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Case No: FD23P00592

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 January 2024

Before:

Paul Bowen KC (sitting as a Deputy Judge of the High Court)

- -

Between:

A mother	**Applicant**
- and -	
A father	**Respondent**

- -

Re. XZR (Abduction: Hague Convention (Lithuania))

- -

Harry Langford (instructed by Bindmans LLP) for the Applicant
Olivia Gaunt (instructed by Freemans) for the Respondent

Hearing dates: 17 January 2024

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APPROVED JUDGMENT

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.

Paul Bowen KC (sitting as a Deputy Judge of the High Court)

Introduction

1. This is the perfected version of a judgment delivered *ex tempore* on 17 January 2024 amended and approved in accordance with the guidance in *Shirt v Shirt* [2012] EWCA Civ 1029, [33-34]. The parties have been anonymised for reasons of privacy and confidentiality.

2. I am concerned with an application under the Child Abduction and Custody Act 1985 by the mother, ('M), for a summary return order under the 1980 Hague Convention. The application concerns a child, XZR, born in the United Kingdom in April 2018 and who is now 5. The respondent is the father, ('F'), who unlawfully abducted XZR to the United Kingdom in October 2023. M seeks XZR's return to Lithuania. Following the order of Poole J dated 15 December 2023 summarily dismissing F's defences based on the child's objections (on the ground he is too young to express any objection) and settlement under Article 12, the only issues in the case are F's claim that (a) there is a grave risk that XZR's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation under 13(b); (b) in any event, the court is not bound to order XZR's summary return and should not do so in its discretion.

3. I conducted a final hearing of the application on 17 January 2024.

Facts

4. The parties met in 2016 when they were both living in England. At that time, M was studying Psychology at University, and met F while they were both living in London. The parties dated for one year and then started living together in 2017. M's pregnancy was unplanned and their son, XZR, was born in the UK in April 2018. The parties have never been married but F is named on XZR's birth certificate so shares parental responsibility with M.

5. M is a Lithuanian national; F is a Kosovan and Serbian national. XZR has Lithuanian and British nationality. The parties lived together with XZR in the UK until March 2019. The parties then agreed that XZR should move to Lithuania in 2019 to live with his maternal grandmother while M continued her studies in the UK. M then returned to the UK after leaving XZR with his grandmother.

6. M has been the victim of a domestic abuse by F as more fully explained, below. Following an assault in March 2019 M reported the offence to the Metropolitan Police: I have seen a copy of the letter from the police confirming details of the investigation. M later separated from F and returned to Lithuania. F had disclosed that he had previously been in prison following an assault on a previous partner and he pressured M to leave the jurisdiction so that the criminal proceedings in the UK against him would be discontinued. M has remained in Lithuania ever since, save for a few days in July 2019 and until this hearing.

7. On 29 October 2023 F abducted XZR from Lithuania and brought him to the UK without notifying M and in breach of Lithuanian court orders. XZR has been here ever since. M seeks his immediate return.

The Lithuanian proceedings

8. In early 2021 M commenced child arrangement proceedings in Lithuania. On 20 April 2021 the Lithuanian court made an interim order [380] for indirect contact to F, and alternate weekend direct contact. That order was unsuccessfully appealed by F. F then applied for leave to remove XZR from Lithuania to the UK for a week in each of July 2021 and August 2021 for a holiday. That application was refused. On 3 September 2021 the Lithuanian court made a further interim order [395], on F's application to vary the April 2021 order. The court noted F's inappropriate behaviour towards M.

9. In April 2022 F applied for the summary return of XZR from Lithuania to the UK, pursuant to the 1980 Hague Convention. That application was refused on 10 August 2022 by the Lithuanian court [408], on the basis that: (1) although XZR had been habitually resident in the UK at the time of his removal in 2019, F had consented to his return to Lithuania and therefore there had been no wrongful removal or retention by M (2) XZR had been living in Lithuania with his mother for nearly 3 years and was settled for the purposes of Article 12(2). In any event, (3) XZR would be at grave risk of harm if he was returned to the UK, so return would be refused in any event on an Art. 13(b) basis. The Vilnius Regional Court found that: "The evidence in the case therefore confirms that the Applicant, who is requesting the return of the child to his country of origin, has a tendency to be violent towards others. It should be noted that the Applicant has been found to use violence in the presence of his minor son." In reaching that conclusion the Court took into account the following at [89-91]:

    9.1. F has a criminal record in the United Kingdom for domestic violence (against a previous partner) and had been imprisoned for 3 months for failing to comply with the conditions on contact with the victim during the pre-trial investigation.

    9.2. On 26 March 2019, whilst on a suspended sentence, F was violent towards M and she contacted the police in the United Kingdom. He was charged but the F again denied his role in the abuse. The Applicant urged the Interested Party to withdraw her complaint and forgive him so that he could avoid a court sentence.

    9.3. On 11 December 2021, in Lithuania, F was the arrested for a further assault of M, whom he had injured by hitting her head against the iron gate of the yard. The reason for his aggression was that M did not go outside the yard gate when he brought the child home but asked him to hand over the child when he was brought to the gate. F kept the child in the car for two hours with the window open (a video is attached to the file) in the rain, which made the child ill the next day and prevented him from seeing his father for that reason.

9.4. On 22 May 2022, F arrived for a non-scheduled contact with XZR when 'the conflict situation recurred. F, again trespassing, snatched the child out of the arms of a relative, even though the child did not want to go with him, and threw him crying into the car, but the child ran away. F then chased the child and caught him, forcibly put him in the car, and kicked and scratched [M], who tried to help the child.' A pre-trial investigation had been brought against F under Article 140(1) and (3) of the Lithuanian Criminal Code in connection with the incident, due to the violence he used against M and the child.

9.5. On 9 July 2022, when F arrived for contact with the child and M was handing him over, F again trespassed into her parents' garden, grabbed the M by the neck (in the child's presence) and started strangling her. This incident and the incident of 22 May 2022 were recorded by the CCTV cameras outside of the property, and all the footage was handed over to the police. A pre-trial investigation had been started in relation to this incident, a search for the F was launched and 'he is likely to be subjected to precautionary measures.'

9.6. Between 1 January 2021 and 26 July 2022, 22 reports and police calls were recorded in the register of police recorded incidents at the address of XZR's maternal grandmother in Vilnius, in connection with the conflicts between F and M. Four pre-trial investigations were started during this period.

9.7. On 4 September 2021, under Article 140(1) of the Criminal Code of the Republic of Lithuania, a police investigation was started by the Vilnius police on the grounds that F had assaulted M's father. This was closed on 24 November 2021, although no explanation is given.

9.8. On 17 September 2021, a further criminal investigation was opened concerning an assault by F on M in which he had grabbed her by the neck with both hands and strangled her, thereby inflicting physical pain. On 1 October 2021 the investigation was closed.

9.9. On 22 May 2022, a criminal investigation was opened concerning an assault by F on both M and XZR. I was informed these proceedings ongoing.

9.10. On 9 July 2022, a criminal investigation was opened concerning an assault on M in which F was alleged to have strangled her, made threats to kill her and caused bodily harm by spilling sulphuric acid over her. I was informed that these proceedings are ongoing.

10. On 15 September 2023 Lithuanian social services prepared a report in relation to XZR, after having undertaken direct work with him [475]. This records at [485] "he does not always want to talk to his dad, that his dad yells and no one yells at home, and that he uses all sorts of ugly words. The child also stated that he remembers when his dad his mother's car, that he was scared, felt bad, was afraid, and knew that he should not behave like that, and that he does not want to meet and is still afraid of his dad". The report also notes that in his interactions F used inappropriate language and said 'I don't give a shit about Lithuanian law' and would 'kill all Lithuanians for his son'.

11. On 14 October 2022, in the context of the criminal investigation against him, F was ordered to surrender his ID and to report to the police station and not to contact M or XZR.

12. On 20 October 2023 [512] the Lithuanian court granted M's application for F's contact to take place at a mediation centre, rather than at her home, for two days a month for two hours per day and refused F's cross applications, which included applications for: a transfer of XZR's residence to F's care; for M to hand over XZR to F; for M to pay F child maintenance of 420 euros each month; and for M to have contact with XZR from 10am to 6pm a day at F's home, on the last weekend of each month.

13. On 24 October 2023 the Lithuanian court made a non-molestation order against F for three months [533] citing, the allegations of assault and threats to kill and harm M made on 9 July 2022; messages sent on 10, 11 14 July, 23, 28, 29 August making similar threats.

14. On 29 October 2023 F wrongfully removed XZR from Lithuania during agreed contact (overnight contact, which M had felt pressured to agree to notwithstanding the recent order of the court). M holds XZR's Lithuanian passport and his expired British passport. F has exhibited a copy of a new British passport for XZR, with an expiry date of 2025, to his C100 application. F has therefore applied for a further passport for XZR, without M's knowledge or consent.

15. On 4 November 2023 [543] the Lithuanian court made orders that: i. XZR's place of residence is with his mother; and ii. that F is prohibited from having in person contact with XZR. On 15 November 2023 [559] the Lithuanian court fined F and his legal representative 4500 Euros for abuse of process. The court dismissed an application by F to dismiss the proceedings in Lithuania or transfer them to the UK. On 5 December 2023 [576] the Lithuanian court made a final order determining that XZR's place of residence was with his mother and regular remote contact between F and XZR.

The proceedings in the United Kingdom

F's applications to Barnet Family Court

16. On 22 July 2023 F applied to the Family Court at Barnet for a child arrangements order ('CAO'), prohibited steps order ('PSO') and specific issue order ('SIO') [**263**]. On 30 October 2023 [319] F applied within his Children Act proceedings for a PSO to prevent M from removing the child from the jurisdiction. That application was refused by HHJ Jacklin KC by order dated 8 November 2023 [346]. The order recites that: i. M attended remotely, in person, from Lithuania with an interpreter; ii. it was the judge's view that the child is habitually resident in Lithuania and had been wrongfully removed by F without M's consent; iii. the court therefore had no jurisdiction to make anything other than protective orders and did not do so, noting that the child should be returned to Lithuania immediately; iv. that F's case that the court should exercise jurisdiction on the basis of parens patriae was fundamentally misconceived; v. it was noted that this 1980 Hague Convention application was to be made. On 12 December 2023 F

applied to the Family Court at Barnet for further orders [349]. That application was considered by HHJ Karp on the papers on 14 December 2023 who noted that the application was an attempt to appeal the order of HHJ Jacklin KC dated 8 November 2023 and dismissed the application as being totally without merit [362];

The non-recognition applications

17. F has referred to two further applications in his witness statement, namely: an application for non-recognition of the orders of the Lithuanian court dated 4 November and 5 November 2023 [26]; and an application for the courts of England and Wales to request that the courts of Lithuania transfer jurisdiction here, pursuant to Art. 8 of the 1996 Hague Convention [38]. Neither application was known about by M prior to receipt of that document. Neither application (which are both fundamentally misconceived) falls for consideration in these proceedings.

The Hague Convention proceedings

18. M's application was issued on 30 November 2023 [4]. On 30 November 2023 the matter came before Morgan J ex-parte [14]. The judge made a passport order and adjourned the matter to 5 December 2023, and required F to file an answer on 4 December 2023. 11. On 5 December 2023 [18] the matter came before me for an inter-parties hearing. F attended in person. The judge listed the matter for a final hearing on 17 January 2024; listed a further short hearing to consider any further directions that are necessary in light of F's Answer (to be filed on 13 December 2023) and directed that F make the child available for indirect contact every at 4pm UK time for 20 minutes. On 15 December 2023 the matter came before Poole J [22], F having only filed his Answer the evening before. The judge summarily dismissed F's defence based upon settlement and upon the child's objections and made directions for final hearing, including special measures for M's benefit. He continued the order for indirect contact between M and XZR, with an order that F not be present, or speak to or engage with M during indirect contact. Unusually, this order was endorsed with a penal notice.

Other instances of F's assaultive, abusive and threatening behaviour

19. In addition to the incidents I have already documented, F has made a number of threats in video calls recorded by M that if she attempted to remove XZR from the jurisdiction of England and Wales, then he would "take [XZR] to Kosovo" so that she will "never be able to find him" [79/48], and has said (in a further recorded video dated 8 November 2023) that he does not care about court orders either in Lithuania or in England [81/55]. F denied making these threats. The first video was then played in open court in which record F threatening to take XZR to Kosovo and that M would never see him again, saying 'don't try, I'll fuck you up, I'm not playing games'. This took place in the presence of XZR who can be heard crying in the background.

20. F has also been highly abusive to M during indirect contact ordered within these proceedings as Whatsapp messages exhibited at [140/22] and [178] demonstrate.

Events on the morning of 17 January in Court

21. At the outset of the hearing Ms. Gaunt for F rose to make three disclosures, as she was right to do. First, F had instructed her that he would not comply with any return order that the court may make and would not allow the child to be returned to Lithuania. Second, when asked about XZR's location he said 'he is not at school; he is unwell', and when mention was made of police involvement F said they 'wouldn't be able to find him'. He later contradicted this by saying that XZR was at home with his paternal grandmother. Third, he made some further generalised threats against the mother. In the light of those threats I informed F he may be in contempt of court and ordered his arrest to prevent him from taking any further steps that might lead to him frustrating any court order by the child being hidden or further removed. I also made a collection order for XZR's immediate collection by the tipstaff. In the event the child was found by the tipstaff and brought to court shortly before the hearing had ended. I return to the contempt issue at the end of this judgment.

Submissions on the substantive application

Respondent father

22. For F, Ms. Gaunt submitted that there was a 'grave risk of harm' to XZR if he was returned to Lithuania for three reasons:

    22.1. First, there would be harm to his relationship with F as a result of the orders of the Lithuanian courts restricting F's contact to indirect contact only. The Lithuanian courts are failing in their obligations to promote a relationship between F and XZR contrary to Article 8 ECHR because they not allow face to face contact. The court should disregard the Lithuanian court judgments, in particular the final decision of 5 December 2022, because he hadn't been notified of that hearing and it was therefore made without him having an opportunity to make representations. He invoked Article 23 of the 1996 Convention (non-recognition) which provides that measures taken by the authorities of a contracting state shall be recognised in other contracting states except, materially, 'on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in cases of urgency, without such person having been given an opportunity to be heard'.

    22.2. Second, because the education system in Lithuania is not as good as in the UK.

    22.3. Third, XCR's identity as a dual British citizen would be harmed in Lithuania because he will be 'deemed' only to have Lithuanian identity. Reference was made to Article 8 of the Lithuanian law of citizenship, but no expert evidence. It was not suggested that he would have give up his British citizenship, however, but the submission made was that he would nevertheless be deprived of his heritage and identity.

23. As to 'protective measures' at stage 2 of the Article 13(b) exercise

23.1. The Lithuanian Courts have failed to enforce Court orders for contact. F produced copies of five court applications he had made to show that only one of those was enforced leading to M being fined for failure to comply.

23.2. M has given undertakings to comply with orders of Lithuanian courts but they are not sufficient given her history of non-compliance.

23.3. There is an ongoing criminal investigation in Lithuania concerning the abduction. M has said she cannot withdraw those proceedings, only the prosecutor can do so.

Applicant mother

24. Mr. Langford for M submitted as follows:

Grave risk of harm

25. F's central complaint is the Lithuanian Court has limited his contact with XCR and mother has alienated him from his father. However,

25.1. The restrictions on contact were imposed because of F's own violent and assaultive behaviour which has caused and is likely to cause XZR harm.

25.2. The order does allow some indirect contact.

25.3. The order is not final and may be reviewed: see paras 30. If F modifies his behaviour so the risk of harm to XZR is reduced then contact can be increased.

25.4. The decisions of the Lithuanian courts are binding other than in the exceptional circumstances of Article 23 of the 1996 Convention and Article 20 of the Hague Convention (return may be refused 'if this would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms'.

(1) As to Article 23, the submission that he did not have notice of the hearing of 5 December 2022 is simply wrong. The order shows on its face that [576] he was present; and he made submissions in response [580].

(2) Article 20 of the Hague Convention – it is only if F can establish that return would breach Article 20 that the application should be refused. He noted that Lithuania is an EU member and a contracting state to the ECHR. It be seen at [518] para 26 of the judgment of 5 December 2023 that the courts do apply ECHR jurisprudence and principles.

26. As regards F's other two submissions of 'grave risk of harm':

(1) The suggestion that Lithuania does not have the same educational provision as the UK is not capable of reaching the threshold of harm within Article 13(b).

(2) The submission that the Lithuanian citizenship law undermines his identity and rights is unsupported by any expert evidence and it is not suggested XZR would have to surrender his UK citizenship.

Protective measures

27. If there is a grave risk, the protective measures are available to meet that risk. M has undertaken to comply with the orders of the Lithuanian Court dated 5.12.23. The Lithuanian Courts will enforce those orders. Lithuania is a 1996 Convention jurisdiction. Orders made will be enforced.

28. There is no need for an undertaking in relation to the criminal proceedings for the abduction. There is a criminal investigation on foot re abduction; the authorities want to interview the father but have not been able to do so. This is not a case where an undertaking not to prosecute is appropriate. Ordinarily such an undertaking is appropriate where the respondent is returning with the child; that is not the case here. Whether there should be a prosecution is entirely a matter for the Lithuanian authorities.

Discretion

29. This is an abduction of the gravest possible kind involving child being removed in breach of an order with the use of deception and the F's lawyers apparently being involved. This was a hot pursuit application by M including an ex parte order by Morgan J given the F's own conduct and threats made by F to remove. The events in court today reinforce the need for the return order to be made.

30. Mr. Langford sought a return order and collection order to be made today to allow for F to return to Lithuania with XZR tomorrow. The Port Alert should be discharged and travel documents released to the mother today. Father's travel documents should not be released until mother is out of the jurisdiction.

Legal framework

31. In this section I set out the relevant legal principles.

Overview

32. The underlying purpose of the 1980 Hague Convention, which is given effect domestically by the Child Abduction and Custody Act 1985, is to enable the 'prompt return of children wrongfully removed to or retained in any Contracting state' (Article 1). It is intended to provide a swift, summary procedure for a left-behind parent to secure the return of a child wrongfully removed to or retained in another country by the removing parent. Where the procedure is triggered the courts of the requested state are required to 'act expeditiously' (Article 11), if

possible within six weeks of the request being made.[1] Once a request is made, the courts of the requested state 'shall not decide on the merits of rights of custody until a determination has been made that the child is not to be returned' (Article 16).

33. The Courts of the requested state must be satisfied that: the request falls within the scope of the Convention, namely that the child was under 16 and was 'habitually resident' in the requesting state at the date of their removal or retention (Article 4); and that the removal or retention was 'wrongful', namely that it was in breach of the custody rights of the left-behind parent and that those rights were actually exercised or would have been exercised but for the removal or retention (Article 3). Where these criteria are satisfied, there is a prima facie duty to return the child if less than a year has elapsed since the wrongful removal or retention or more than a year has passed and it is not demonstrated that the child has now settled in their new environment (Article 12).

34. The Courts of the requested state are not obliged to return the child if one of the defences in Article 12 or 13 are made out. Return under the Hague Convention may otherwise be a breach of Article 3(1)[2] of the UN Convention on the Rights of the Child (UNCRC) and Article 8 of the European Convention on Human Rights (ECHR) in circumstances such as those considered by the Grand Chamber of the European Court of Human Rights (ECtHR) in *Neulinger v Switzerland* (2012) 54 E.H.R.R. 31. Following *Neulinger*, the Supreme Court clarified the interrelationship of the Hague Convention with the UNCRC and ECHR in *E (Children), Re (Abduction - Custody Appeal)* [2012] 1 A.C. 144. At [13-17] of their speech on behalf of the Court, Baroness Hale and Lord Wilson observed that 'the fact that the Hague Convention does not expressly make the best interests of the child a primary consideration does not mean that they are not at the forefront of the whole exercise'. The Hague Convention is premised on the assumption that 'if there is a dispute about any aspect of the future upbringing of the child the interests of the child should be of paramount importance in resolving that dispute'. It is also based on a second assumption, namely that 'the best interests of the child will be served by a prompt return to the country where he is habitually resident'. This latter assumption may, however, be rebutted, 'albeit in a limited range of circumstances, but all of them inspired by the best interests of the child', namely:

    34.1. if proceedings were begun more than a year after her removal and she is now settled in her new environment (Article 12);

    34.2. if the person left-behind has consented to or acquiesced in the removal or retention or was not exercising his rights at the time (article 13(a));

[1] Under the terms of EU Council Regulation 2201/2003 (the 'Brussels IIa Convention') the process was expected to be completed within six weeks of the application being made. Although, since the UK's departure from the EU on 31 January 2020, Brussels IIa no longer applies so there is no longer a legal deadline, Hague Convention proceedings are still expected to be completed within a six week window: para 1.2 of the Practice Guidance 'Case Management and Mediation of International Child Abduction Proceedings' (2018) (the Practice Guidance).

[2] 3(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

34.3. if the child objects to being returned and has attained an age and maturity at which it is appropriate to take account of her views (article 13);

34.4. if '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': article 13(b).

35. Where one of these defences is established, the assumption that it is in the best interests of the child to be returned to the requesting state 'may not be valid': *Re. E*, [16]. Accordingly, the Courts of the requested state will then have a discretion whether to accede to or refuse the request to return the child, to be exercised in accordance with the principles at paragraph 39, below.

36. However, 'these limitations on the duty to return must be restrictively applied if the object of the Convention is not to be defeated'. Moreover, 'there is a particular risk that an expansive application of Article 13(b), which focuses on the situation of the child, could lead to this result': *Re. E*, [30], citing the explanatory report to the Hague Convention, para 34. This has implications for the procedure that the Court is to undertake when determining Hague Convention proceedings, including the following.

36.1. The burden of proof lies on the person opposing the child's return (usually the removing parent) to adduce evidence to substantiate one of the Article 13 defences to the civil standard: *Re. E*, [32].

36.2. The Courts of the requested state are not expected to carry out a 'full-blown examination of the child's future … which it was the very object of the Hague Convention to avoid': *E*, [22].

36.3. There is, moreover, no right to call oral evidence which should only be allowed 'sparingly', with the threshold for the court giving permission a 'high one': *Re. B* (CA) [2022] 3 WLR, [57-65]. While that threshold is more likely to be crossed where binary issues of fact are involved, such as whether consent has been given for the purposes of Article 13(a), the judge must decide whether it is necessary to hear oral evidence in order to be able fairly to determine central issues of fact in the context of what is a summary process and in the context of the available documentary and written evidence: *Re. B*, ibid, [64].

36.4. There are particular restrictions that apply when the Court is concerned with the defence under Article 13(b).

Article 13(b): grave risk of harm

37. A parent opposing return may establish a defence under Article 13(b) if they prove that '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 Supreme Court in *E* held at [31-34] that Article 13(b), by its very terms, is of restricted application. In addition to the burden being on the parent opposing return to establish the defence:

37.1. The risk of harm to the child must be 'grave'. It is not enough that the risk be 'real'. The risk must reach a certain level of seriousness as to be characterized as 'grave'. Although 'grave' characterizes 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: *Re. E*, [33].

37.2. The child must be put at risk of 'physical or psychological harm' or otherwise placed in an 'intolerable situation'. 'Intolerable' gives colour to the term 'physical or psychological harm'. It 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'. Every child must put up with a certain level of 'rough and tumble, discomfort and distress', but there are 'some things it is not reasonable for a child to tolerate'. Among these are physical or psychological abuse or neglect of the child, as well as 'exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent': *Re. E*, [34].

37.3. Article 13(b) looks to the future: the situation as it would be if the child were to be returned forthwith to his home country, having regard to any protective measures that may be put in place to safeguard the child from such harm: *Re. E*, ibid, [35]. There may, objectively, be a 'grave risk' that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation if they are returned (whether with or without the removing parent) to live with the left-behind parent without any protective measures. But if, for example, the child can be returned to a different setting, with effective restrictions on the left-behind parent having any contact with them and the removing parent, then the threshold required for Article 13(b) purposes will not be crossed. The gravity of the risk of harm, including both its likelihood and the potential seriousness of the harm, needs to be evaluated in the light of the availability and efficacy of any protective measures. 'The clearer the need for protection, the more effective the protective measures must be': *Re. E*, [52], cited in *Re. S (Abduction: Article 13(b)) (Mental Health)* [2023] EWCA Civ 208, [92].

37.4. Relevant protective measures may include anything which might reduce the risk, including general features of the home State such as access to the courts and other state services: *Re. C* [2019] 1 FLR 1045, [41]. The measures may also include orders made by the court in the requested state or undertakings given by the left-behind parent requiring them, for example, not to contact the removing parent pending the resolution of children's proceedings in the requesting state. In assessing the efficacy of any such orders or undertakings, the fact that they are enforceable in the requesting state under the terms of the 1996 Hague Convention[3] is a relevant consideration: *Re. Y (Abduction: Undertakings)* [2013] 2 FLR 649. If there is any doubt as to the availability or efficacy of protective measures,

[3] Full name the 'Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children Protection of Children 1996'

enquiries may be made through the international liaison judges and a short adjournment may be necessary for that purpose: *E v D* [2022] EWHC 1216 Fam, [32].

The approach to determining the Article 13(b) issue

38. In determining the Article 13(b) issue the court should adopt the following approach.

    38.1. The burden of establishing the Article 13(b) defence remains throughout on the party opposing return. However, given the nature of allegations of domestic abuse upon which the risk of harm is likely to be founded and the limited evidence available given the summary nature of the proceedings, the court may be unable to determine the truth of the allegations. The courts have therefore adopted a pragmatic solution. Unless the available evidence enables them 'confidently to discount the possibility that the allegations give rise to an article 13(b) risk', the judge 'should assume the risk of harm at its highest and then, if that risk meets the threshold in Article 13(b), go on to consider whether protective measures sufficient to mitigate the harm can be identified': *Uhd v Mckay* [2019] 2 FLR 1159, per MacDonald J, [68-70], applying *Re. E*, [36] (as endorsed by the Supreme Court in *Re. S (A Child)* [2012] 2 AC 257, [22]) and the Court of Appeal decisions in *Re. C (Children) (Abduction: Article 13(b))* [2019] 1 FLR 1045, [39], and *Re. K (1980 Hague Convention: Lithuania)* [2015] EWCA Civ 720, [52-53].

    38.2. Although the case-law does not expressly say so, in my judgment it follows from the reasoning in *Re. E*, *Uhd*, *Re. C* and *Re. K* that <u>if</u> the judge is able to find, on the limited evidence available, that the allegations made by the removing parent are made out then they may make such a finding, rather than assume the allegations to be true. That is particularly so if (as here) those findings of fact are also relevant to other issues that do turn on binary issues of fact, such as the question of 'habitual residence'.

    38.3. Although it is not necessary, it is preferable for the judge to adopt a two stage process under Article 13(b): *Re. B*, [2022] 3 WLR 1315, [70-71].

        (1) At stage one, the judge should evaluate the nature and level of the risk *in future* on the basis of their finding (if made) or assumption that the allegations made by the removing parent of the left-behind parent's *past* behaviour are true: ibid, see also *Re. C*, [2019] 1 FLR 1045, [48-50]. If a number of different allegations are made, the judge should consider the cumulative effect of those allegations as a whole before evaluating the nature and level of risk: *Re. B*, [70]. If the court

assesses the necessary threshold has been reached then they will proceed to stage two; if not, the defence fails.

(2) At stage two, the judge should evaluate the sufficiency and efficacy of any protective measures in reducing or removing that risk to a level below the threshold of 'grave risk' provided for by Article 13(b).

38.4. At the second stage, there is no legal or evidential burden on the left-behind parent to establish the availability and efficacy of protective measures. Article 11(4)[4] of the Brussels IIa Convention had imposed a legal burden of that nature, but this is no longer law due to the UK's exit from the EU. Lewison LJ in *Re. C* [2019] 1 FLR 1045, [69] observed that to impose such a burden would reverse the burden of proof imposed by Article 13(b) on the party opposing return. I will approach the task at each stage by considering all the available evidence and conducting an evaluative judgment: first, as to the nature and level of risk in future if the child is returned; second, as to the sufficiency and efficacy of any protective measures in that event; and then to ask whether the removing parent, F, has discharged the burden on him under Article 13(b).

Discretion

39. Where the court is satisfied one of the defences in Article 13 is made out it is no longer under a duty to order the return of the child to the requesting state under Article 12. However, the court retains a discretion to return the child. This discretion is 'at large', that is to say it is not exercised within limits set down by the Hague Convention: per Baroness Hale in *Re. M (Abduction: Zimbabwe)* [2008] 1 FLR 251, giving a speech with which the rest of the House of Lords agreed: [43]. The underlying purposes of the Hague Convention are relevant to the exercise of the discretion, but should not always be given more weight than other considerations, which may include wider considerations of the child's rights and welfare: [43]. The exercise of discretion will be determined by the court's findings as to why there is no obligation to return the child. For example, where the decision has been taken under Article 13(b) that there is a 'grave risk' of harm to the child if they are returned it will be 'inconceivable' that the court will nevertheless in its discretion order their return: [45]. Different considerations may apply in consent cases, although as a general principle 'the further one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be': [44].

Relevant principles in making findings on the evidence

40. The relevant principles I will apply in making findings on the evidence are these:

40.1. The approach to fact-finding by a judge when conducting Hague Convention proceedings is conditioned by their underlying purpose, namely the 'prompt return of children wrongfully removed to or retained in

[4] "*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."*

any Contracting state' (Article 1). The proceedings must be determined swiftly and, if possible, within six weeks of their commencement. The judge does not conduct a fact-finding exercise such as that under PD12J. Oral evidence is the exception, not the norm.

40.2. The judge must nevertheless make findings of fact necessary to resolve the issues before them. In doing so, it is not open to a judge to say: 'I don't know where the truth lies'. A fact in issue must be determined one way or the other: the law is binary and does not allow for any value other than zero and one: per Lord Hoffman in *B (Children) (Sexual Abuse - Standard of Proof), Re* [2009] 1 A.C. 11, [2]; see also per Baroness Hale at [31-32]. The judge must make findings of fact only on the admissible evidence and appropriate inferences but cannot speculate about the existence of other evidence. Where there is little evidence on a particular issue, the fact-finding exercise may be not so much about establishing the truth as a forensic exercise in determining whether the party upon whom the burden of proof rests has discharged that burden: *Air Canada v Secretary of State* [1983] 2 A.C. 394, 411F-G, per Denning LJ.

40.3. This principle is qualified in proceedings under Article 13(b), as I have explained at paragraph 0 above. Rather than make findings of fact, the judge may instead assume the truth of allegations that support the existence of a 'grave risk' of harm if the child is returned, although these must be 'reasoned and reasonable assumptions based on an evaluation that includes consideration of the relevant admissible evidence that is before the court': *Uhd v Mckay*, ibid, [70]. If the judge has sufficient evidence 'confidently to discount the possibility that the allegations give rise to an article 13(b) risk' they should do so. By the same token, if the judge has sufficient evidence they may make positive findings of fact.

40.4. In making findings of fact or Article 13(b) assumptions, contemporaneous documents carry a particular weight in the forensic exercise. The advantages of such contemporaneous documents compared to witness testimony have been repeatedly stressed in the case-law, helpfully summarized by Warby J in *R (Dutta) v GMC* [2020] Med. L.R. 426 at [39].

40.5. Witness testimony that has been tested by cross-examination and has not been discredited in the process will carry more weight than evidence contained only in a witness statement, particularly that of a witness who has been directed to attend court to give evidence and has failed to do so without good reason.

40.6. A finding or admission that the witness has lied on one issue may undermine their credibility in relation to another, related issue unless the witness had an innocent reason for lying such as shame, misplaced loyalty, panic, fear or distress: *R v Lucas* [1981] Q.B. 720; *Re. A (A Child) (Fact-Finding Speculation)* [2011] EWCA Civ 12, [21].

40.7. The judge may consider the inherent probability or improbability of an event when deciding whether, on balance, the event occurred or its truth should be assumed for Article 13(b) purposes. 'The more improbable the

event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established': Lord Hoffman in *Re. B,* [11], citing Lord Nicholls in *H (Minors) (Sexual Abuse: Standard of Proof), Re.* [1996] AC563, 586. However, the fact that an event is a very common one does not lower the standard of probability to which it must be proved. Nor does the fact that an event is very uncommon raise the standard of proof that must be satisfied before it can be said to have occurred: *BR (Proof of Facts), Re* [2015] EWFC 41, [7(3)], Jackson J.

40.8. Similarly, the fact that allegations are particularly serious, or have serious consequences, does not change the standard of proof to which they must be established. 'The court will consider grave allegations with proper care, but evidence is evidence and the approach to analysing it remains the same in every case': *BR (Proof of Facts), Re* [2015] EWFC 41, [7(1-2)].

40.9. 'When approaching decisions on issues of fact judges should deploy the kind of rational, objective and fair-minded rigour that all reasonable people would deploy when deciding questions of fact on really important matters': *F v M* [2021] EWFC 4, [4], Hayden J.

Decision

41. Against that backdrop I can articulate my decision on the issues in relatively short compass.

Article 13(b)

42. It is for F to show, on the balance of probabilities, that there is a grave risk that XZR's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation for the purposes of Article 13(b). I reject that submission. My reasons are these (and applying the two-stage approach advised in *Re. B,* [2022] 3 WLR 1315, [70-71], above paragraph 38.3).

43. Stage one: is there a grave risk of harm? The claimed risk does not come close to the necessary threshold of 'grave risk of harm' for Article 13(b) purposes. The Lithuanian Courts in their final decision of 5 Dec 2022 imposed restrictions on F's contact with XZR because of his own violent and abusive behaviour towards M, the child and his paternal grandparents. That was also the basis for the Lithuanian Court's dismissal of F's Hague Convention application in August 2022 on Article 13(b) grounds. The restriction is not total; the order allows for indirect contact on a regular and frequent basis. In any event it is not final for all time; if F's behaviour changes then the court may vary its own order. I am bound to give effect to the Lithuanian Court orders other than in circumstances provided for by Article 23 of the 1996 Hague Convention or Article 20 of the 1980 Hague Convention. No such circumstances arise here. In particular I reject the suggestion that F was not notified of the hearing; the judgment and order record he was present and made representations through his lawyers. Lithuania is a contracting state of the ECHR and there is nothing to suggest that the order made on 5 Dec 2022 is incompatible with F's convention rights. I also reject the other bases advanced by F that there is a 'risk' for the reasons given by M.

44. Stage two: are there adequate and effective protective measures that will avoid that risk? In view of my conclusion on stage one it is not necessary to consider whether protective measures are necessary to guard against that risk.

Discretion

45. In view of my conclusions that F is unable to establish a defence of 'grave risk' under Article 13(b), I am bound to order XZR's return to Slovakia. In any event, I am satisfied this application was wholly unfounded and unjustified and simply further evidence of the father's willingness to exploit and abuse the legal system in his desire to undermine or destroy M's relationship with XZR.

Conclusion

46. For the above reasons, in my judgment:

    46.1. I am not satisfied that there is a grave risk that XZR's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation for the purposes of Article 13(b).

    46.2. I am bound to return XZR to Lithuania but, even if I had a discretion to refuse return I would not exercise it.

47. The application is accordingly dismissed.

Contempt

48. I have explained how at the outset of the hearing on 17 January 2024 F expressed, through counsel, his intended refusal to comply with any order that the court might make and intimated that he had taken steps, or would take steps, to frustrate any order by hiding and removing XZR from the jurisdiction to Kosovo. In those circumstances I concluded that F may be guilty of contempt in the face of the court, namely 'conduct that denotes wilful defiance of, or disrespect towards, the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law itself': *Solicitor General v Cox* [2016] EWHC 1241 (QB) ('Cox'), [67]. I was also concerned that he would take steps to implement a pre-arranged plan to remove XZR to Kosovo if I made a return order. He has made such threats in the past and, of course, abducted XZR from Lithuania to the UK in October of last year. I formed the view that the threat of further abduction was real and imminent. I had also been informed that he was behaving in and outside court in an aggressive and intimidating manner which was making M extremely uncomfortable. I arranged for the tipstaff and for security officers to be present in court and then notified F, in open court, that his expressed refusal to comply with any court order, and his stated intention to frustrate any order if made, might constitute a contempt of court and that he was under arrest. I ordered him to surrender his phone to the tipstaff so that he could not contact anyone else who might frustrate the court's order. F was permitted to remain in court during the hearing but I remanded him to the cells between the end of the hearing and the giving of judgment shortly after 3 o'clock. When I returned to court to give judgment I was informed that the tipstaff had been able to locate XZR and was on her way to the RCJ and would be arriving shortly. In due course XZR was

reunited with his mother who plans for them both to fly to Lithuania on January 18.

49. Following judgment I invited submissions from the parties on what steps should be taken with regard to F's apparent contempt. M did not wish to make a contempt application under FPR 37 but was concerned that F might take steps to frustrate her return to Lithuania with XZR if he was released. F submitted, through counsel, that his legal representatives had 'misunderstood' his instructions and that he had, and has, every intention of complying with any order of this court and it was always his position that XZR was always at home in the care of the paternal grandmother or nearby. I do not accept this as his earlier defiance was consistent with his attitude to the Lithuanian courts as expressed in video calls that I have seen and given his willingness to lie when it suits him (as witness his denial that he had threatened to remove XCR to Kosovo in a video call to F, a lie exposed in the 17 seconds that the video was then played in court). I conclude his 'new' instructions were a fabrication and I remain concerned that F will take steps to disrupt XZR's removal if he possibly can.

50. I have to determine, first, whether this is an appropriate case to refer to the Attorney-General or for the Court to initiate proceedings of its own motion by summons under FPR 37.6. Of the three mechanisms by which contempt proceedings may be brought, the hierarchy is (a) the person in whose favour an order was made; (b) the Attorney-General; (c) the Court, but only 'in exceptional cases of clear contempts . . . in which it is urgent and imperative to act immediately': *Bedfordshire Police v U* [2014] Fam. 69, Holman J, recently considered in *Isbilen v Turk* [2021] EWHC 854 (Ch) in the context of proceedings under CPR 81, which mirror those under FPR 37. The Court should therefore be slow to initiate proceedings of its own motion under FPR 37.6. However, I am satisfied that I should do so. In my judgment permission would be granted under FPR 37.3(5) if an application was made, and I see no reason why the same approach should not be applied by the Court in deciding whether to initiate proceedings of its own motion by way a summons under FPR 37.6(3). The relevant factors were considered in *EBK v DLO* [2023] 4 W.L.R. 51, [72], namely: the strength of the case; the public interest; the proportionality of proceedings; and the overriding objective. I would add that the best interests of the child should also be a relevant factor.

51. Applying those considerations: by his initial stated refusal to comply with the court's order, and his threat to frustrate that order, F 'may have committed' a contempt in the face of the court (FPR 37.6(1)); it is appropriate to proceed against F by way of summons given the urgent need to prevent F from taking steps to carry out his threat to frustrate the court's order by disrupting XZR's return, particularly given F's history of violence against M; there is a strong public interest in the court making clear that its orders are to be respected and not frustrated; it is in the best interests of XZR that the court take steps to protect against the risk to his removal; and such proceedings are a proportionate means of achieving the objective of both protecting the interests of justice and preventing F from frustrating the court's order by disrupting M's removal. I therefore direct the issue of a summons under FPR 37.6(3).

52. Second, I must decide whether to remand F in custody or to release him on bail. In my judgment there are substantial grounds for believing that, if released on bail, F would follow M and XCR or otherwise harass or assault them and seek to frustrate the court ordered removal process. I therefore refuse bail and F will be remanded in custody. The matter will return for hearing on 18 January 2024 for directions and consideration of bail.

53. That is my judgment.