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Case No: FD22P00621

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 07/12/2022

**Before :**

**THE HONOURABLE MRS JUSTICE JUDD**

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**Between :**

**A Mother**

**Applicant**

**- and -**

**A Father**

**Respondent**

**Re N (Abduction)**  
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**Mani Basi** (instructed by **Thomas Dunton Solicitors LLP**) for the **Applicant**  
**Professor Rob George** (instructed by **International Law Group LLP**) for the **Respondent**

Hearing dates: 1st December 2022  
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**Approved Judgment**

This judgment was handed down remotely at 10.30am on 7 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html>).

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**THE HONOURABLE MRS JUSTICE JUDD**

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 :**

Introduction

1. This is an application for a return order pursuant to the 1980 Hague Convention.

Background

2. The child with whom I am concerned, ‘N’ is just under three years old. Her mother is from Country A (an EU state) and her father from Country B (another EU state). The parents met in 2017 and married in 2019. They have spent time living in the UK, Russia, Country A and Country B. The parties first went to live in Country A as a family in April 2020. The father’s case was that it was always intended to be temporary. The family spent six months in Country B from June to December 2020 and then returned to Country A.
3. In Country A the mother worked five days a week from 7 until 3, and the father cared for N at home. The relationship deteriorated in 2022 at the same time as the parties were discussing coming to England. The father applied for and obtained a good teaching job here, and the parties signed up to a tenancy on a flat.
4. In February this year the mother contacted a domestic abuse charity stating that she was the victim of emotionally abusive and controlling behaviour. In July she filed for divorce. In August, just as she and N were supposed to be moving to the UK with the father she left him, with the assistance of the local social services department, taking N with her. For two weeks she cut off contact with the father. After that, the father was contacted by the social worker in order to arrange contact with N. At first the mother agreed to overnight staying contact (despite having told social workers earlier that she feared the father would abduct N if he had the opportunity) but then on advice changed her mind. Contact supervised by a social worker was arranged and agreed between the parties. N was dropped off with the social worker by her grandmother. The supervised contact visit took place at a park close to the social work office, but when the social worker was looking the other way the father disappeared with N. When she tried to contact him he did not respond. The police were called but they were not able to find them. It seems that the father must have left Country A with N almost immediately, driving over several borders without detection even though she did not have her passport.
5. The mother contacted solicitors and made a swift application for a return order pursuant to the 1980 Convention. Although the father says the mother must have known he was in England (the plan had been to go

there and he had secured a job) he refused to tell the mother their postal address so that the father and N were only found by means of a location order. The father did, however, provide for the mother to have virtual contact with N as soon as he arrived here.

The father's case

6. The father accepts that his removal of N was wrongful within the meaning of Article 3 of the Convention. His case is that I should exercise my discretion to refuse to order a return on the basis of Article 13b, namely that a return would expose N to a grave risk of harm and/or place her in an intolerable situation.
7. On behalf of the father, Professor George advanced a number of points to support that case. He submitted that, whilst individually some or even all of them might not meet the threshold for amounting to a grave risk of harm, that taken together they clearly did so.
8. First, a return order as things stand would mean, for N, a sudden change of primary carer. The father's case is that he acted as primary carer for her during the relationship because the mother worked, and of course since he brought N to this country in August he has been her sole carer. She is a child who has had to cope, at a very young age, with the separation of her parents, followed by over two weeks where she did not see her father at all, and then a move of country. Before her parents separated she was bound to have been exposed to the toxic relationship between them (including an admitted occasion when the mother spoke very disparagingly about the father to her). This will mean that she is likely to be vulnerable now, as things stand, and could very well be seriously affected by such a dramatic change as the mother proposes. Professor George submits that the mother's complete refusal to agree that the father should be able to return with N and to undertake that she can remain in his primary care pending an inter partes hearing is a matter of great concern and demonstrates what is likely to be her attitude upon a return.
9. Second, and very much tied up with the first point, is the fact that the mother is only offering virtual contact to the father after a return. Professor George points out that after the mother decided to leave the father taking N with her, he was cut off completely from contact with her, including virtual contact. Virtual contact would not have created any risk of abduction. There is no explanation, Professor George says as to why she did this, which leads the father to fear that a return to Country A will lead to a complete separation between him and his daughter, and she not

be permitted to see or have any relationship with him. Whilst there is a hearing listed in Country A on 4<sup>th</sup> January this is only a short hearing where it is unlikely that substantive decisions will be made, such will take a long time to come to fruition.

10. The situation for the father, if he returns to Country A (which he says he will do) will be very difficult. He will have no job and nowhere to live. This is something which will once again exacerbate the difficulties for N in having a relationship with him.
11. The father's case is that the mother was aggressive and abusive to him in front of N. She demonstrated some violence, in that she threw a phone across the room, nearly hitting him. She exposed N to this toxic behaviour.
12. The father also states that the mother's care of N was at some points, remiss. She allowed N to swallow a stone, which could have been extremely dangerous although fortunately it was not. She also allowed N to fall off a high bed by not ensuring that there were guards around it, and also to slip on wet ground (which she had been warned about) and hit her head on a hard surface.
13. Professor George also points to the mother's unwillingness to use her best endeavours to vary the prohibited steps order made by the Country A court which prevents the father from crossing the border with N so that it makes clear that the prohibition should only apply to his leaving the country with her, not entering. This, along with her refusal to agree to an order or undertaking that he should be permitted to return to Country A with N and not to be separated from her pending the first court hearing means that the court cannot ameliorate the grave risk of psychological harm for N if a return is ordered. It also demonstrates, he says, her attitude towards him and the relationship he and N have. The mother, he submits is using the Hague proceedings to bring about an unplanned change of primary carer and to pre-empt a proper decision by the Country A courts at a proper on notice welfare hearing. Further, her proposed undertaking to the court that she will not seek to promote any prosecution of the father for child abduction do not mitigate the risk that he will be arrested if he returns.
14. All these points, cumulatively amount to a situation whereby N would be exposed to a grave risk of psychological harm (and some physical harm) and placed in an intolerable situation if a return was to be ordered.

The mother's case

15. On behalf of the mother, Mr Basi submits that none of the points put forward by the father, either alone or together reach the level required for the court to conclude that the defence under Article 13b is made out.
16. First he submits that the allegations of domestic abuse raised by the father are not of a nature and of sufficient detail and substance to give rise to an Article 13b risk. They are not in themselves of the most serious type, and in any event the father's evidence has been contradictory. He argued that the mother should come to England to see N, and he has been willing to facilitate contact (including staying contact) when she did. Before the separation it was always his view that the mother should come to live in England with N.
17. Mr Basi also argues that the mother's concerns about the father having contact in Country A both before the abduction and now are grounded in reality. She was given advice about contact by professionals whom she properly consulted. There are custody proceedings underway in Country A and there is another listed hearing in just over a month. Mr Basi states that the father can get work in Country A, and in any event his family is wealthy.
18. As to the risk of prosecution, Mr Basi points to a number of authorities including *H v K (Return Order)* [2017] EWHC 1141 and *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145 where it was held that generally the risk of an abducting parent being arrested and prosecuted for child abduction is not sufficient by itself to satisfy Article 13b. In any event, the mother is willing to give an undertaking that she will not advance any prosecution herself, and this can be registered in Country A.
19. Given the circumstances in which the father brought N to this country and that he seems to have done it without her passport and any trace that she had been moved across borders, the mother says she is extremely concerned of a further risk of abduction. For this reason she is very keen to return N herself at the earliest opportunity and that there cannot be contact other than virtual contact pending the next court hearing on 4<sup>th</sup> January.
20. In his written and oral submissions Mr Basi emphasises the circumstances and manner of this abduction, which was highly deceitful. Not only that, when the father and N arrived in England he did not let the mother know where they were, and indeed told the mother in emails that he would let

her know their address only if she was to come to England to see N. There had to be Tipstaff orders to find them, and the mother only found out they were in England because of the background in video calls.

21. The father had some response to this – it was the mother who had reneged at the last minute from a plan which would have had the whole family move to England in time for the father to start his new job in September and she also reneged on staying contact at the last minute in Country A after weeks of his not knowing where they were either (and with no contact at all). The mother knew full well the father had come to England and the problems with serving the order were incidental and not deliberate.

#### The law

22. The law with respect to Article 13b has been set out in numerous cases, most recently in Re IG (Child Abduction: Habitual Residence: Article 13b) [2021] EWCA Civ 1123 where Baker LJ stated at paragraphs 46 to 48;

*‘46. The leading authorities remain the decisions of the Supreme Court in Re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 AC 144 and Re S (A Child) (Abduction: Rights of Custody) [2012] UKSC 10, [2012] 2 AC 257. The principles set out in those decisions have been considered by this Court in a number of authorities, notably Re P (A Child) (Abduction: Consideration of Evidence) [2017] EWCA 1677, [2018] 4 WLR 16 and Re C (Children) (Abduction: Article 13(b)) [2018] EWCA Civ 2834, [2019] 1 FLR 1045. Since the hearing of the present appeal, this Court has handed down judgments in another appeal involving Article 13(b), Re A (A Child) Article 13(b) [2021] EWCA Civ 939 in which Moylan LJ carried out a further analysis of the case law. I do not intend to add to the extensive jurisprudence on this topic in this judgment, but merely seek to identify the principles derived from the case law which are relevant to the present appeal.*

*“47. The relevant principles are, in summary, as follows.*

*(1) The terms of Article 13(b) are by their very nature restricted in their scope. The defence has a high threshold, demonstrated by the use of the words "grave" and "intolerable".*

*(2) The focus is on the child. The issue is the risk to the child in the event of his or her return.*

- (3) The separation of the child from the abducting parent can establish the required grave risk.*
- (4) When the allegations on which the abducting parent relies to establish grave risk are disputed, the court should first establish 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 establish how the child can be protected from the risk.*
- (5) In assessing these matters, the court must be mindful of the limitations involved in the summary nature of the Hague process. It will rarely be appropriate to hear oral evidence of the allegations made under Article 13(b) and so neither the allegations nor their rebuttal are usually tested in cross-examination.*
- (6) That does not mean, however, that no evaluative assessment of the allegations should be undertaken by the court. The court must examine in concrete terms the situation in which the child would be on return. In analysing whether the allegations are of sufficient detail and substance to give rise to the grave risk, the judge will have to consider whether the evidence enables him or her confidently to discount the possibility that they do.*
- (7) If the judge concludes that the allegations would potentially establish the existence of an Article 13(b) risk, he or she must then carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to the risk.*
- (8) In many cases, sufficient protection will be afforded by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting State to protect him once he is there.*
- (9) In deciding what weight can be placed on undertakings, the court has to take into account the extent to which they are likely to be effective, both in terms of compliance and in terms of the consequences, including remedies for enforcement in the requesting State, in the absence of compliance.*
- (10) As has been made clear by the Practice Guidance on "Case Management and Mediation of International Child Abduction Proceedings" issued by the President of the Family Division on 13 March 2018, the question of specific protective measures must be addressed at the earliest opportunity, including by obtaining information as to the protective measures that are available, or could be put in place, to meet the alleged identified risks.*

23. In his judgment in the recent case of Re A (Children) (Abduction: Article 13b) [2021] EWCA Civ 939, Moylan LJ (at paragraph 97) gave this warning about the failure to follow the approach set out above in paragraph (4):

*"if the court does not follow the approach referred to above, it would create the inevitable prospect of the court's evaluation falling between two stools. The court's "process of reasoning", to adopt the expression used by Lord Wilson in Re S, at [22], would not include either (a) considering the risks to the child or children if the allegations were true; nor (b) confidently discounting the possibility that the allegations gave rise to an Article 13(b) risk. The court would, rather, by adopting something of a middle course, be likely to be distracted from considering the second element of the Re E approach, namely "how the child can be protected against the risk" which the allegations, if true, would potentially establish."*

#### Discussion and conclusion

24. I shall deal first with the father's allegations as to the mother's carelessness in letting N fall off the bed and/or fall when running around and hit her head on the ground. I do not find that these are of such a nature or of sufficient detail, by themselves or in addition to other matters as to constitute a grave risk, indeed I can be confident that they are not. The incident with the stone was no doubt frightening for both parents but events like this do happen with small children. No harm came to N, and likewise she suffered no serious injury arising from any of the other incidents. The mother has looked after N for extended periods of time without her coming to any harm.

25. As to the remaining matters, it is quite correct that if I make an order for N's return without more, the remaining orders in place are those made by the Country A court including prohibited steps and custody orders in favour of the mother. This will mean a complete change of the current care arrangements for N (albeit they have been imposed by the father's unilateral action). N will move suddenly from living in the sole care of her father in England to the sole care of her mother in Country A. The concrete situation for her will be that she will move to live with her mother in her grandmother's house, she will have to move nursery having been here for a short while, and will move from an English/Language B speaking environment to a Language A speaking one. For a while and maybe longer she will not have in person contact with her father.



26. I have no doubt that N will have been affected by all the events of the last few months, and before that the very difficult relationship between her parents. Professor George is right to say that she is vulnerable as a result. To order her back to Country A now or within the next few days, will, coming on top of what she has gone through, be distressing and somewhat bewildering for her.
27. Added to this, N will not be able to see her father in person for some time because the mother is unwilling to agree to more than virtual contact until the matter is next before the court on 4<sup>th</sup> January. At this point it is not known if the court will be in a position to make some substantive decisions about contact, or how the father will be fixed in terms of his living arrangements.
28. If the mother was to become angry in N's presence and behave in an aggressive manner this would be an added stress for her.
29. Whilst I recognise that all these things taken together, particularly a sudden and prolonged separation from her father, will be distressing and confusing for N, in my judgment they do not reach the threshold for a grave risk of psychological harm, nor would they place her in an intolerable situation.
30. They will be disturbing for her certainly, but the situation does not meet the level of gravity or seriousness required. I accept that the father was responsible for caring for N on weekdays when the mother was working during the course of the relationship, but at other times (after the mother finished work and for weekends and holidays) the parties cared for N together. The mother is hardly a stranger to N even since the most recent separation. She has cared for N alone many times before. N will miss her father, of that there is no doubt, but I bear in mind that the court of Country A has had several hearings in this case already and is seized of this case. I do not know what time will be available on 4<sup>th</sup> January but the amount of time the court appears to have been able to give to the case since August is significant and I have no reason to think that the situation on 4<sup>th</sup> January will be different or that the court will be unable to make decisions then on urgent matters relating to N's welfare. In the meantime N will be going to live with her mother who she knows well and to live with her and her grandmother. She will at least be able to have virtual contact with her father. I note that the arguments between the parties when the mother shouted and threw a phone took place when the parties were living under the same roof and things were very fraught. This is unlikely to recur in the same way now they are separated.

31. For all these reasons I do not find that a return on the basis that the mother will collect N from the father next week and take her back to live with her pursuant to the Country A court order, and with virtual contact only to the father, exposes her to a grave risk of physical or psychological harm, or places her in an intolerable situation. Nor does the risk of the father being arrested for child abduction. In those circumstances, whilst I accept the undertakings that the mother is offering, I do not need to look to protective measures to ameliorate an Article 13b risk.

32. It follows therefore that I must make an order for N's return to Country A pursuant to Article 12.

#### Soft Landing

33. Although his primary case was that (at the very least) orders and/or undertakings to prevent separation of father and child were necessary to ameliorate an Article 13b risk before a return could be ordered, Professor George also urged upon me their importance in enabling the father and N's to achieve a 'soft landing'. He quite properly points out that it is a standard feature of cases such as this for the requesting parent to agree to orders (or give undertakings) to ensure first that the other parent is able to return together with the child to the country of habitual residence, and then to remain caring for them pending an inter partes hearing.

34. In the absence of the mother being willing to give undertakings to the court, Professor George reminds me of my power to make interim orders with respect to child arrangements pursuant to Article 11 of the 1996 Hague Convention, and invites me to make an order that N should be cared for by her father pending the next hearing in the court in Country A.

35. I have given this very careful consideration, as it is obviously important for N to minimise any distress and disruption that a return order will bring about for her, including a sudden loss of day to day contact with her father. Notwithstanding the skilful submissions made by Professor George I have come to the conclusion that I should not make any further orders, indeed I should leave things as they are.

36. The parents' relationship has been extremely fraught over the last months and possibly longer. They each make allegations against the other. Proceedings for divorce were issued in Country A in the summer of 2022, and in August social services (or an equivalent) were consulted by the mother. The courts of Country A have made several orders and another

hearing is listed on 4<sup>th</sup> January. It seems to me, looking at the documents I have been provided with, that there has been a quite detailed consideration of this family by the judge or judges there. This has included making an order that N should be placed in the custody of her mother. I note the court declined to make this order on the mother's first application but did so on the next occasion when it was apparent that the father had removed N to this country. I do not think it would be right for this court to override the decision of the Country A court by making a different order in advance of the next hearing. Making an order that N should remain in the care of her father until that time has a superficial attraction, but looked at more carefully there are risks and benefits either way. In every case where a relationship breaks down with allegations by both sides, difficult interim decisions have to be made.

37. One of the risks in this case is of a further abduction if N is not returned to the care of her mother to take back to Country A. The father's act in removing N during a period of supervised contact and bringing her to this country across several borders without a passport was deceitful to say the least. Although I can understand his distress and frustration at the mother's decision not to move to England, at her disappearance and lack of contact with N for over two weeks (plus disappointment at a change of contact arrangements) the father's conduct was very serious, particularly as he refused to tell the mother his address in England unless and until she was prepared to come over to visit N. I note the reason that the mother told the professionals in Country A in August that she was worried about direct contact was the risk of abduction, so her assessment of what the father might do turned out to be justified. Professor George submits that the father would be very unlikely to breach an order made here, because this is the place he wishes to live and work, but this is still a less safe option than placement with the mother. In any event, in my judgment it is the courts of Country A which are best placed to assess the risk of future abduction and how to protect N after her arrival in that country.

38. For all these reasons I make the return order sought. I will order that N be delivered to the care of her mother by 4pm on 12<sup>th</sup> December to be taken back to Country A thereafter. I do not think it right to delay the departure beyond that time. In the meantime she should have contact (which I hope can be agreed between the parties) so as to prepare her for the move.