



Neutral Citation Number: [2022] EWHC 2042 (Fam)

Case No: FD22P00465

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2022

Before :

THE HONOURABLE MRS JUSTICE JUDD DBE

Between :

HM
- and -
HA

Applicant

Respondent

Matthew Fletcher (instructed by **London Family Solicitor**) for the **Applicant**
Roshi Amirafabi (instructed by **Brethertons Solicitors**) for the **Respondent**

Hearing dates: 26 July 2022

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HONOURABLE MRS JUSTICE JUDD DBE

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.

The Hon Mrs Justice Judd :

1. This is an application by a mother for the summary return of two children, X and Y, aged four and two to Poland pursuant to the 1980 Hague Convention.

Background

2. The mother and father (who are Polish and English respectively) met in 2013 and began a relationship the following year. For the first few years they lived in England although there were times when they spent time in Poland. Both children were born here.
3. In January 2021 after spending Christmas with family in Poland the parties decided that the mother and children would settle there. The father would then join them when his contract of employment came to an end a few months later. X received a diagnosis of autism at about the same time. He started at a specialist nursery in September 2021.
4. Also in September 2021 the father moved to Poland to join the family and in November 2021 the parties married. In March 2022 the father's grandmother died, and the mother and father agreed that the father would travel over here with the children for the funeral and to see family. On 4th May, the day they were due to return, the father informed the mother that he and the children would not be coming back.
5. On 23rd May the mother contacted the Polish Central Authority. Meanwhile the father made an application for interim residence orders in the family court. A number of orders were made, on the declared basis that the court had jurisdiction as a result of the children's presence. Those proceedings were later stayed pending the determination of this application.
6. During this period there were discussions between the parties, and some disagreements about contact. In early June the father stated within the Children Act proceedings that he no longer objected to the children's return to Poland, although he later changed his mind about that and defends these proceedings. This application was made on 24th June.

The parties' respective cases.

7. The mother's case is that the children were habitually resident in Poland at the time they were retained in the UK, on 4th May. In those circumstances she submits that the retention was wrongful and in breach

of her rights of custody pursuant to Articles 3 and 5 of the 1980 Hague Convention and that the court should order their return forthwith.

8. The father accepts that he wrongfully retained the children in this jurisdiction. He relies on the defence of Grave Risk under Article 13b of the Convention.
9. In support of his case the father makes a number of allegations against the mother. First he says that the mother has a unstable and volatile temperament particularly when she has been drinking. He said that there was ‘a very clear cycle that [the mother] would become drunk, become verbally abusive often being physical towards me and would then sober up and apologise. He said that there was an occasion some years ago when the mother had kicked him twice on the shin and another when she hit him in the face causing his nose to bleed.
10. The father also alleges that the mother has been aggressive to X (who has been diagnosed with autism), shouting at him, and at times hitting, yanking him or dragging him when she could not manage him. He said this occurred in about 2019.
11. The father further states that the mother found it difficult to manage X between early 2021 when she was living with the children alone until September 2021 when he came to live in Poland. He has produced some messages during that period in which she says that she was finding it a struggle to manage and had slapped him. He said that the X became timid, distressed and weary, and that there was an occasion when he had an accident requiring stitches in his lip when he was left unattended.
12. The father said that when he arrived in Poland in September 2021 X was saying less and not making eye contact as he had. He had stopped defending himself when his younger cousin was rough with him. He said the child displayed no affection to his mother and there was ‘no expression or emotion whenever she entered the room’. He said ‘I felt as though he had almost developed a self-defence mechanism to minimise the abuse coming from his mother’. He said that although X attended a therapeutic nursery the nursery raised concerns that X only ever asked for his father.
13. Once he arrived back the father said X had meltdowns because he could not communicate, and when he did so he only asked for his father. He said on one occasion he heard the mother slap him. He said the mother

was aggressive to X, and began to behave in the same way towards Y. He said she admitted to hitting Y on one occasion.

14. The father said that when he came over to England for his mother's funeral he contacted the local authority and the police. He said he had changed his mind about the children going back to Poland in early June because the mother promised that she would seek professional help and he would go with her.
15. In his statement the father says that if the court orders the children should return, he will return with them. He says that the children will need to live with him, and the mother will have to provide him and them with accommodation and living expenses until the court in Poland is able to deal with the case. He set out a number of undertakings that he would seek from her.
16. The mother rejects the father's allegations, and states that it is he who is short tempered and impatient and not her. She says that he has fabricated allegations in order to get accommodation in this country and public funding. She says she would be willing to pay for the children's flights back but not to provide separate accommodation for them and the father together. During the hearing she modified her stance so as to offer to provide funding for accommodation for him alone. The children, she says, can live with her, and the father could spend time with them during the day.
17. On behalf of the mother, Mr Fletcher submits that the allegations made by the father, taken at their highest, do not substantiate anything near a grave risk to the children if they were to be returned. At best, he states that they relate to the quality of care that each of them can give X that should properly be a matter for a welfare determination. So far as Y is concerned, Mr. Fletcher submits that there is virtually no criticism of the mother's care of her at all.

Article 13(b)

18. Article 13b reads as follows; "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 position'.

19. In *Uhd v McKay* [2019] EWHC 1239 MacDonal J summarised the principles to be derived from the decision of the Supreme Court in *Re E (Children)(Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144, as follows:-

“[67] ..

i) There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.

ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.

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

iv) The words ‘physical or psychological harm’ are not qualified but do gain colour from the alternative ‘or otherwise’ placed ‘in an intolerable situation’. ‘Intolerable’ is a strong word, but when applied to a child must mean ‘a situation which this particular child in these particular circumstances should not be expected to tolerate’.

v) Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child’s immediate future because the need for protection may persist.

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

situation would become intolerable, in principle, such anxieties can found the defence under Art 13(b).

20. In *Re E*, the Supreme Court made clear that in examining whether the exception in Art 13b has been made out, the court is required to evaluate the evidence against the civil standard of proof, namely the ordinary balance of probabilities whilst being mindful of the limitations involved in the summary nature of the Convention process (which include the fact that it will rarely be the case that the court will hear oral evidence and, accordingly, rare that the allegations or their rebuttal will be tested in cross examination). Within the context of this tension between the need to evaluate the evidence against the civil standard of proof and the summary nature of the proceedings, the Supreme Court further made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as grounding the defence under Art 13b. Rather, the court should assume the risk of harm at its highest and then, if that risk meets the test in Art 13b, go on to consider whether protective measures sufficient to mitigate harm can be identified”.
21. This process does not mean that there should be no assessment at all of the substance or credibility of the allegations. A judge has to be careful when conducting a paper evaluation but there are cases where the evidence before the court enables the judge confidently to discount the possibility that the allegations give rise to an Article 13(b) risk (*Re K (1980 Hague Convention: Lithuania [2015] EWCA Civ 720*). The assumptions made with respect to the maximum level of risk must be reasoned and reasonable assumptions based on an evaluation which includes consideration of the relevant admissible evidence that is before the court, albeit an evaluation that is undertaken in a manner that is consistent with the summary nature of the proceedings.
22. In the Guide to Good Practice Under the Convention of 25th October 1980 published in 2020, it is suggested at paragraph [40] that the court should first ‘consider whether the assertions are of such a nature and of sufficient detail and substance, that they could constitute a grave risk’ before determining, if they could, whether the grave risk exception is established by reference to all the circumstances of the case. In *A (Children)(Abduction) Article 13(b) [2021] EWCA Civ 939*, Moylan LJ stated, that when analysing whether the allegations are of sufficient substance and detail, the judge will have to consider whether the ‘evidence before the court enables him or her to confidently discount the

possibility that the allegations give rise to an Article 13b risk'. The assumptions made by the court with respect to the maximum level of risk must be reasoned and reasonable assumptions.

Discussion

23. There is no issue that the children were habitually resident in Poland before they were retained by their father following an agreed trip to England to attend the funeral of his grandmother. It is conceded that their retention was wrongful within the meaning of Article 3. This means that the court should order the return of the children forthwith under Article 12 (they having been in the jurisdiction for less than a year) unless (in this case) the defence in Article 13b is made out.
24. When coming to a decision about this, I must take the risk to the children from the behaviour of the mother at its highest on the basis that the allegations made by the father are true.
25. Although the mother has offered to provide (for a short period) for accommodation for the father to live in alone if he is to return, she is not offering to pay to accommodate him and the children together. I must therefore approach the case on the basis that if I order a return the children will go back and live in the maternal family home with the mother, and in the absence of the father.
26. The risk to the children is therefore that what the father says happened to the children before will happen again. The risk is that she will become impatient and aggressive, particularly with respect to X. She may slap him in anger (she did this once between September 2021 and April 2022 but may have done this more often when the father was still in England). She may become frustrated with him and shout when he needs patience and understanding. She could yank or drag him if he does not do as she tells him. This may affect him particularly as he is a child with special needs. In his statement the father has described X's behaviour when he came back to Poland both on visits and then finally in September 2021. He was, the father said, saying less, not making eye contact, and had stopped defending himself when other children were rough or took things away from him. He would hang his head low and behave in a timid fashion.
27. Added to the risks above, there is a risk of physical harm if the mother does not supervise him properly (as is said to have occurred when he needed stitches to his lip after an accident last year).

28. The risk to Y is also of being shouted at and physically chastised, although the evidence the father has provided as to this is very limited. This will affect her emotionally, as it would to see her older brother being treated as described above.
29. The messages produced by the father in support of his case were sent in the first half of 2021 when the mother was alone with the children and not working. X was not at nursery. Even then, whilst she expresses frustration and (at one point) distress that she believes she is not a good mother, the sentiments expressed do not go beyond what many a single parent in charge of two children under the age of 5 (one of whom has autism) might express in a low moment.
30. In looking at the question of risk it is right to say that the situation for the children would not be the same as when the mother was looking after them without the father before. X will go back to the therapeutic nursery he has been attending since September 2021. He will be there for a good part of the day. The mother is now working full time and her own mother will be assisting with the childcare. It is true that frustration can arise in the middle of the night, but apart from a complaint in the mother's messages that X had kept her and Y awake one night there is no evidence that this has been a particular problem.
31. Looking at all the evidence available to me, I have come to the conclusion that the risk to the children if they are returned to Poland does not meet the threshold of Article 13b. Whilst I do not wish to minimise the effect on X in particular of being subjected to impatience, anger and physical chastisement from the mother, I do not find that there is a grave risk that the return of the children would expose either of them to physical or psychological harm or otherwise place them in an intolerable situation. In my judgment the situation that X and Y would be in if I ordered a return does not reach that level for either child. Assuming the risk at the highest, the level is that of discomfort and distress, not intolerability. The children have spent much of their lives being cared for by the mother. They will be returning to a home which is familiar to them, and where the maternal grandparents also live. X will return to his therapeutic nursery where he was doing well.
32. There are genuine issues as to whether the children would be better placed with the mother or the father, and whether this should be in Poland or England, but these are matters for the court with a welfare jurisdiction to decide after hearing the evidence.

33. So far as any risk to the father is concerned, there is no suggestion by either him or the mother that they return to live under the same roof or that mother's behaviour to the father has compromised his ability to care for the children. In his statement the father said he had received threats from the mother's family but they were not particularised at all. In oral submissions Ms Amiraftabi said that the threats were from the mother's brothers, but such details as she gave did not suggest anything explicit. In any event, I am confident that the father would have recourse to the authorities in Poland in the event that he was to allege that he was at risk from the mother or indeed anyone else were he to return.
34. Given my findings, the question of protective measures before the children can be returned does not arise (subject to what I have said in paragraph 25 above). I note that the mother is prepared to give undertakings to withdraw any civil or criminal prosecution in Poland as to child abduction, and that she will pay for the children's flights. I also note that she remains willing to provide the father with accommodation for himself for a period if he was to return to Poland, and that he will not forfeit his right to benefits here whilst he remains temporarily in Poland. This will assist the father to be able to come to Poland and to see the children pending decisions in the Polish court.
35. As the father has failed to establish his case under Article 13b, I will make an order that the children should return to Poland, and will fix the date for this to happen in the absence of agreement between the parties. I see no reason at present why this should not take place swiftly but will consider any submissions the parties may wish to make to me about that.