Neutral Citation Number: [2023] EWHC 2351 (Fam)

Case No: FD23P00147

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 September 2023

Before :

MR JUSTICE POOLE

- -

Between :

G — **Applicant**

- and -

H — **Respondent**

G v H (Hague Convention: Wrongful Removal)

- -
- -

Michael Gration KC (instructed by Anthony Louca Solicitors Limited) for **the Applicant**
Teertha Gupta KC (instructed by Goodman Ray Solicitors) for **the Respondent**

Hearing date: 12 September 2023

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JUDGMENT

Mr Justice Poole:

Introduction

1. The child with whom I am concerned is F who is an 8 year old boy. G is his father, H is his mother. He has an elder sister J. The family lived in England but moved to Portugal in 2020. After financial difficulties due to third party fraud, in 2022 the mother took up employment in England. The children stayed with G in Portugal. After a visit home to Portugal the mother returned to England on 22 January 2023 taking F with her, without G's consent. She admits that at the time this was a wrongful removal within the meaning of Article 3 of the 1980 Hague Convention. However, on 25 January 2023 the mother applied to the Portimao District Court in Portugal for what may be termed a child arrangements order and on 3 May 2023 that court made "provisional" orders including (in translation) that "The boy, F, shall be entrusted to the care of his mother and shall live with her…"

2. The preliminary issues for determination on the father's application for summary return of F to Portugal are:

   i) What is the meaning and effect of the Portuguese order?

   ii) Whether, as the mother contends, the admitted wrongful removal has been rendered lawful by the subsequent order of the family court in Portugal.

   iii) If not, should the Court proceed to a final determination of the father's application and, potentially, make a summary return order notwithstanding the Portuguese court order?

3. A very similar set of circumstances arose before Sir Mark Potter, then President of the Family Division, *in T & J (children, Re (Abduction: Recognition of Foreign Judgment)* [2006] EWHC 1472 but he resolved the issue before him by reference to Council Regulation (EC)No.2201/2003 (BIIr) which is no longer applicable in this jurisdiction. How should the court approach the current circumstances without recourse to BIIr?

4. I announced my decisions to the parties at the hearing but informed them that I would give a judgment in writing.

5. Upon F's removal, G reported the matter to the police and made an application for F's summary return to Portugal which was issued in the High Court in England and Wales on 17 March 2023. Case management directions were given at a first hearing on 24 March 2023 at which the mother confirmed her reliance on Art 13(b): grave risk of harm/intolerability, and Art 13(2): child's objections. She has conceded that she removed F from Portugal on 22 January 2023 without consent and that the removal was wrongful at the time. The parties agreed an extended timetable after non-compliance with those directions. By 3 July 2023, the court had statements from each party and a Cafcass report from Ms Demery.

6. In the meantime the mother's application was heard by Judge Trindade in the Portimao Family and Children's Court on 3 May 2023. The record of the hearing and order, in translation, reveals that at a short hearing the judge heard from both parents and from J, but not from F. The parties were represented. Submissions were made by State Counsel. The order made was,

> "As the file and the statements made at this conference show, the parents have different views about the arrangements to be made and it is clear that they have a contentious relationship which may be detrimental to the best interests of the children.
>
> On the other hand, it appears from the case-file that the father has set in motion a mechanism to return the child to Portugal, although it is not known how and under what terms.
>
> Thus, it is important to ascertain from the Portuguese Central Authority, what is the status of the case that is being dealt with in the courts of England, as well as the application made by the father, which is hereby ordered by this Court.
>
> Furthermore, in order to regulate the current situation of the children and to ensure that the children have contact with their parents (Article 37, paragraph 5 RGPTC - General Arrangements for Civil Proceedings), I hereby order the following provisional arrangements:
>
> 1. The boy, F, shall be entrusted to the care of his mother and shall live with her, who shall exercise parental responsibility in matters relating to the management of his daily life;
>
> 2. The girl, J, shall be entrusted to the care of her father and shall live with him, who shall exercise parental responsibility in matters relating to the management of her daily life;
>
> 3. Parental responsibility in matters of particular importance for the life of the children shall be exercised jointly by both parents, except in cases of manifest urgency, in which case either parent may act on his or her own behalf and shall inform the other parent as soon as possible."

Arrangements for the children to spend time with the parent with whom they were not living were then set out. There has been no appeal against that decision.

7. This intervening order of the Portuguese Court was brought to the attention of Moor J at a pre-trial review but he ordered that the final hearing should go ahead as listed. However, at the listed final hearing, on 24 July 2023, Sir Jonathan Cohen decided not to proceed but gave directions including that the assistance of the international

judicial liaison network be sought in relation to a number of questions about the Portuguese Court's orders, namely:

> "a. Was Judge Trindade authorising the Mother to continuing living with F in England until his future is resolved?
>
> b. When will the next hearing take place in the Portimao Family and Children's Court?
>
> c. In the opinion of the Portuguese Court is it seised with the jurisdiction over F's welfare?
>
> d. How long will it take for the Portuguese courts take to make a final welfare decision?
>
> e. Will Portimao Family and Children's Court accept the England & Wales Cafcass report in so far as it relates to F's welfare?
>
> f. What steps will be necessary for that review to take place i.e. preparation of social or other reports and can this be done without F needing to travel to Portugal?"

8. The final hearing was re-listed before me on 12 September 2023 by which time responses had been received via the Portuguese Hague Network Judge. Their responses were:

> "a) Provisional arrangements have been made for the exercise of parental responsibility, with the child F residing with his mother in England and the child J with his [sic.] father in Portugal.
>
> b) No proceedings or parental conference have been scheduled. However, as it appears that the parents do not agree on the residence/custody of the child F, the proceedings will proceed as normal, with the lodging of pleadings in due course and the holding of the trial. This will not take place before December as the Court's diary is currently full until the end of November 2023.
>
> c) This Court has jurisdiction to rule on the question of the child's residence. However, the Portuguese judge recognizes that the Court in the area of the child's residence may be better placed to assess the welfare and quality of life of the child F;
>
> d) There is no prediction as to how long it may take for a decision to be handed down as the courts are not always in charge of managing the time for a final decision, but are dependent on external reports and expertise, which may prolong the time for a decision. However, it is believed that a final decision (in first instance) will be made by July 2024;

> e) The Family and Children's Court of Portimão will accept reports from official bodies in England and Wales working in the area of children and young people;
>
> f) These reports can be made by the children's organizations in England and Wales and then sent to the case file, without the need for the child to travel to Portugal."

9. The first matter for me to determine is what is the meaning and effect of the order made in Portugal on 3 May 2023. Mr Gration KC submits that it merely recognises the reality of the child arrangements in place and was not designed to defeat the father's Hague application. He points to the wording of the determination that the order is made "in order to regulate the current situation of the children" and to ensure that the children have contact with their parents. He highlights the questions raised in the determination about the proceedings in England, and draws attention to paragraph (c) of the Hague Network Judge's response, which leaves open whether the Court "in the area of the child's residence may be better placed to assess the welfare and quality of life of the child."

10. For the mother, Mr Gupta KC submits that the Portuguese order, as the Network Judge has clarified, placed F in the care of the mother in England as an interim order. I prefer that interpretation, indeed I am sure that the effect of the order was for F to reside with his mother in England until further order of the Portuguese court. As the Network Judge has also clarified, the Portuguese court is in fact seised with jurisdiction over F's welfare but will take into account evidence in the England and Wales Cafcass report about his welfare. There would be no need for F to travel to Portugal.

11. Consequently, were I to make a summary return order at the final hearing of the father's application, the mother could return F to Portugal but lawfully turn around at the airport there and bring him back to England. Due to the order of 3 May 2023, that would not be a breach of the father's rights of custody. For so long as the Portuguese order remains in force, it would be futile for the High Court in this jurisdiction to make a return order.

12. The second issue for determination is whether, as Mr Gupta KC for the respondent mother contends, her admitted wrongful removal of the child from Portugal on 22 January 2023 has been rendered lawful by the Portuguese court order of 3 May 2023. Article 3 of the 1980 Hague Convention reads,

> "Article 3
>
> 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, 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 sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

13. Mr Gupta KC accepts that at the date of the removal it was wrongful but contends that the subsequent court decision retrospectively confers lawfulness on the removal so that, now, the removal is not to be considered wrongful. He did not refer the court to any authority or guidance to support that contention.

14. Mr Gration KC brought the court's attention to the judgment of Sir Mark Potter, in *T & J* (above). The relevant background facts in that case appear in the first five paragraphs of the judgment:

> "[1]. In these Hague Convention Proceedings, the plaintiff mother applies for the return of her children … to the jurisdiction of the Government of Spain pursuant to the Child Abduction and Custody Act 1985.
>
> [2]. The parties were married in 1998. The mother is Estonian and the father is British. They met in Estonia and three years later, shortly after the birth of T, married on 5 September 1998 in Kidderminster, England. In late 2000 they moved with T and J to Spain from the Czech Republic where they were then living and became resident in Spain.
>
> [3]. In Spain, the father at first worked as a salesman and the mother, who was not employed, was the principal carer for the children. However, quite soon their roles were reversed in that the defendant became unemployed and the plaintiff became busy as a self-employed real estate agent. The marriage became unhappy and the parties decided to separate. At that time the family were living in Malaga … the habitual residence of the children being in Spain.
>
> [4]. The mother made arrangements to move with the children to a new apartment around the corner from where they were then living.
>
> [5]. On 24 September 2005, whilst the mother was moving furniture to her new apartment, the father offered to take the children to a restaurant and then to a playground to enable the mother to handle the furniture removal. In the absence of mother and without her consent,

> he flew directly to England that day with the children, a fact of which the mother became aware only when he telephoned her that evening from England so to inform her."

The mother applied to the Spanish court, seeking parental care and custody of the children. The father brought a counter-application. After hearing evidence, the Spanish court decided that as an interim measure custody should remain with the father. On the mother's application for summary return of the children to Spain, one of the father's defences was that the Spanish court's determination had "overtaken" the unlawfulness of his removal:

> "[33] The second defence advanced by the father relies upon the judgment and order of the Spanish court dated 9 February 2006. It is submitted that, despite the father's concession that his original removal of the children was wrongful for the purposes of Article 3 of the Convention, the unlawfulness of that removal has been overtaken by events, namely a full consideration by the Spanish court on welfare grounds of the appropriate place for the children to reside (i.e. England) pending the final hearing of the mother's separation and the father's divorce proceedings. In these circumstances, the order of the Spanish court should be recognised and given force by this court in accordance with Council Regulation (EC)No.2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of Parental Responsibility (Brussels II b), which, by Article 60(e) provides that, in relation to Member States, the provisions of Brussels II b "take precedence over the [Hague Convention 1980] in so far as they concern matters governed by Brussels II b"."

Sir Mark Potter accepted that submission whilst expressing surprise that it should be necessary to "resort to the provisions of Brussels II b to achieve the result which [the father] seeks." [34]. The judge went on,

> "[35] The primary rationale underlying the Hague Convention is to ensure that decisions as to the welfare of children, and questions where and with which parent they should reside, are taken in the country of

> the child's habitual residence. In this case, as a result of proceedings initiated by the mother in Spain, by the time the matter comes before this court for decision as to whether an order for the return of the child should be granted under the terms of the Hague Convention, those purposes have been achieved, in the sense there has been a full and careful hearing of the issue by a Spanish court in possession of all the relevant facts going to its welfare decision, as well as the full circumstances of the father's removal of the children. The Spanish court has specifically vested interim custody in the father on the basis that the children should continue to reside in England with the father as their main carer, and with appropriate and beneficial educational arrangements, pending a full and final hearing.
>
> [36] By virtue of the relevant Spanish law, that interim custody order is not capable of appeal and will remain in place till the resolution of the divorce and/ or separation proceedings. As uncontested expert evidence placed before me has made clear, since an order for the return of the children to Spain is no more than that (i.e. it does not involve any award of care or custody), in the event of such an order being made, so far as the Spanish court is concerned the father would have the right to return with the children to England without any breach of the letter or spirit of the Spanish court order.
>
> [37] Recitation of these facts is sufficient to make clear that, if, as is submitted on behalf of the mother, this court is obliged to return the children as requested by the mother, it would defeat rather than assist the overall purpose of the Hague Convention as I have stated it. Fortunately, by application of the provisions of Brussels II b, such a result is avoided."

The relevant provisions of Brussels II b (BIIr) concerned the recognition and enforcement of judgments given in another Member State. Sir Mark Potter held at [50] that,

> "… it is plain to me that, were I to make an order for the return of the children to Spain, I would be failing to give effect to my recognition of the Spanish judgment of 9 November 2005 and thus failing to accord precedence to Brussels II b over the Hague Convention in that respect."

15. Mr Gration KC points out that following our withdrawal from the European Union, BIIr no longer has any application in this jurisdiction. Furthermore, similar provisions

under the 1996 Hague Convention are subject to Art 50 of that Convention,

> "Article 50
>
> This Convention shall not affect the application of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, as between Parties to both Conventions. Nothing, however, precludes provisions of this Convention from being invoked for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights."

Accordingly, he submits, neither BIIr nor the 1996 Convention can come to the aid of the mother. Accordingly, the following part of Sir Mark Potter's judgment may be particularly apt:

> "[56] Article 1 of the Hague Convention provides:
>
> "The objects of the present Convention are (a) to secure the prompt return of children wrongfully removed to or retained in any contracting state; and (b) to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states."
>
> As I have already observed, this reflects an underlying belief that it is in the interests of children that parents or others should not abduct them from one jurisdiction to another, but that any decision relating to their custody is best decided in the jurisdiction in which they have hitherto been resident.
>
> [57] In the ordinary case, in order to achieve object (b) of Article 1, it is necessary to make an order to bring about object (a) i.e. the two objects operate in harmony. In the unusual circumstances of this case, namely where immediately following removal of the child, the mother commenced custody proceedings in Spain, the adverse result of which was determined before the hearing of her Hague Convention application, an order made in pursuit of object (a) would conflict with object (b). Common sense would suggest that it should not be necessary to resort to the provisions of Brussels II b in order to resolve this conflict, but to adopt instead an appropriate internal construction of the provisions of the Hague Convention in order to do so. That could readily be done, as it seems to me, were it not for the established Convention jurisprudence that removal and retention are mutually exclusive concepts, each being distinct events occurring on a specific occasion and that it is impossible for them to overlap or be treated as an ongoing process: see *Re H, Re S (Minors) (Abduction: Custody*

> *Rights)* [1991] 2 AC 476 at 498-499. Were it not for the rigid compartmentalisation of the two concepts, it might be feasible, and would certainly be desirable in a case of this kind, for the courts to treat the decision of the Spanish court as having intervened to validate or excuse what would otherwise be a wrongful removal and/ or retention when considered in terms of the Convention.
>
> [58] It was no doubt this difficulty which, in the light of her concession as to wrongful removal, led to Miss Meyer's reliance upon the provisions of Brussels II b as her necessary route to success. Despite the difficulties which obviously lie in the development of a Convention argument along the lines to which I have referred, I would not wish to close the door to such an argument if similar circumstances should arise in a case where the country of the child's habitual residence is a signatory of the Hague Convention but is not a member of the European Union.

16. Mr Gration KC submits that *Re H* (above) is firmly established authority for the proposition that removal and retention are mutually exclusive concepts and that removal happens when a child who has previously been in the state of its habitual residence is taken away across the frontier of that state. If, as here, that was done in breach of custody rights attributed to the left behind parent, and those rights were exercised at the time, then it was a wrongful removal under Art 3 of the 1980 Convention and subsequent events cannot change that. In support of his submission that a wrongful removal cannot subsequently be remedied by a court decision in the state of the child's habitual residence at the time of removal, he referred, by analogy to *DL v EL* [2013] EWCA Civ 865 in which a mother removed the child from the USA to England at a time when she had the benefit of a court order in the USA allowing her to do so. Subsequently the order was overturned on appeal. The father sought the return of the child to the USA from England. At first instance his application was refused. The Court of Appeal had to consider three grounds of appeal, but only the second is relevant to the present case. Thorpe LJ giving a judgment with which the other members of the court agreed, noted at [43],

> "On his second ground Mr Harrison submitted that the mother's removal on 14 August was clearly wrongful once the appellate decision removed its lawfulness. The father held rights of custody pursuant to the orders of the Texan court and he was exercising his rights, or would have exercised those rights but for the removal. The return order did not curtail his rights of custody but authorised removal in spite of his rights. Article 3 of the Convention requires a ruling on whether the father exercised rights at the date of the hearing before Sir Peter Singer. Although the point is novel this approach is consistent with the language of Article 3 and the policy considerations that underlie the convention."

This ground was rejected,

> "[52] … it seems to me quite artificial to assert that the effect of the appellate decision was to render a lawful removal wrongful and that the father was exercising rights of custody prior to the issue of his Convention application and/or at the date of trial. Mr Harrison submits that the language of Article 3 of the 1980 Convention supports this interpretation. I cannot agree. In my judgment the 1980 Abduction Convention was never foreseen or intended to be used in present circumstances. Once there has been a lawful departure, annulled 12 months later by a successful appeal, in my opinion only Article 18 (and in an English context the inherent jurisdiction) provides a remedy for the successful appellant."

Permission to appeal to the Supreme Court was dismissed on that ground but allowed on the other grounds. So, I am asked to consider how, as the mother contends, a court decision subsequent to a wrongful removal can render it lawful, if the Court of Appeal has determined that a court decision subsequent to a lawful removal cannot render it wrongful.

17. I have also considered the consequences of accepting the mother's contention that a later court decision can render a previously wrongful removal lawful. Firstly, it might encourage abducting parents to abduct first and apply to the court later, rather than to apply for permission to relocate in advance of taking their child out of the jurisdiction of their habitual residence. This is particularly important because a known trigger for abduction is anxiety about a pending court decision. Secondly, it would lead to uncertainty, inconsistency, and potential delay in applications which the court in the receiving state is encouraged to dispose of summarily. One court could proceed on the basis that there was a wrongful removal only for another court to make decisions about child arrangements that would render the removal lawful. The court determining a Hague application for return might be invited to await the outcome of court proceedings in another jurisdiction in order to determine whether the removal had been wrongful or not.

18. I have found that, because of the order of 3 May 2023, if the mother now travelled to Portugal with F and then immediately returned then that return would not be wrongful. Is it therefore a nonsense to hold that the removal on 22 January 2023 was wrongful? I do not think so. They are two separate events. It seems to me that the mother's case that an admitted wrongful removal can be subsequently rendered lawful by a court order in the state in which the child was habitually resident prior to the removal, is wrong. It is contrary to long established authority that a wrongful removal takes place in a fixed place and time, it would be inconsistent with the Court of Appeal's decision on the second ground of appeal in *DL v EL* (above), it would create incentives to act in ways that are clearly contrary to the purposes of the 1980 Hague Convention, and risk uncertainty and delays in return order applications that would be

contrary to the stated object of the Convention to secure the prompt return of children wrongfully removed or retained in a contracting state. Accordingly, I am satisfied that the removal of F from Portugal on 22 January 2023 is to be considered wrongful under Article 3 of the 1980 Hague Convention.

19. The remaining issue for me to determine is, nevertheless, whether I should proceed to make a final determination of the father's application for summary return under the 1980 Hague Convention. Having determined that the removal was wrongful then Article 3 and Article 12 require a return order to be made unless one of the defences under Article 13 is made out and in which case the court has a discretion not to order return. However, I have already found that in the light of the Portuguese Court order of 3 May 2023, a return order would be futile – the mother could immediately return F lawfully to England. The court must manage cases having regard to proportionality and an appropriate allocation of resources. The order in Portugal is an interim order. The family court there is seised of F's welfare (and that of his sister) and will receive evidence from the Cafcass Officer who has advised in these proceedings. It is clear that further consideration will be given to F's welfare in the jurisdiction in which he was habitually resident when removed in January this year. Pending such determinations, it would be a waste of this court's time and resources to make a return order for the reasons already given.

20. In those circumstances should I dismiss the application? Given the summary nature of a return application it might indeed be appropriate to dismiss it if it has become futile for the reasons set out above. However, the Portuguese order is an interim or "provisional" order made at the first hearing and before any significant welfare inquiries. The Portuguese court expressed the need for it to be given more information about the proceedings in England. This is a case of an admitted wrongful removal of an eight year old boy who has a sibling still living in Portugal. There is therefore a realistic possibility that changes may be made to the interim child arrangements orders and that the Portuguese court may make orders which would not prevent, or may even require, the return of F to Portugal. If so, this court could be well placed to act to act summarily under the 1980 Hague Convention to secure his return or to find that the defences under Art 13 are made out and exercise a discretion not to order return.

21. I have also considered whether I should proceed to make determinations about the Art 13 defences but (i) such determinations ought ordinarily to be made close to the time of any potential return, and (ii) the Portuguese court's decision (and any future decisions) would be relevant, as Mr Gration KC has conceded, to the exercise of the court's discretion which might arise depending on the findings made about the Art 13 defences at the appropriate time.

22. Although dismissal of the application for a return order might well have been a suitable approach in another case, I am satisfied that the appropriate decision in the particular circumstances of this case is to make a case management decision to stay the father's application with liberty to apply to restore on notice, including if and when the Portuguese court requests this court to do so, or orders that F's custody should be with the father, or orders F's return to Portugal (effectively denying the mother her wish to relocate with F to England). I acknowledge that a stay is contrary to the object of the Convention to effect a prompt return of a child wrongfully removed, but the circumstances here are unusual. To avoid the stay running in

perpetuity, I shall order that if no application to lift the stay and restore the application has been made by 12 September 2024 the application shall stand dismissed.

23. After the circulation of this judgment in draft for corrections, and receipt of those corrections from Counsel which I adopted, on the eve of handing down the final approved judgment, Mr Gupta KC brought the court's attention to a decision of Sir James Munby, then President, in *In the matter of D (Children) (Child Abduction: Practice)* [2016] EWHC 504 (Fam), in which, in similar circumstances, he gave permission for the applicant to withdraw his Hague application for a return order. It was agreed that the application had "no utility" due to orders made in the other jurisdiction. The circumstances are somewhat different in the present case because of the uncertainty expressed by the Portuguese court, the early stage at which it made its interim order, and the real possibility of different orders being made in those proceedings. The applicant in the present case has not offered to withdraw his application. As I hope to have articulated in the previous paragraph, dismissal of his application was a realistic option but, for the reasons given and as stated in court, I have decided to stay the proceedings. Munby J's judgment having been made on its own facts does not cause me to change that decision.

24. As I said to the parents at the hearing, although it was dominated by legal submissions F was at the forefront of my mind. It is important to establish the correct way to proceed otherwise there will be more uncertainty for him. As it is, the Portuguese family court is seised of his welfare, and that of his sister, the Cafcass assessment has not been wasted, it is before the Portuguese court in translation, and the parties can take steps to ensure that welfare decisions in F and J's best interests are made as soon as possible.