Neutral Citation Number: [2023] EWHC 140 (Fam)

Case No: FD22P00480

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/01/2023

Before:

THE HONOURABLE MR JUSTICE COBB

- -

Between :

F	**Applicant**
- and -	
M	**Respondent**

- -

Re L (Article 13: Protective Measures)(No.2)

- -

Mark Jarman (instructed by **Oliver Fisher Solicitors**) for the **Applicant**
Andrew Tidbury (instructed by **A&N Care Solicitors**) for the **Respondent**

Hearing dates: 23 January 2023

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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.

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THE HONOURABLE MR JUSTICE COBB

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 Honourable Mr Justice Cobb:

Introduction and context

1. On 21 December 2022, I handed down judgment in the case of *Re L (Article 13: Protective Measures)(No.1)* [2022] EWHC 3427 (Fam). That judgment should be read as a prelude to this.

2. By my earlier judgment, I explained my reasons for granting an order for the summary return of L to the Kingdom of Belgium under the provisions of the 1980 Hague Convention. It will be noted (§10 and §28: [2022] EWHC 3427 (Fam)) that the central issue in the case was whether "there [was/is] a grave risk that L's return would expose [him] to physical or psychological harm or otherwise place [him] in an intolerable situation" (Article 13(b) 1980 Hague Convention).

3. At the substantive final hearing of his application in December 2022, L's father (the Applicant) had offered to put in place a range of 'protective measures' to mitigate the effect of the risks to L should he return to Belgium, as alleged by his mother (the Respondent). I made clear in my judgment that L's return was conditional upon my satisfaction that relevant and rudimentary steps had indeed been taken to put in place those measures.

4. Materially, it will be noted that L's father (who at the time of the hearing had moved back to live with his own parents: see §11, [2022] EWHC 3427 (Fam)) had offered to provide accommodation for L and his mother on their return (at least for the first few months); he had identified a suitable flat, albeit that the formalities for the lease had not yet been completed. This was plainly crucial given that there was no likelihood of state-provided accommodation (see §14 below), the mother's closest family live in England, and the mother has no other support network in Belgium. Specifically, I recorded that the father had agreed (see §28(v): [2022] EWHC 3427 (Fam)):

> "To arrange (to coincide with L's return with the mother) for a furnished 1-bedroom property in or around Leuven for the mother and L to live in alone; he has identified one for which he has provided particulars for which the monthly rent is €880. The father agrees that he will pay the deposit and first three months rent (to include the utilities) with the assistance of the benefits agency, and in the event that the benefits agency cannot assist, the applicant's parents will assist with the necessary payments".

5. It will be noted that I regarded the provision of suitable furnished accommodation as an essential pre-condition to the return order: see:

> (§41) "It is <u>essential</u> in my judgment that reasonable furnished accommodation is provided for L and his mother on return; indeed, I will indicate (see below) that any return is <u>conditional</u> upon proof being provided of adequate furnished accommodation for a period of no less than 3 months".

I added:

> (§52(i)) "That order [for return] is subject to the father providing to the court:
>
> i) proof that he has secured adequate furnished accommodation for the mother and L, with the deposit and three months' rent paid".
>
> (Underlining above has been added for emphasis).

6. Following my judgment on 21 December 2022, I gave the father three weeks to finalise arrangements for securing the lease on the property.

7. A further hearing was therefore convened on 16 January 2023. The father did not attend. Extensive efforts were made by his legal team to contact him; I was later told that he had failed to respond to the multiple phone-calls from his solicitor and the interpreter as he had "overslept" (the hearing commenced at 10:00am GMT, 11:00am, Belgian time). Mr Jarman, for the father, told me that the father had not in fact secured the property proposed as he could not rent it in his name for the mother, nor had he acquired suitable other accommodation for the mother and L.

8. At Mr Jarman's invitation, I gave the father further time to address and resolve the issues and file a statement to advise the mother and the Court what steps he had taken in order to deliver upon the protective measures which he had offered. That statement should have been filed on 20 January at 11am but no statement was filed. The (unsigned) statement was finally filed and served as the reconvened hearing began on 23 January 2023. In the statement, the father explained that:

   i) he had been unable to obtain 1-bedroom accommodation for the mother and L;

   ii) he has been able only to identify a 'budget' bed-sit for L and the mother in student accommodation. Photographs are attached to the statement; the bed-sit is described in the publicity rubric as "cosy". If 'cosy' is intended to mean 'small', then it is right. If 'cosy' is meant to be a description of the room's character, it is way wide of the mark; the accommodation appears spartan and unwelcoming, without proper cooking facilities, and not suitable, in my judgment, to accommodate a mother and 18-month old child;

   iii) he was still reliant on state benefits, and would struggle to afford to pay the €4,200 which would be required to secure the student bed-sit accommodation for three months.

   I should add that in the period since the judgment the father has adduced no evidence that he has taken any steps to implement any of the other proposed protective measures. For instance, I have seen no indication that he has done anything to assist and support the mother in relation to any application to the Belgian benefits agency in respect of state benefits for herself and for L.

9. Mr Jarman applied for a yet further adjournment for the father to undertake more enquiries in relation to accommodation. That application was opposed. I refused his

application. These proceedings commenced more than six months ago; the final hearing of this application began in November. In my judgment, the father has had more than enough time to assemble his case. I indicated at the hearing that I would be setting aside the order for L's return to Belgium and dismissing his application, with my reasons (this judgment) to follow.

Protective Measures

10. The judges of the Supreme Court and the Court of Appeal have emphasised many times that the assessment of 'grave risk' in *Article 13* of the *1980 Hague Convention* must be "contextual" and must be specifically directed to the circumstances of the individual child – that is to say, in this case, as they would be if L returned to Belgium. The authorities make clear that it is necessary to look forward, crucially, to what would happen *if*, with the mother, the child is returned (see Moylan LJ in *Re C* [2021], citation above at see §49 and §50, and Lord Wilson in *Re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257, at §34).

11. It is in the specific 'context' of the individual child that protective measures must be considered. And they must be considered early on in the proceedings – indeed, at the outset. The *2018 Practice Guidance Case Management and Mediation of International Child Abduction Proceedings* could not be clearer in this regard: see, in particular, paragraphs 2.5(b), 2.5(d), 2.9(b), 2.9(d), 2.11(d) and 2.11(e). If further emphasis were required of the need to address this point early, it was offered by Moylan LJ in *Re C (Article 13(b))* [2021] EWCA Civ 1354 at §11 (viz: "this issue must be addressed as early as possible in the proceedings to avoid unnecessary delay… I would wish to emphasise the importance of this being undertaken").

12. Where a legitimate *prima facie* case is advanced that the proposed return would expose the child to a grave risk of physical or psychological harm, or an otherwise intolerable situation, the 'left-behind' parent must address that argument conscientiously and in a child-focused way; indeed, the left-behind parent would be well-advised (and they often are) to anticipate the argument when filing their first evidence in support of their application. When the court comes to review the material as a whole, it is bound to look at whether the proposed protective measures are indeed:

    i) Forward looking to address the risk(s) which would otherwise exist if/when the child returns;

    ii) Effective to address the risk(s); exceptionally, this may involve undertakings or protective measures being in place and remaining in force for a period beyond the first hearing in the courts of the child's habitual residence;

    iii) Proportionate;

    iv) Appropriate and readily available (whether specifically facilitated by the left-behind parent, or under the country's own laws, or otherwise);

    v) Practical;

    vi) Focused on the child, and on the effect of the proposed arrangements on the individual child; the situation of the child has to be looked at in 'concrete terms'.

While the court of the requested state will doubtless wish to scrutinise the protective measure proposals carefully by reference to the points which I have listed above, it has no role in micro-managing their realisation, nor will it seek to usurp the role of the court of child's habitual residence. A 'lighter touch' still will be applied where the court is considering the merely practical arrangements to achieve the child's return *S (a child) (Hague Convention 1980: return to third state)* [2019] EWCA Civ 352 at §55).

Protective Measures and L

13. It has been obvious from the outset of this application that if L was to be summarily returned to Belgium, as a consequence of these proceedings, he would need somewhere to live, and some means for the mother to support herself. In his first statement, dated 1 July 2022, the father proposed that the mother and L should return to the flat which he was then occupying (inferentially, he would move out). However, after signing that statement the father unilaterally surrendered the tenancy and moved back to live with his parents.

14. When the matter was first before me for final hearing on 14 November it was apparent that the father had not truly addressed this issue in these changed circumstances, and he sought time to place before the court details of substitute accommodation for L and his mother. I gave him time to do so. At a further hearing on 23 November, he presented some limited evidence about the availability of state-funded accommodation ("social housing") which was not at all reassuring; indeed, the only tangible offer of support for state-funded accommodation was predicated on the basis that L would be returning to Belgium to live with the father not the mother. He further presented particulars of private-rented *unfurnished* property; an *unfurnished* property would self-evidently be unsuitable for the mother and L in these circumstances. At the final hearing on 12 December, the father put before the court details of a *furnished* duplex flat. I indicated in my judgment (§42) that "the property proposed in my judgment appears suitable". As earlier mentioned (see §7 above), I was later advised that that the father could not in fact take a lease of that property in his own name.

15. The father has now had more than six months since the launch of the proceedings to put forward suitable 'protective measures' to ensure that his son's basic needs are met on his return, and he is not otherwise placed in an intolerable situation. More than a month has passed since my judgment, since which time he has known that this was a clear requirement of the court before the return would be effected. In my judgment, he has failed to step up to the obligation on him to demonstrate an ability to deliver on the essential features of the protective measures which he himself has proposed; when a court hearing was convened for him to demonstrate his commitment to honour his promises he failed to attend without good cause.

16. I have applied the specific contextual approach required (§10 above) in this case. There is no doubt that this young mother (aged 20) is a vulnerable young woman for whom a return to Belgium would not be easy; I recognised this in my earlier judgment and said so (§50 and §51 [2022] EWHC 3427 (Fam)). She has no family in Belgium; she is not a national of Belgium and has lived in that country for only a very short time; the mother's only connection with Belgium is the father (who she met on social media); she is (as is the father) from a Roma family; she has no employment in Belgium, and no right to immediate state benefits; she does not speak Belgian; her relationship with L's father appears to have been a volatile one; she is subject to an order in the family

court in Belgium which contains provision for the removal of L from her care, and she faces possible prosecution for the abduction. She is also effectively without anywhere to live; the temporary student bed-sit room proposed by the father is, in my judgment, unsuitable for this mother and L. It is clear that the father is not at all well-placed to offer financial or emotional support to the mother; his casual engagement with this court process, evidenced recently by his failure to address the requirement to provide evidence of the protective measures in a timely way, and his absence for a crucial court hearing without proper reason, give me no confidence in his ability or willingness to step up in L's interests.

17. I have concluded that the father has failed in a meaningful way, notwithstanding his own offer, to address the central obligation on him to find somewhere suitable for L to live on a return to Belgium. Given the context of the mother's unusually precarious financial and social situation in that country, I find it probable that L's basic needs would not be met on his return, and that he would in fact be exposed to a risk – which I classify as 'grave' – of being placed in an intolerable situation if he were in fact to return. In reaching this conclusion I should make clear that I am not making any comparison with L's living circumstances in this country at present (about which I know relatively little); in making this assessment, I have focused on the 'situation' which would be likely ton be faced by the mother and L in Belgium. For the avoidance of doubt, I should add that in this regard:

    i) I have treated the word 'grave' as characterising both the risk and the harm ("there is in ordinary language a link between the two": Baroness Hale in *Re E* – see above);

    and

    ii) I have treated the word 'situation' in the 1980 Convention as meaning just that – a 'situation' – and do not read into the word 'situation' a necessity to find inherent 'peril' (see *AO v LA* [2023] EWHC 83 (Fam) at §36).

Discretion: Outcome

18. It follows that the mother has, after all, effectively made out the Article 13(b) exception, and this then requires me to consider whether I should exercise my discretion to order L's return to Belgium. I summarised some of the salient legal principles at §35 and §36 of my earlier judgment. Of course I pay due and respectful regard to the policy of the Convention itself, but in view of all that I have just rehearsed about the intolerability of the situation for L should he be required to return to Belgium, and the father's inability in a timely way to address that risk, I conclude that it would not be appropriate to order the return of L to Belgium. In this regard, I have specifically considered what Baroness Hale said in *In re D (A Child) (Abduction: Rights of Custody) [2007] 1 AC 619* at §55:

> "… it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate".

19. I propose therefore formally to dismiss the father's application for summary return of L to Belgium; my earlier order is discharged on the basis that he has not complied with the condition-precedent within a reasonable time, and has shown insufficient engagement with the process of achieving this. For the avoidance of doubt, I propose to set aside the return order which I made on 21 December 2022; in this regard, I regard myself as able to exercise the power invested in me under rule 4.1(6) of the Family Procedure Rules 2010 ("A power of the court under these rules to make an order includes a power to vary or revoke the order"), as read with PD12F FPR 2010, para.4.1A, viz:

> "If the return order …. was made under the 1980 Hague Convention, the court might set aside its decision where … there has been a fundamental change in circumstances which undermines the basis on which the order was made".

20. In exercising these powers to set aside my earlier order, I have had regard to, and adopt the reasoning set out in, the characteristically helpful judgment of MacDonald J in *N v J* [2018] 1 FLR 1409, especially at §72, §74(i) and §78.

Conclusion

21. This is a somewhat unusual case, which has taken an unusual turn. But for the reasons set out herein, I propose to set aside the return order which I made last month, and I shall dismiss the father's application.

22. That is my judgment.