminating to have the opportunity to see in so much detail the way in which welfare proceedings have unfolded before the French courts

### **The Legal Principles Engaged**

- 12 Unsurprisingly there is no dispute between Counsel as to the legal principles engaged and I have taken the summary largely from the detailed written skeletons they each provided to me.
- 13 Article 3 of the 1980 Hague Convention defines the removal of a child is to be considered wrongful where:

*" it is in breach of rights of custody attributed to a person... either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal...; and at the time of removal... those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal..."*

- 14 Article 12 of the Convention stipulates that unless a defence is established pursuant to Article 13:

*" 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."*

- 15 In Re D (A Child) (Abduction: Rights of Custody) [2006] UKHL 51, Baroness Hale of Richmond observed at para.48:

*"The whole object of the Convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their 'home', but also so that any dispute about where they should live in the future can be decided in the courts of their home country, according to the laws of their home country and in accordance with the evidence which will mostly be there rather than in the country to which they have been removed."*

- 16 Mr Justice Mostyn summarised the relevant principles in B v B [2014] EWHC 1804:

*"2 The Hague Convention of 1980 is arguably the most successful ever international treaty and it has over 90 subscribers to it, over half the countries in the world. The underlying and central foundation of the Convention is that, where a child has been unilaterally removed from the land of her habitual residence in breach of someone's rights of custody, then she should be swiftly returned to that country for the courts of that country to decide on her long-term future.*

*3 There are very few exceptions to this and the exceptions that do exist have to be interpreted very narrowly in order that the central premise of the Convention is not fatally undermined. It is important to understand what the Convention does not do. The Convention does not order a child who has been removed in the circumstances I have described to live with anybody. The Convention does not provide that the parent who is left behind should, on the return of the child, have contact or access in any particular way. The Convention does not provide that, when an order for return to the child's homeland is made, the child should stay there indefinitely. All the Convention provides is that the child should be returned for the specific purpose and limited period to enable the court of her homeland to decide on her long-term future. That is all it decides.*

*4 ... Equally, if the exception that is relied on is that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place her in an intolerable situation, that again has to be seen through the lens of the*

*objective of the Convention. We are not talking here about long-term risks. We are not talking here about long-term harm. We are talking about risks and harm that would eventuate only in the period that it takes for the court of the child's homeland to determine her long-term future and to impose the necessary safeguards, if necessary, in the interim."*

### **Article 13b defence**

17 I have been referred by both Counsel to **Re E (Children) (Abduction: Custody Appeal) [2011] 2 FLR 758, SC**. Also the following way in which Macdonald J summarised the relevant principles in **Uhd v McKay [2019] EWHC 1239 [§67]** :

“(i) There is no need for Art 13(b) 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.

(ii) The burden lies on the person (or institution or other body) 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 will be mindful of the limitations involved in the summary nature of the Convention process.

(iii) The risk to the child must be 'grave'. It is not enough for the risk to be 'real'. It must have reached such a level of seriousness that it can be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two.

(iv) The words 'physical or psychological harm' are not qualified but 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'.

(v) Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or 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.

(vi) Where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation would become intolerable, in principle, such anxieties can found the defence under Art 13(b).”

- 18 Macdonald J gave further guidance that the evidence cannot be viewed entirely in the abstract. The court is entitled to weigh all the evidence and make an assessment about the credibility and substance of the allegations. Of applicability here also is the dicta from Moylan LJ in **Re C (Children) (Abduction: Article 13(b) [2018] EWCA Civ 2834** notably at paras 70-72:

“70. In the circumstances, the methodology articulated in *Re E* forms part of the court's general process of reasoning in its appraisal of the exception under Art 13(b) (see *Re S (A Child) (Abduction: Rights of Custody)* [2012] 2 WLR 721), which process will include evaluation of the evidence before the court in a manner commensurate with the summary nature of the proceedings. Within this context, the assumptions made with respect to the maximum level of risk must be reasoned and reasonable assumptions based on an evaluation that includes consideration of the relevant admissible evidence that is before the court, albeit an evaluation that is undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention.

- 19 As to that part of MacDonald J's analysis, there was a difference of view as to the applicability in the circumstances of this case. Mr Basi on behalf of the Mother said that what it meant was that I must approach it on the basis that the 'maximum level of risk' would entail having regard to the risk if what the Mother alleged in relation to sexual abuse, and which Mr Basi described in submissions as 'undetermined' were to be established. Ms Guha's submission was that it was not open to me to take that approach where those allegations had been investigated within the jurisdiction in which the welfare decisions were being made and the Court in France had made its custody decision on 28<sup>th</sup> January in the knowledge of those allegations and after having called for disclosure of the investigations by the criminal authorities.

### The Father's Case

- 20 The father's case is straightforwardly put. This is he says a deliberate planned and blatant abduction. It is reflective of a longstanding wish on the part of the Mother to relocate to the UK which had been thwarted when she was unsuccessful in persuading the French Court to permit her in 2020. In her statement for these Hague proceedings the Mother has made wide ranging allegations against the Father all, or at least the great majority of them albeit in some instances in slightly different forms have been made within the welfare proceedings in France. She has appealed in France neither the outcome of the June 2020 relocation proceedings, nor any of the other orders. In respect of the application which was

before the French courts in November 2021, she fled the jurisdiction abducting the child without so much as waiting for the Court's determination.

- 21 The Mother cannot, and certainly I should not permit her, submits Ms Guha to in these summary proceedings challenge or go behind the unappealed decisions of the French Court seized of welfare in seeking to establish a defence under 13b. The father's response to the 13b defence needs little consideration here since it is the mother who bears the burden of proof on that and must establish it. Furthermore, says the Father, in circumstances where this court in these summary proceedings has already ruled against the Mother first in her application for a Cafcass report on the child's wishes and feelings and second on her part 25 application for psychological assessment of the child it is not open to her at this hearing to argue a defence based on the child's objections.
- 22 The package of protective measures and undertakings offered by the father within his statement are sufficient to put in place should the child be returned to France. In relation to what he submits is a 'generic' risk of prosecution for child abduction, Ms Guha submits that the fact that the father has done all he can by confirming that he will not instigate or support any prosecution and by withdrawing his complaint. For the fact that he cannot bind the authorities, who might bring such a prosecution regardless, to be meaningful in creating an Article 13 b defence it would have to have that effect in all abduction cases. It is a speculative risk which falls short of the defence.

### **The Mother's Case.**

- 23 Mr Basi puts his client's case by reference to the categories of concern which the Mother says establish the 13b defence and would mean that a return would place Z in an intolerable situation. The first category is that of Domestic Abuse and Violence. The French Courts have paid insufficient heed to this aspect and to the effects of it on the Mother as well as on this child. Although the courts did not find that the earlier domestic abuse she alleges is either a) established or b) a reason why there should not be a shared care arrangement between the parents, the Mother says it is relevant because she is of the view she is a victim. Furthermore, the anxiety and stress she suffers is directly relevant to her position that in the event that I direct a return of the child she is unequivocal that she will not return to France with her. That says the mother would have the effect of placing the child in an intolerable position of being parted from her primary carer. It is right that of



course for the Mother Mr Basi has to acknowledge that until the abduction the parents were having shared care on a 50/50 basis.

24 Mr Basi sensibly proposes a ‘cooling off period’ should I make a return order despite the Mother’s robust position that she will not go. Although the Mother does not produce any psychiatric evidence in support of what she says in relation to the effect of the Domestic Abuse she alleges on her mental health, she does rely heavily on a document produced from an organisation called *Accueil Femmes en Difficulté* the author of which does not appear on the face of the document but which dates from 30<sup>th</sup> August 2019. It details the Mother’s engagement with that service, for what is described as psychological support and accompaniment following her accounts of domestically abusive and violent behaviour from the father. I have read carefully that document and within the context of these Hague proceedings there are two aspects of it which are especially relevant to my consideration of it. The first is that it is a report based entirely on the Mother’s self-report; the second is that it predates the decisions for Z in France and was part of the documentary material placed before the court in the French proceedings.

25 The second category of concern which Mr Basi advances are the allegations made by his client of sexual abuse. He acknowledges that these have been dealt with within the French proceedings and not found to be true. He submits however that I should not see that as the end of the matter since as I am looking at 13 b defence I should consider the allegations and the risk flowing from them at its highest – this being, submits Mr Basi the correct interpretation of para 70 of MacDonald J’s judgment in *UHD v Mackay*. He invites me in effect to undertake a critique of the investigation of the French Authorities, including for example by examining minutely the notes of the interviews of the child. She was, he submits a young child, interviewed 3 times without an adult (which I take to mean an adult familiar to her) present. Mr Basi’s submission is that on the notes or minutes of the interview before me – and which I remind myself were before the judge making the welfare decisions in the French court - there are indications of leading questions which make what the child says unreliable. It was therefore wrong of the French courts to reach the conclusions it did as to coaching and influence by the Mother in relation to the child’s

allegations , and I should not rely on the fact that they did so conclude when I assess whether the Mother has made out her 13b defence.

- 26 There are a number of difficulties with this part of the Mother's case and the submissions in support of it. First the submission made to me about the quality of the investigation and/or the appropriateness or otherwise of the interviewing might be thought to be something better directed towards an appeal within the French proceedings. The Mother has not availed herself of that route. Second, I do not accept that it is for me in this jurisdiction to be conducting in these Hague proceedings a critique of that investigation in determining whether the Mother has discharged the burden in relation to her 13 b defence. Third , I do not accept, even were it appropriate for me to be carrying out such a critique, that a reading of the material as a whole supports the submissions made by Mr Basi. It is not difficult to see why the French court reached the conclusions it did on coaching and influence. I have read also the judgment delivered on the 28<sup>th</sup> January which sets out in some detail the way in which the court examined material before it in relation to the allegations of sexual abuse including what was said by the child in interview.
- 27 The third category of concern on which the Mother relies is that although the father has provided undertakings in the way of protective measures should she return, there is a sole custody order made by the court in France following the abduction. The father should she says have moved to have this extinguished rather than simply offering undertakings not to enforce it. The threat of it means that both she and the child would be placed in an intolerable situation were there to be a return followed by a placement in the father's care. In this respect she submits that what she characterises as the 'undetermined' allegations of sexual abuse are relevant. She further relies on the fact that since she is resolute that she will not return to France whatever direction may be made in relation to the child's return that will place Z in an intolerable situation because she will lose her mother and that separation will place her in an intolerable position. Although because she will not return it may be academic, the mother also urges on me that the father cannot guarantee there will be no criminal proceedings (albeit that they would be without his support). The threat of those proceedings adds to the intolerability of the situation for her and the knock-on effect of that is to render the child's position on return as intolerable. The Mother asserts, through counsel, that since she has been in the UK, the child has been displaying distress which she regards as attributable to having been sexually abused. The mother has obtained for her some therapeutic support. That support, Mr Basi confirmed to me when I asked

him to take instructions on the point, is being provided on the basis and understanding that Z is a child who has been sexually abused.

### **Conclusions**

- 28 Whilst I have listened carefully to the submissions Mr Basi has made in which he has faithfully put before the Court every aspect of that which his client argues in support of her contention that were I to order the child to be returned to the place in which she is habitually resident then she would be exposed to grave physical or psychological harm or otherwise be placed in an intolerable situation, I am not satisfied that the mother has discharged or come close to discharging the burden of proof on that defence. The matters she seeks to rely on before me, and on which she has produced a large number of documents which were placed before the French Court have already been determined in that court seized as it is of the matter. She has conducted these proceedings as if this court is an appellate or reviewing court of the French Court.
- 29 Whilst I accept that it is possible that a defence under Article 13 b may be based on anxieties of a respondent which are not based on objective risk but which are nevertheless of an intensity such that in the event of a return would destabilise the parenting of a child to a point where her situation would be intolerable that is not on the evidence the situation here. Nor has the mother not placed evidence before me which establishes that in relation to her own anxieties, but this is a child who until the abduction was living half her time with the father. If the Mother decides not to return to France with the child I am sure that that separation would have an effect on Z - as no doubt has had the separation from her father - but not so serious as to cause grave psychological harm or to be intolerable for her. She will be returning to someone familiar to her. Her nursery place remains available to her and that will be another familiar aspect of her life.
- 30 As will be apparent elsewhere in this judgment, I do not accept that the allegations of sexual abuse on which the Mother seeks to rely are undetermined. They were known to, considered and dismissed by the Court which made the order for sole custody to the Father on 28<sup>th</sup> January 2022. That the Mother seeks to rely on the existence of that order as something which establishes an intolerable situation on return, arising as it does out of the circumstances in which she abducted the child in the face of ongoing court proceedings, is misconceived.

- 31 It follows from all of the above that I am satisfied that this court must make a return order. I hope that the Mother will accompany the child back to France but if she does not then a mechanism must be put in place for the father to collect her. I will adopt the proposal made by Ms Guha that the Mother must indicate to the Father's solicitors by Friday 25<sup>th</sup> March whether she will accompany Z back to France and if she will Z is to be returned by 23.59 on 29<sup>th</sup> March. If she will not then the Father will travel to the UK to collect Z on 28<sup>th</sup> March so as to travel back with her to France by 23.59 on 29<sup>th</sup> March.
- 32 I will make such consequential directions as are necessary to achieve this and invite Counsel to draft an order reflecting the same.