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Case No: FD23P00497

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London
WC2A 2LL

Date: 22 November 2023

Before:

HIS HONOUR JUDGE STEVEN PARKER

Sitting as a Judge of the High Court pursuant to section 9(1) Senior Courts Act 1981

Between:

IN THE MATTER OF: A (Minors)

MR BASI (instructed by **Stephensons Solicitors LLP**) appeared for the **Applicant**

MS BARUA (instructed by **Sam Solicitors**) appeared for the **Respondent**

JUDGMENT

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HIS HONOUR JUDGE STEVEN PARKER :

1. I am dealing with an application for summary return pursuant to the Hague Convention 1980 made by the father, represented by Mr Basi in respect of his child, A, born 7 January 2021. This is opposed by the mother, represented by Mr Barua. She asserts a defence under Article 13(1)(b).
2. The background to the application. The father was born in Ireland in 2000. The mother was born in England in 2001. The mother moved to live in Ireland in 2007. The parties commenced a relationship in 2016. They were married in Ireland on 26 November 2019.
3. The parties' child, A, was born in Ireland on 7 January 2021.
4. The parties separated in August 2021 and the child remained in the mother's care.
5. The father's case is that the mother initially allowed him to have contact but then stopped doing so. Be that right or wrong, the father then made an application to court in Ireland in October 2021 in relation to custody, access and maintenance arrangements for the child.
6. In October 2022 the court in Ireland made an order for the father to have contact with the child every Wednesday from 2 pm until 6 pm and overnight from Saturday 10 am to Sunday 6 pm every other weekend.
7. In July 2023, the father's case is that the mother stopped making the child available for contact with him and he restored his case back before the court in Ireland in connection with breach of a court order.

8. The mother did not attend court in Ireland on 13 September in relation to those proceedings. Following this, the father asked the police in Ireland to conduct a welfare visit to the mother's house. The house was found to be empty and the father was subsequently advised that the mother had left Ireland with A and travelled to England.
9. I understand that this was in or about August. The removal was without the knowledge or consent of the father.
10. The father attempted to communicate with the mother, but the mother did not respond to any communications nor has she responded to the Irish police.
11. Solicitors to the father received instructions via ICACU on 29 September in relation to return of the child to Ireland.
12. The father's return application was lodged with the court on 6 October 2023 with a request for an urgent first hearing to consider the making of a location order as to the whereabouts of the mother and A in England.
13. The first hearing took place on 10 October at which a location order and third party disclosure order were made.
14. The case was timetabled through to a further hearing on 1 November.
15. On 16 October, notice was received from the Tipstaff at the location the order had been executed and served on the mother at a confidential address.
16. The Tipstaff asked that the case be listed for further directions on 20 October. That hearing took place. The mother attended with her legal representation and indicated

that she would oppose the father's return application, relying upon allegations of domestic violence against the father.

17. The mother advised the court that her British passport and child's British passport had been sent to the DWP and her Irish passport was at her uncle's caravan in Ireland. The court gave directions for filing of statements and listed for final hearing today.
18. In addition, directions were given for the issue of interim contact between the father and child to be considered at the hearing listed on 1 November.
19. The court also made an order against the DWP for release of the passports to the Tipstaff.
20. On 27 October, the mother filed and served her statement setting out her opposition to the child returning to Ireland relying upon Article 13(1)(b).
21. On 31 October, the father filed and served his statement in relation to interim contact.
22. A further hearing took place on 1 November with the court making an order for contact to take place at a Contact Centre on 11 November.
23. I have seen a supervised contact report which was entirely positive.
24. The mother attended court with her British passport and the child's British passport and provided those to the Tipstaff.
25. On 17 November, the father filed and served his statement responding to the mother's evidence.

The mother's case.

26. The mother seeks to rely upon Article 13(1)(b) which is that notwithstanding the provisions of Article 12 relating to the duty to return forthwith, the State should not return A because the mother opposes his return on the basis that A would be exposed to a grave risk that his return would expose him to physical or psychological harm or otherwise place him in an intolerable situation.
27. This is the only issue raised by mother, accepting that A's habitual residence is in Ireland.
28. The mother asserts that there are no protective measures that would be adequate to address the risk. The mother maintains that the traveller community is widespread in Ireland, with the two families, both her own and the father's, well known to each other, and, indeed, a significant family connection which has been demonstrated on a diagram prepared by counsel this morning. It shows that the father is connected to the maternal side of the family and the paternal side of the mother reside in the UK.
29. Further, that she cannot safely settle anywhere in Ireland without her whereabouts being known to the father and the traveller community generally with information passed quickly between individuals therein.
30. The mother relies upon her statement and also states that she did not tell anyone that she had been pushed into the television as she feared the father's behaviour would get worse. It was only after the father was attacked by his two cousins that she made a report to the police as she felt that matters were escalating out of control and she feared further incidents.
31. It is also said on her behalf that the mother was very young when she entered into her marriage with the father with an expectation that she would be subservient to the

father, undertaking a traditional traveller wives' community's role with little autonomy, tolerating abusive behaviour, which comprised, in the main, coercive controlling behaviour. The mother was expected to do as she was told.

32. An example, the mother considers of this behaviour continuing, is that of the failure of the father to respond to the divorce petition which he was to respond to by 17 November and had still failed to do at the time that the position statement of the mother was prepared.
33. The father's case is that he had only received it five days ago.
34. The mother says that it was only when she came to the United Kingdom that she finally understood that such behaviour demonstrated by the father is not acceptable.
35. In fact, she had come to that realisation shortly before leaving Ireland and, in fact, had made a complaint to the Irish Garda who were approached to provide details of that complaint but refused to do so.
36. It is also said that the mother is having psychological counselling in the UK as a result of the trauma that she suffered at the hands of the father and those associated with him. The ongoing stability of the mother's mental health is important when considering any risk upon return to A by its impact on the mother's ability to parent him and the level of harm which is said, on behalf of the mother, to be intolerable.

The father's case.

37. The mother has no Article 13(1)(b) defence. There have been proceedings in Ireland. She has or could have put her case before the Irish courts or she can do so on a return.
38. Most relevant right now. At the recent Contact Centre it is reported:

“A was emotional on arrival. However, as soon as he saw his father he stopped crying and had a big smile on his face. He immediately went to his father and threw himself on his father’s lap. Furthermore, father embraced A with a hug. A appeared to enjoy this and could not stop laughing. They kissed each other and cuddled for approximately ten minutes. A was enjoying the affection he was receiving from his father and, furthermore, father proactively guided A and gave guidance when needed and ultimately there were no issues or concerns and no interventions from the supervisor was needed. The father paid for direct contact himself and arranged it through his solicitors. The contact went extremely well. He’s child centred and child focused.”

39. This is a case, it is argued, that the Irish Central Authority accepted and transmitted to the English Central Authority. The father has a contact order in existence, which is at C24. This provides him with significant contact, including staying contact. The mother is in breach of this order. The order remains live and is operative.
40. The father has also completed a Parent Plus programme and Early Years programme.
41. The mother accepts that notwithstanding all her allegations she did not raise any of these incidents at the Irish courts. (C36 paragraph 23).
42. The 1980 Hague Convention will not operate a fact finding hearing and any disputes should be considered in Ireland.
43. The father rightly makes the point that the mother was able to raise allegations against him in Ireland but did not do so.
44. It is also said that this is a case where the court can and should evaluate the mother’s evidence in these proceedings accordingly. it is submitted that she has not discharged the burden. In any event, the mother will not be able to discharge the burden of proving Ireland which is a signatory to the Convention will not offer the mother the protection she seeks.

45. Were the court minded to consider the mother's defence further and assume the risks the mother advances within her statement in these proceedings in isolation, an exercise that the father does not support, and the father offers a raft of undertakings as protective measures, adding to those that he would readily consider whatever more the court might deem necessary.
46. Further, reference is made to a decision of Mr Reece KC sitting as a Deputy High Court Judge in *Re Y (A Child: Abduction: Romania. Article 13(b))* [2023] EWHC 1676.
47. At paragraph 48 the Judge said this:
- “I, therefore, turn to look at the protective measures that have been proposed in this case to consider whether they are sufficient to address the risk that I have identified. First and most importantly it is the fact that this is a case where the mother is not returning to live with the father. Even if I order a return the parties' relationship is at an end and neither party suggests that the mother and the father would be living the same property. As such, it is considerably less likely that Y would be exposed to the risk of violence taking place between the father and the mother. He can be protected further by undertakings and by the other protective measures that have been proposed.”
48. It is also argued that the mother is Irish, has lots of family and support in Ireland. The father states around 90 per cent of the family are in Ireland. (C63 paragraph 22). Her parents have a house in County Dublin where she can live it is said. The mother is entitled to State benefits in Ireland and the father pays maintenance in any event at the rate of 30 Euros per week.
49. The court should also note that there are significant concerns about the mother's credibility in respect of the passports being handed over to the Tipstaff. The father has disclosed some correspondence at C69 and further details of his concerns at C64

paragraph 26. There remains a concern about the existence and whereabouts of the mother's Irish passport.

50. Further, the court will note that during the course of the mother's arrival to England she obtained a British passport for A. That was without the father's consent or permission of the Irish court.

The law.

51. 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 (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. Article 4. The Convention shall apply to any child who is habitually resident in a contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

“Pursuant to Article 12, where there has been a wrongful removal or retention under the terms of the Hague Convention unless a year has elapsed between the abduction and the application the return of the child is mandatory unless the respondent can establish one of the limited exceptions to return under Article 13. The burden is upon the respondent to establish any of the exceptions and even if this burden is discharged the court then goes on to exercise a discretion as to whether or not to order the child's return, albeit it was acknowledged by the Supreme Court in Re E that if a grave risk of harm is established under Article 13(b) the court would not go on to order the child's return so as to expose them to that risk.

“Article 12. 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.

“Article 13. 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. (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.”

52. In Re D (a child) (abduction rights of custody) [2006] UKHL 51, Baroness Hale of Richmond observed at paragraph 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 be returned 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 their home country, according to the laws of their home country and in accordance with evidence which will mostly be there rather than in the country to which they have been removed.”

53. It is well established that the Article 13(b) grave risk of harm exception to the return is of restricted application. There is no need for any further elaboration or gloss because the article is, by its terms, of narrow application.

54. If this were not the case, then the object of the Convention would be defeated.

55. The Supreme Court held in Re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27. Paragraph 32:

“32. First, it is clear that the burden of proof lies with the “person, institution or other body” which opposes the child’s return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the Page 14 evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13b and so neither those allegations nor their rebuttal are usually tested in cross-examination.

33. Second, the risk to the child must be “grave”. It is not enough, as it is in other contexts such as asylum, that the risk be “real”. It must have reached such a level of seriousness as to be characterised as “grave”. Although “grave” characterises the risk rather than the harm, there is in

ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as “grave” while a higher level of risk might be required for other less serious forms of harm.

34. Third, the words “physical or psychological harm” are not qualified. However, they do gain colour from the alternative “or otherwise” placed “in an intolerable situation” (emphasis supplied). As was said in *Re D*, at para 52, “‘Intolerable’ is a strong word, but when applied to a child must mean ‘a situation which this particular child in these particular circumstances should not be expected to tolerate’”. Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: eg, where a mother’s subjective perception of events leads to a mental illness which could have intolerable consequences for the child.

35. Fourth, article 13b is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home. Mr Turner accepts that if the risk is serious enough to fall within article 13b the court is not only concerned with the child’s immediate future, because the need for effective protection may persist.

36. There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. Mr Turner submits that there is a sensible and Page 15 pragmatic solution. Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, the

court may have no option but to do the best it can to resolve the disputed issues.”

56. Lord Justice Moylan made clear in *Re C (Children) (Abduction, Article 13(b))* 2018, EWCA Civ 2834:

“Although the court takes evidence at its highest for the purposes of Article 13(b), this does not mean that no evaluative assessment of the allegations could or should be undertaken by the High Court. Of course, a Judge has to be careful when conducting a paper evaluation but this does not mean that there should be no assessment at all about the credibility or substance of the allegations.”

57. Lord Justice Moylan subsequently has stated in *Re A (Children) (Abduction, Article 13(b))* [2021] EWCA Civ 939. Paragraph 94:

“In the guide to good practice at paragraph 40 it is suggested that the court should first consider whether the assertions are of such a nature and of such detail and substance that they could constitute a grave risk before then determining if they could whether the grave risk exception is established by reference to all the circumstances of the case. In analysing whether the allegations are of sufficient detail and substance, the Judge will have to consider whether to adopt what Lady Justice Black said in *Re K*. The evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an Article 13(b) risk. In making this determination and to explain what I meant in *Re C* I would endorse what Mr Justice MacDonald said in *UHD v Mackay*, Law Reports England and Wales, High Court, 2019 at page 1239, namely that “the assumptions made by the court with respect to the maximum level of risk must be reasoned and reasonable assumptions. If they are not reasoned and reasonable I would suggest that the court can confidently discount the possibility that they give rise to an Article 13(b) risk.”

58. Mr Justice MacDonald in *G v D*, Article 13(b), *Absence of Protective Measures*, (2021) 1FLR 36, quoted with approval by the Court of Appeal in *C. (A child)*. (Abduction. Article 13(b)) [2021] EWCA Civ. 1354. At paragraph 60:

“Finally it is well established that courts should accept that unless the contrary is proved, the administrative, judicial and social services authorities of the requesting State are equally as adept in protecting children as they are in the requested State.”

59. Although as has been said it is generally assumed that the authorities of the requesting State can adequately protect the child, if it can be shown that they cannot or are incapable of or even unwilling to offer that protection, then an Article 13(b) case may well succeed.

Analysis.

60. In my judgment, the court should order summary return of A back to the jurisdiction of Ireland. He should be returned to that jurisdiction no later than 11.59 on 6 December 2023, which is 14 days from today.

61. The mother advances a defence under Article 13(1)(b). The case is based on allegations of domestic abuse to include violence and controlling coercive behaviour involving members of the extended family as agents of the father as well as the father himself. The mother asserts that there are no protective measures that would adequately address the risk.

62. In addition, she says the impact of this on her mental health is such that it will impact on her ability to care for A.

63. The father's case is essentially dismissive. He suggests that she has no such defence. There have been proceedings in Ireland. She has firmly and squarely put her case before the Irish courts and could do so on her return. In fact, he says, and she accepts, that there was no complaint made within the Irish proceedings in line with the allegations that she makes now.

64. Notwithstanding the arguments of the father, it is still right, in my judgment, that this court takes the mother's allegations at their highest. The mother's case that she has been indoctrinated into the culture and ethos of the travelling community in which the

wife plays a more subservient and domesticated role and where involvement of the State or authorities in marital relations are viewed in a dim light within the community are not claims that are bereft of credibility. That would explain her failure to report incidents and to rely upon them in proceedings before the family court.

65. It is also significant, in my judgment, that she is still very young. She married at the age of 18 having met the father at the age of 15 and 16.
66. I also note that she is having psychological counselling in the UK which she alleges is as a result of the trauma she suffered at the hands of the father and those associated with him.
67. As argued by the mother, there are points in the father's statement in response to documentary evidence produced by the mother, which, whilst I am not satisfied amount to partial admissions, are at least consistent with her case.
68. In those circumstances, and taking her case at its highest point, I am satisfied that there is a grave risk to A in terms of psychological harm which are or would be caused by the impact on the mother of ongoing coercive controlling behaviour or abuse. That would, in my judgment, likely impact on her ability to care for A. Further, the grave risk that A would be placed in an intolerable situation.
69. I am, however, satisfied that there are protective measures which can be employed which are sufficient to address the risks that I have identified. I consider it necessary and proportionate to employ those protective measures.
70. With that in mind, the father should give the following undertakings.

- He will not attend at the port of entry or encourage or inform any third party of the mother's travel arrangements.
- The father will not contact the mother, save through the grandfather whose contact details will be provided through the mother.
- Providing a separate email address and telephone number that can be used solely for any purpose directed for communication between the parties as directed by this court.
- The father will not bring civil or criminal proceedings in Ireland for unlawful removal or retention of A. The father will not threaten, pester or harass or in any other way molest the mother or ask for, instruct or encourage any third party so to do.
- The father will not telephone, text, email or otherwise contact or attempt to contact the mother, including via social network websites or other forms of electronic messaging.
- He will not attend any address that he believes the mother to be at or is living at without express permission of the Irish courts nor any nursery that he knows or believes A is attending nor will he come within 100 metres of the mother nor will he ask, instruct or encourage any third party to do any of the above.
- He will not seek to contact the mother either indirectly or directly, save through the grandfather.
- The father will seek to bring the matter before the Irish courts forthwith in order for them to consider the matter of continuing contact with A and the

level thereof.

- He will not attempt to remove A from the mother's care without the express permission of the Irish courts nor will he ask, instruct or encourage any third party so to do.
- He will not take any steps to ascertain the address of the mother where she lives in Ireland with A.
- In addition, he undertakes to pay for the flights of the mother and A back to Ireland.
- He also undertakes to continue to pay the maintenance ordered by the Irish court at 30 Euros per week.
- He states through his counsel that he has continued to pay 30 Euros per week into the bank account into the sole name of the mother. The mother states that she is unable to verify that she does not have access to bank card or paperwork which remains in Ireland. I require an undertaking from the father to meet any shortfall in those payments since the court order was made and up to date.
- He will also make a one off maintenance payment of 700 Euros to the mother to enable her to settle back in Ireland.

71. I am not satisfied that it is appropriate for this court to seek an undertaking from the father that he would meet the rental payments on a property for the mother and A. That will be a matter for the Irish authorities.

72. Whilst a number of the allegations relied upon by the mother relate to the father's contact when they were together, they are now separated and the mother has issued

divorce proceedings and the father says he intends to do so as well. There appears to be no realistic prospect that they will reconcile. Therefore, the ability of the father to carry out the sort of behaviour alleged by the mother is significantly limited.

73. When the mother left Ireland there were ongoing court proceedings. I am satisfied that the Irish courts are well able to make orders to control such behaviour as is alleged against the father and his associates and to provide sufficient protection for the mother, and, therefore, indirectly A.
74. In addition, the mother is able to pursue applications before the Irish courts relating to the arrangements for A to see his father and also in relation to her permanent residence.
75. In my judgment, the Irish court is better placed to deal with these issues as Ireland is the place of birth of the father and A, the mother living there since the age of about 6 and home for the parents and A.
76. There have already been proceedings in that jurisdiction. I have no doubt that the Irish court will have considerable experience at the sort of cultural issues raised by the mother in this case.
77. Should the father and extended family members continue to engage in the sort of behaviour alleged against them by the mother, then she can provide evidence of that to the Irish courts and if accepted then, in my judgment, any Judge will take the dimmest view of such conduct and could have only sympathy for the mother. That would be bound to be reflected in any orders made by the Irish courts.
78. In a case such as this where there were ongoing proceedings in Ireland when the mother brought A into this country and the Hague Convention application has been

issued very promptly the policy of the Convention is a very important factor. In considering the policy of the Hague Convention, it is generally accepted that abduction is harmful to children. It is harmful generally if abductors are able to find havens in other jurisdictions.

79. It is clear from the contact report that the father has a warm, loving relationship with A, and there is, of course, already an order in Ireland providing for significant contact or family time to include overnight stays for A with his father. These arrangements would clearly be almost impossible to maintain if the mother and father were separated by the Irish Sea.
80. That is the end of this judgment and I will now consider practical arrangements with counsel.

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