



Neutral Citation Number: [2022] EWHC 8 (Fam)

Case No: FD21P00717

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/01/2022

Before :

THE HONOURABLE MRS JUSTICE JUDD DBE

Between :

UG
- and -
NN

Applicant

Respondent

Alistair Perkins (instructed by **Oliver Fisher Solicitors**) for the **Applicant**
Henrietta Boyle (instructed by **LS Legal Solicitors**) for the **Respondent**

Hearing dates: 16th December 2021

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.

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives and any litigants in person by email. The date and time for hand-down will be deemed to be 2 pm on 4 January 2022. A copy of the judgment in final form as handed down will be automatically sent to the advocates and any litigants in person shortly afterwards.

The Hon Mrs Justice Judd :

1. This is an application for the return of three children to Austria under the 1980 Hague Convention.

Brief background

2. The proceedings concern three children who are aged between 7 and 9. Before their removal to this country in the summer of this year the family were living in Austria. The parents divorced in 2019, and since their separation the children had been living with their father for most of the time, but spending four days every fortnight from Thursday to Monday with the mother, plus extended periods of time during the holidays. There have been proceedings in Austria which compromised on the basis of a visitation agreement dated 8th July 2020 which is set out in an Austrian Court document contained in the bundle for these proceedings.
3. On 22nd or 23rd August (the precise date is in dispute) the father sent the mother an email saying that he and the children were moving to the UK. The father states that he left Austria on the next day after sending the email. On 1st September the mother made this application, and on 2nd September she also made an application to the Austrian court. On 1st October this court made a Location Order and the father was personally served on 6th October. There have been two directions hearings, the first before Peel J on 8th October and then before Mostyn J on 25th October. The father was ordered to file a statement and Answer and to lodge the children's passports with the Tipstaff. An expert in Austrian law was appointed to prepare a report as to the law as to rights of custody.

The parties' respective cases

4. The mother's case is simply that the removal of the children was wrongful within the meaning of Article 3 of the Convention and that the court should accordingly order their return pursuant to Article 12.
5. The father argues that the removal was not in breach of the mother's rights of custody under Austrian law, and was therefore not wrongful under Article 3. In the alternative he submits that the court should not order a return because there is a grave risk that such would expose the children to physical or psychological harm, or otherwise place the children in an intolerable situation (article 13b).

The Law

6. The mother must prove that the removal of the children was wrongful in that it was in breach of her rights of custody by reference to the law in Austria (there is no argument here that the children were habitually resident in there).

7. The meaning of ‘rights of custody’ is set out in Article 5 of the Hague Convention. Whether they exist in a particular case is to be determined by reference to the law of the state in which the child was habitually resident immediately before the removal. Thus, as set out by MacDonal J in BK v NK [2016] EWHC 2496 (Fam), the court must approach the question in a two stage process as follows:-

What is the position created by the law of the state in which the child was habitually resident immediately before the removal or retention?

Does the position created by the law of the state in which the child was habitually resident immediately before the removal or retention equate to ‘rights of custody’ for the person in question having regard to the meaning as established by the autonomous law of the 1980 Hague Convention?

8. As will be seen later in this judgment, consideration of whether the removal was in breach of the mother’s custody rights depends on a number of factors, but in particular as to whether the mother gave consent. For this reason I will need to deal with the issue of consent as part of Article 3, despite the extensive domestic case law which emphasises that it falls to be considered under Article 13a.
9. 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.

48. In his judgment in the recent case of Re A, 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."

10. Pursuant to the Guide to Good Practice, paragraph 40;

- (i) As a first step the court should consider whether the assertions are of such a nature, and of sufficient detail and substance, that they could constitute a grave risk;*
- (ii) If it proceeds to the second step, the court determines whether it is satisfied the grave risk exception to the child's return has been established by examining and evaluating the evidence presented by the person opposing the child's return, and by taking into account the evidence pertaining to protective measures available in the state of habitual residence'.*

Rights of custody

11. Dr. Pallauf, an expert in Austrian law, based in Salzburg, was jointly instructed to advise the court as to rights of custody in that country. His report is dated 18th November. A summary of his advice is included at

paragraph 22 of the skeleton argument prepared by Mr. Perkins on behalf of the father, which is also agreed by Ms Boyle on behalf of the mother. In summary, Dr. Pallauf states that by virtue of the parties' agreement before the Austrian court the father is the domiciliary parent who has the sole right to determine the children's place of residence. Nonetheless, the domiciliary parent has to seek the consent of the other parent and to take their views into account. Any removal from the jurisdiction without certain pre-requisites is to be qualified as child abduction. The pre-requisites are as follows:-

- (a) That notification (to the other parent) 'was impossible or impracticable';
- (b) The other parent consented;
- (c) The other parent was informed in time, yet did not react by filing an application...for a court order that forbids the removal of the child abroad;
- (d) The court has rejected the application of the other parent to refuse the change of residence.

12. The father's case as set out in his documents before the expert report was available was that he and his partner had decided to move to the UK for a better life. He asserted in his statement that he had legal advice and was reassured that he was fully within his rights to relocate. All he had to do was to provide a notice of departure and facilitate the contact.
13. After the expert report was filed, and very shortly before this hearing the father sought to file another statement. In this he asserted that he told the mother the day before he left the jurisdiction (22nd August) of his decision to move. She did not contact him until the following day when he had already left. He said that they had a telephone on 24th August where she agreed the children could stay. He further stated that the mother had asserted to the Austrian judge dealing with their case on 23rd August that she gave her consent to the move, and produced a letter from the court where this was set out.
14. The mother then filed a statement in response where she vehemently denied having consented, or even knowing that the children had gone before they had departed. She said that the father had only sent her an email on 22nd August saying they were planning to move. When she went around to his apartment (which was in the same place as that of the paternal grandparents), he had already gone.

15. Given this last minute evidence which demonstrated a clear factual dispute, I decided that I would hear the parties give short evidence on this point despite the case management order which stated otherwise.
16. The mother's evidence that she had gone around to the father's property on receiving an email from him on 22nd August was consistent and contained contextual detail. She said that she spoke to the grandparents that afternoon and they told her that the father had left early in the morning and that the children had come to say goodbye. She explained why she did not send a message to the father straight away, but at 10.15 the next morning she did send a text asking him 'where are you and the kids?'
17. I acknowledge the letter from the Austrian judge, but accept the mother's evidence that she did not tell him she agreed to the children's removal. She was certainly very upset and shocked, and German is not her first language. She was particularly shocked at the way they had been taken and he may have misunderstood her from something she said about that. In any event at this point the father and children had already gone. She sent a message to the father on 23rd August (the day he says he left) telling him that she did not agree with him taking the children to England, and that he should at least discuss it with her beforehand. On 26th August she told him that he should bring the children back immediately. This application was made nine days after the removal. It seems to me highly unlikely that in the middle of all this, as the father seeks to suggest, the mother spoke to him on 24th August in a pleasant way, and gave her consent to his actions.
18. Even though the mother gave evidence remotely, her distress at the children's sudden removal was clear and palpable, as was her vehemence when denying the suggestion put to her that she had consented.
19. On his own admission the father did not tell the mother about the planned move because he believed that she would not be happy about it. The email he sent to her informing her of the move contained a deliberate lie too, for he gave her a false address. He did this, he said, because the mother had caused trouble in the past, by turning up outside his property and being aggressive.
20. Taking all these matters into account, I have no hesitation in accepting the mother's evidence. In my judgment the father did not tell the mother about the move until it was too late for her to do anything about it. I reject his suggestion that he gave her a day's notice of the departure and believe

that his evidence about the telephone conversation was untruthful . If the mother really had told him she agreed, I am sure this evidence would have featured in his Answer as a possible defence under Article 13 and in his first statement.

21. It follows from my findings that the father did not seek or obtain the mother's consent to the move, nor did he inform her in time so that she was able to react by applying to the court or in any way at all. Nor was informing her impossible or impractical; the reason he did not do so was to avoid her making a fuss or doing what she could to stop it.
22. This means that his removal of the children did not meet any of the necessary pre-requisites under Austrian law and was thus in breach of the mother's rights of custody pursuant to Article 3. Accordingly the court must order the return of the children forthwith unless the father establishes the pleaded defence under Article 13b.

Article 13b

23. The father's case is based upon the fact, as he asserts, that if the court were to make a return order he would not accompany the children. He said that he and his wife (and the children) had made their lives here and that he has no funds in Austria, no job and nowhere to live. He had fallen out with his parents and could not live with them. Therefore he was simply not in a position to go back, and so if a return order was made the children would have to return to the mother.
24. The father was not a credible witness in relation to the issue of consent, and certainly the reasons he offered for refusing to return, namely that the family were settled here and he no longer had a job or somewhere to live, were not particularly persuasive for he has worked and lived in Austria for years. His parents live close to where he had been previously and seem to have a good relationship with the children. Nonetheless he has been made bankrupt and the mother's suggestion that he moved suddenly because of difficulties with creditors, may well be right. I therefore proceed on the basis that the father is being truthful when he says he will not return.
25. The father's case is there is a grave risk that the children would suffer harm and/or be placed in an intolerable situation if they were to return because the mother has never focussed on the children's needs. She has failed to see them regularly and neglects them emotionally. He says that she has an alcohol problem and that she has got drunk when she has had them in her care. In support of his case he produced two photographs of

her lying on the floor, one of them showing that she had been sick. He produced a message in which the mother admitted having thrown a glass. He said that she lacks mental stability and lies to the court. She has problems with anger and aggression, and he pointed out that the Austrian court had followed the recommendation of the expert appointed in their case and concluded that the children should primarily live with the father.

26. Ms Boyle submits on behalf of the father that although the children do not suffer harm over the weekend contact or when they are on holiday with the mother, the length of time they would be with her pending any decision of the Austrian court would mean she would be likely to resort to drinking alcohol and other neglectful behaviour. This would place the children at grave risk of physical or psychological harm, and place them in an intolerable position.
27. On behalf of the mother, Mr. Perkins submits that the father has come nowhere near establishing the defence under Article 13b. First the photographs of the mother drunk were taken many years ago – on the mother’s case in 2014 and the father’s in 2017. The father does not give any examples of a recent incident where the mother’s care of the children has been found wanting. Although it was agreed by the parties in the Austrian proceedings in 2020 that the children would have their primary home with the father, they spent extensive periods of time with the mother. They had contact with her for four nights every fortnight, and holiday contact too, the last example being for three weeks in the summer holidays in 2021. There is no complaint at all about the children’s care during this lengthy period. During these Hague proceedings the mother has assiduously come over to this country every other weekend and had staying contact. The expert report from the Austrian proceedings did not include any suggestions in it that there were concerns about the mother’s drinking.
28. Having considered all the material before me, I accept Mr. Perkins’s submission that the assertions made by the father here, even if they are true, are not of a nature, or of sufficient detail or substance that they could constitute a grave risk of physical or psychological harm, or place the children in an intolerable situation. I can confidently discount this. This is a mother with whom the children regularly spend time with no recent examples of problems given (for example of drinking when she has the care of the children) or evidence of them coming to any harm at all when they have been with her. The photos the father produces of drinking predate the Austrian proceedings and indeed their separation. At their height the father’s allegations of emotional neglect and instability or

aggression on the mother's part would demonstrate that the children are better cared for by him in the long term, but that is something for the Austrian court to consider. I do not accept the submission made on his behalf that whilst the mother could be trusted to care for the children for a few days or three weeks at a time, once it was longer than this the mother's care for them would become so deficient as to meet the test set out in Article 13b. Nor do I accept that the children would be placed at risk because the mother does not have enough money to keep or feed them. She may have accrued arrears with respect to maintenance to the father but this is a different matter. She and her partner are both working and have their own home where the children have stayed regularly.

29. The effect upon the children of a separation from their primary carer cannot be said to be so serious as to cause them psychological harm. Nor could it be intolerable for them. They are used to spending periods of up to three weeks away from him. They will be returning to a situation which is familiar to them. They will return to their old schools and they speak the language. In any event, the father suggested that it was likely there will be a hearing in Austria in about eight weeks, so that that court could make decisions about the children's welfare then. No doubt if there were any concerns about the children arising more urgently the authorities would act.
30. I note that the mother is willing to give a number of undertakings, including that she would not drink to excess when looking after the children. I will accept these undertakings as offered, although make it plain that this is not a case where I have decided that protective measures are necessary before making a return order.
31. It follows from all that I have set out above, this court must make a return order.
32. If I do so, Ms Boyle on behalf of the father invites me to delay the return until such time as the Austrian court is seized of the matter and has made a decision as to where the children should live. I do not consider that it is right in this case to do so. Although the father asserts there will be a hearing in eight weeks' time, there is no independent evidence of this. There could be a longer delay and in those circumstances I do not think the order for return should wait. The situation here is somewhat different to the one before Cobb J in C v B [2021] EWHC 1369 (Fam).
33. The mother is expected to travel here to have contact with the children from 29th December until 4th January. I will order that the children should

return to Austria by 6th January which will enable them to see their father for a day to collect their things and say their goodbye to him. They can then return with their mother.