Neutral Citation Number: [2024] EWHC 1689 (Fam)

Case No: FD24P00102

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2024

Before:

MR JUSTICE HAYDEN

- -

Between:

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

- -

Ms Anita Guha KC and Mr Edward Bennett (instructed by **Goodman Ray Solicitors**) for the **Applicant**
Ms Jacqueline Renton and Mr Harry Langford (instructed by **Child and Child**) for the **Respondent**

Hearing dates: 23-24th May 2024

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Approved Judgment

This judgment was handed down remotely at 2pm on 1st July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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This judgment was delivered in private and a transparency order is in force. 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 and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

MR JUSTICE HAYDEN:

1. This case concerns the mother's (M) application for summary return of S, the parties' daughter, now aged 5 to Ukraine. The application is made pursuant to the 1980 Hague Convention. The father (F) advances a broad defence to these proceedings relying upon Article 3 (Habitual Residence), Article 13(a) (Consent/Acquiescence) and Article 13(b) (Grave risk/Intolerability).

2. Applications pursuant to the Hague Convention are intended to be speedy and summary, recognising that in cases of abduction and wrongful retention, delay will invariably, perhaps always, be harmful to the child. It is instructive to consider the weight given to the impact on the children, recognised in the criminal law: ***Re H*** **[2016] EWCA Crim 1754, [2017] 1 Cr App R (S) 23 (165).**

3. The family's background is an unusual one. The relationship between the parents is also complex. Holding fast to the summary nature of this jurisdiction, I do not consider it necessary to explore this in any great detail. It is relevant only when analysing whether the Article 13(a) defences are properly engaged.

4. F has been described as a *"highly influential, ultra-high net worth businessman"*. He has enjoyed considerable status and influence in Ukraine, in the past. M is a leading fashion designer, based in Kyiv, with a range of high-profile clients.

5. M is 21 years younger than F, she is now 40 years of age. The parties met in 2007. For most of their relationship, F was married to another woman. That marriage finally concluded in divorce, in 2023. The two relationships appear to have been broadly concurrent. However, M has a 16-year-old daughter (O), conceived in another relationship. O, who is not a subject of these proceedings, has a close relationship with F and is presently at a boarding school in England, where the fees are paid by F. Despite the highly litigious nature of these proceedings, M and F continue to have a sexual relationship. This is an agreed fact.

6. The family have lived what is described as *"an international lifestyle"*. F has access to a private jet. They have travelled and continue to travel extensively. They are Ukrainian. Neither girl was born there, both parents were born and grew up there, grandmothers, on both sides, continue to live in Kyiv. In a case where there are very few areas of agreement, the parties appear to accept that they, but more particularly S, lived and was habitually resident in Ukraine until February 2022. The significance of this date is now obvious to the world. In that period there was a considerable escalation of tension in Ukraine surrounding a potential Russian invasion. F stated that, and I am prepared to accept, he had extensive access to intelligence, not in the public domain, which left him in no doubt, at that time, that invasion loomed. He told me, in evidence, that in that period, he was sure of Russia's intentions and that he believed that the war (or 'special military operation', to use the Russian nomenclature) was imminent. He also considered, from the information that he had,

that the capture of Kyiv would take little more than a matter of weeks. It is an understatement to say that F would not have flourished under a Russian regime. Inevitably, it was necessary for him to leave his country.

7. Eventually, but not without considerable procrastination, M agreed that she and S would leave Ukraine with F. F has a villa in Italy, where they have all enjoyed holidays in the past. I hesitate to use the phrase 'family holidays' as, at this time, F was still married to another woman, with whom he has children. The reality appears to have been an arrangement of parallel families. For a while, they lived in the villa. This was never intended to be a permanent home. F obtained (along with his wife) leave to remain in the UK, in April 2022, pursuant to the Homes for Ukraine Scheme (UK). It is clear that F made this application without informing M. When M discovered, she was plainly very angry and, despite their continuing relationship, little of that anger appears to have dissipated.

8. M and S were granted leave to remain under the scheme, in July 2022. The evidence before me indicates that M, F and S were all distressed to be exiled to the villa in Italy. However idyllic it might have been for a holiday; the loss of their home manifestly caused the adults great pain. Instinct suggests that S too might have sensed this and felt something of it herself, but there is little information about this in the papers. M felt the distress most acutely. She had left her home, her business, and her mother behind. Unlike F, she did not have property or roots, however shallow, in any other country. She told me that she was *"extremely sad"* in this period. F, in a rather curmudgeonly way, agreed that she was, concentrating mainly on his own distress.

9. The invasion, as the world now knows, did not proceed in the way that had been anticipated by F. The war became one of attrition. After a while, M started returning regularly to Kyiv. S sometimes travelled with her. It is, at least as I understand it, acknowledged by F, that S lived in Kyiv for some 6 weeks between January and February 2023. For entirely obvious reasons, the family continued to be unsettled. However, between mid-October and mid-December 2023, they all returned to Kyiv and were joined by O, who plainly regards F as a father figure.

10. In September 2023, a place was secured for S at a highly respected school in Ukraine. In August 2023, I had understood that F purchased what appears to be a rather grand house in a highly regarded suburb of Kyiv. In fact, Ms Renton tells me that it was transferred to him as part of his divorce settlement and that it was matrimonial property acquired in 2017. To my mind, how it was acquired is of little significance. The retention of it indicates some level of commitment to Kyiv. In mid-December, the family travelled to London and from there departed, a few days later, on a quite extensive Caribbean holiday. The transcript of the messages between the parents indicate that M had some hesitation about the holiday plans.

11. Following the holiday, M told me and I accept, that she was clear that she and S were to return to Ukraine to resume their life there. It is obvious that M's heart and home remain in her home city. Whilst contending this to be a departure from an agreed plan

to live in London, F nonetheless accepts that on the 27th January 2024, M told him in terms that she and S were intending to return to Kyiv.

12. It is M's case that F is a highly controlling man who is used to others bending to his will. There is a good deal of evidence supporting M's view. Both M and F have covertly recorded each other's telephone conversations. In one such recording, which has been transcribed but is undated, F refers to the decision to leave Ukraine in February 2022 in these terms:

> *"And as the head of this whole company of ours, I made the decision. In 2022 that we need to leave Kyiv because there is a war.*
>
> *I made it as the head. You ran around, fussed about. You were hysterical, saying you did not want to leave.*
>
> *[O] was talking to me about some ballet thing. I took you all by the scruff of your neck and got you out…*
>
> *… and we always discussed it. I made the decision that we live in London, just like on February 14th I made the decision, and now I have made the decision.*
>
> *We live in London. And all the children agreed. But you say no. I won't live in London.*
>
> *So you don't feel like part of our family. So if you felt like part of our family, you would have said yes… I agree".*

13. F has constructed an elaborate argument that the 'plan' to live in London, which he appears to contend began in those few days before the Caribbean holiday, was concluded but subsequently reneged upon by M. Ms Guha KC, Counsel on behalf of M, points to the evidence that all of S's belongings (including her much loved dog) remained in Kyiv, which is of course, entirely inconsistent with having moved to live permanently in London. She also emphasises the controlling mindset, revealed in unambiguous terms in the extracts set out above. This, Ms Guha submits, illustrates behaviour which is corrosive of M's autonomy and inimical to her independent decision making. F simply does not regard M's consent to the family's arrangements as necessary. He considers that the decisions are his *"as head"* of the family. He regards M's submission under the weight of his persistence as equivalent to consent. It is not. In any event, I do not consider M ever agreed to the plan, though she was undoubtedly prepared to negotiate around it.

14. Ms Renton, Counsel on behalf of F, points to the exhibits which contain M's signature relating to enrolling S in a school in London. There are also transcripts of

conversations which reveal the mother as trying to conflate financial arrangements with some rather loosely defined concept of joint residence between London and Kyiv. Into this maelstrom must also be added an intense and highly emotional conflict between M and F, predicated on F's belief that M is or has been having an affair with another man.

15. What is evident is that F and M have been living their own psychodrama for many years. It is also clear that the children's welfare will inevitably have been damaged by it. Both adults have been entangled in a powerplay in which their own emotions, the needs of the children and money have all been conflated by both. Though there is no equality in this powerplay, M was prepared to play such cards as she perceived to be at her disposal. On the morning of the hearing, I received further covertly recorded transcripts of the parties' telephone conversations. The following, which refers to a conversation on 19th May 2024, illustrates the point I have made above:

> *[F]: I'm ready to do everything.*
>
> *[M]: So, just cover. And the house in [Ukraine], listen to me carefully. Just listen carefully. Just listen carefully.*
>
> *[F] I'm listening.*
>
> *[M] This is a big chance for you.*
>
> *[F] Yes, fine.*
>
> *[M] A tremendous chance. You should re-register the house in the name of [S].*
>
> *[F]I won't do that.*
>
> *[M]: Look. I'll do in an hour. That is it! I swear*
>
> *[F] What will you do?*
>
> *[M] I'll sign everything!*
>
> *[F] What is everything?*
>
> *[M] I will abandon all proceedings in courts. Extraditions.*
>
> *[F] That is, if I re-register the house*
>
> *[M] Then we will agree.*
>
> *[F] That is, if I re-register the house. So, the house is the price!*
>
> *[M] No. No. This is not worth the house. It is worth the respect. So far you have no respect for the mother of your children and are suing her.*

> *[F] If you want to take your child to the war, so do it. If you want to take your child to the war, so do it. You will bear that burden for the rest of your life...*

16. The following passages do not make for edifying reading. I remind myself that both parents were covertly recording each other and that there is a degree of artifice to the conversations. Each parent was intending to trap the other into some kind of significant admission:

> *[M] I'm going to take a break now. You have until the 23rd to write me a paper. Write me a paper where you waive that, and pay me my costs.*
>
> *[F] Provided you sign that [S] lives in London.*
>
> *[M] So I'll do that. Just sign the house over to [S] and that's it.*
>
> *[F] No. No.*
>
> *[M] That's it.*
>
> *[F] No. No.*
>
> *[M] And we'll move on.*
>
> *[F] I said no.*
>
> *[M] I'm going to give up on this whole thing in an hour.*
>
> *[F] I said no. Don't give up.*
>
> *[M] Okay. Okay. That's it.*
>
> *[F] Don't give up I said the terms are as follows. There won't be any others. We end the trials together. I compensate you for the costs. And you sign that [S] lives in London for at least a year.*
>
> *[M] For free? There you go again.*
>
> *[F] Don't sign. You want money for it? I won't pay you money for it.*
>
> *[M] I don't want money. I want a house for the child.*
>
> *[F] [M!]*

[M] Huh. That's it! I want it for the child...

[F]Moving on to the next subject.

[M] That's it. I have nothing else for you.

17. Ultimately, in considering whether the mother consented or acquiesced to a plan for S to move to live in London, I am satisfied, that whilst this became integral to parental powerplay, it remained unresolved. This must be considered in the context of the applicable legal framework, in which sphere the law is both clear and well-established.

18. The approach to 'consent' for these purposes is succinctly summarised by Mostyn J in ***JM v RM (Abduction: Retention: Acquiescence)*** **[2021] EWHC 315 (Fam), [2021] Fam 261**:

> *"44. In Re G (Abduction: Consent/Discretion) [2021] EWCA Civ 139, [2021] 2 WLR 1013, [2021] 2 FLR 972, at para [26], Peter Jackson LJ stated:*
>
> *'... as a matter of ordinary language the word "consent" denotes the giving of permission to another person to do something. For the permission to be meaningful, it must be made known. This natural reading is reinforced by the fact that consent appears in the Convention as a verb ("avait consenti/had consented"): what is required is an act or actions and not just an internal state of mind. But it is at the practical level that the need for communication is most obvious. Parties make important decisions based on the understanding that they have a consent to relocate on which they can safely rely. It would make a mockery of the Convention if the permission on which the removing parent had depended could be subsequently invalidated by an undisclosed change of heart on the part of the other parent, particularly as the result for the children would then be a mandatory return. Such an arbitrary consequence would be flatly contrary to the Convention's purpose of would also be manifestly unfair to the removing parent and the children.'*
>
> *45. Therefore 'consented' means, for the purposes of the 1980 Convention, active, advance, communicated permission granted by the left-behind parent for the period of care with the other parent…."*

19. Similarly, in respect of 'acquiescence', Lord Browne-Wilkinson in ***Re H and Others (Minors) (Abduction: Acquiescence)*** **[1998] AC 72**, at **[90]** identified that:

> *"(1) For the purposes of Art 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill LJ said in [Re S (Minors) (Abduction: Acquiescence) [1994] 1 FLR 819 at 838]: "the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact".*
>
> *(2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.*
>
> *(3) The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law.*
>
> *(4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent clearly is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."*

20. Sub-paragraph 2 of Lord Browne-Wilkinson's judgment emphasises the 'subjective' intention of the wronged parent as a question of fact; paragraph 4 is essentially an 'objective' evaluation of the evidence. Both the defences contemplated above are, to my mind, characterised by the need for clarity i.e., lack of ambiguity. The evidence here is the antithesis of both. Whilst it is not always coherent, the preponderant evidence reveals a couple in almost permanent conflict. Agreement on virtually anything seems to elude them. Their language is that of hostile negotiation and bargaining, in which neither seems prepared to say what they really feel. This does not even come close to establishing the clarity of evidence required by the defences. Insofar as they were arguable at all, they were predicated upon a confection of highly selective evidence which was incapable of establishing any clear forensic conclusion.

21. A further issue in dispute concerns where S is habitually resident. In their skeleton argument, Ms Renton and Mr Langford submit:

> *"**By virtue of her application, M seeks for [S] to be returned to Kyiv, a war zone, and a city that [S] barely knows and has little memory or association with, having last lived in Ukraine for any appreciable period of time in February 2022 when she was 3 years old.** The war between Ukraine and Russia continues unabated since 2022 and without any sign that the war will end soon, and if anything, there is a real and tangible risk that things will get much worse as it seems Russia is gearing up for another attack this Summer"* [Counsel's emphasis].

22. I will turn to the question as to how the court should address the situation in Ukraine in the paragraphs below. It is that issue which I believe to be central to this case. The other matters raised here strike me, essentially, as makeweights, though they have been pursued with vigour and tenacity. What is important to address is the emphasised sentence in the above passage. I say, at once, that I find it to be a proposition which runs entirely contrary to the preponderant evidence of where S herself regards her home to be. As the case law establishes, the habitual residence of a child will inevitably correspond to the place which reflects some degree of integration by that child in a social and family environment. A child will usually, though not inevitably, have the same habitual residence as the parent who cares for her. The younger the child, the more likely the proposition. Stability for the child is what characterises habitual residence and not days or time spent in a particular location. It is, as the case law has emphasised, the child who should be at the centre of the exercise when evaluating habitual residence. Yet again, the evidence in this case, which is voluminous, especially for a summary application, focuses on the parents. The statements reveal nothing of S's character or personality nor do they engage properly with the kind of material that the case law indicates is required (see ***Re B (A Child) (Custody Rights: Habitual Residence)*** **[2016] EWHC 2174 (Fam); [2016] 4 WLR 156**; ***M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)*** **[2020] EWCA Civ 1105, [2020] 4 WLR 137**).

23. In her oral evidence, M was asked about S's life in Kyiv. Almost immediately, it became clear that this is S's home. Near to her mother's house is her maternal grandmother, whom she sees regularly when in Kyiv. F's mother also live close by but, perhaps understandably in the light of the complex parallel family arrangements that I have referred to, F's mother has played a small part in S's life. M spoke of S's enthusiasm for ballet and piano, which are very much part of her life in Kyiv. These interests, to some extent, reflect those of her older sister, O. They are interests that M has encouraged and takes obvious pleasure in. She told me that S enjoyed dancing to the ballets of Prokofiev (Cinderella) and Tchaikovsky (The Nutcracker). It is poignant that those two great composers are of Ukrainian and Russian heritage, respectively. None of this matters to S however, whose real enjoyment of music and dance was reflected in the mother's own joy in relating this to me. In addition to her daily routine, there are also both piano and extra ballet lessons. M said that S had not been practising the piano whilst in London.

24. Though F suggested that he might be S's primary carer, based on some calculation of time spent with him in recent months, I was left with no doubt at all that it is M who is the primary carer. I have no real sense of S's life, from the available evidence, in any other environment. It is only in the description of her life in Kyiv, with her mother, that she becomes three dimensional. Of note is her relationship with her nanny in Kyiv, with whom she clearly has a strong bond and whom she continues to speak with on the telephone regularly. In addition to all this, I have already noted the frequency and the duration of S's time in Kyiv, including time spent with both her mother and father together. The pull of Kyiv to all this family is magnetic (including O). F told me that when he left Ukraine in February 2022, he had assumed that he would never be able to return. He too was plainly delighted at having had the unexpected opportunity to do so and, I note, as recently as 6 months ago.

25. Ms Guha and Mr Bennett advance the following:

> *"At the time of the wrongful retention, whilst she came from a much-travelled family, the centre of [S]'s world was Ukraine. Her main home was with M in Kyiv, her nursery and school were in Kyiv, her wider family (including her maternal grandmother), extended social life and world was in Kyiv. Italy, where she spent most of her time since February 2022, was always a holiday home, and neither party has sought to suggest otherwise. Whilst in Italy, the place she was most familiar, and where she slipped back into her familiar routines, was Ukraine, where, in 2023, she spent just short of four months. Her mother has travelled back frequently there. Her sister was at boarding school (now day school) in England but returned to Kyiv in October for two months to see her own father. F had sufficient business interests there to warrant his still having to return there on occasion. Indeed, he maintains a substantial home there, as M's photos exhibited to her second witness statement attest. As M points out, that home was procured in October 2023, barely a month after he paid the fees to Ukraine's top school for [S] to attend in 2024. The purchase of this sizeable property does not at all sit well with F's assertion that he himself had 'moved' to London by the end of 2023".*

26. As is clear from my own analysis, I agree with the above. I remind myself, of course, that S speaks Ukrainian at home. Even in the UK, there is a strong sense of her Ukrainian culture. I noticed a photograph of her with her father, with him wearing the Ukrainian flag, the national Trident symbol and a traditional Ukrainian folk shirt, which I understand is called a vyshyvanka. S's school reports in Ukraine, predictably, also reveal her to be steeped in Ukrainian culture. Given that I have found that there was never a collective intention or agreement to move permanently to London, and

having looked at the circumstances of S's life, I am entirely satisfied that it is Kyiv and her family home there where S remains most integrated and which continues to provide her with stability. Whilst I do not wish to diminish F's love and concern for his daughter, I am also satisfied that it is M who is S's primary carer. It is Ukraine where S is habitually resident.

Article 13(b) – Grave Risk of harm and Intolerability

27. 'Grave risk of harm or intolerability' was considered by the Supreme Court in ***Re E (Children) (Abduction: Custody Appeal)*** **[2011] UKSC 27; [2012] 1 AC 144.** These principles have been applied in a variety of cases by the Court of Appeal, see: ***Re P (A Child) (Abduction: Consideration of Evidence)*** **[2018] 4 WLR 16** ***and Re C (Children) (Abduction: Article 13(b)*****) [2019] 1 FLR 1045** ***and Re A (A Child) (Article 13(b))*** **[2021] EWCA Civ 939.** ***In E v D (Return Order)*** **[2022] EWHC 1216 (Fam)**

28. The applicable principles were summarised by MacDonald J in E v D (supra):

> *"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).*

29. In Re E, the Supreme Court emphasised that in evaluating whether the exception in Art 13(b) has been established, the Judge is required to assess the evidence by reference to the civil standard of proof, whilst being mindful of the limitations involved in the summary nature of the Convention process. This is the ever-present tension within the Hague Convention. In this context, the Supreme Court emphasised that the approach in respect of the 'harm defence' is not one which "*demands"* the court to engage in a fact-finding exercise to determine the veracity of the matters alleged as grounding the defence. The court is required to assume the risk of harm at its highest and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm can be identified.

30. In ***Re IG (Child Abduction: Habitual Residence: Article 13(b))*** **[2021] EWCA Civ 1123,** Baker LJ further refines the applicable principles, emphasising that the Article 13(b) defence has what he refers to as *"a high threshold"*. In my judgment, this is key to understanding the scope and ambit of this defence. Baker LJ summarises the principles thus:

> *[47] (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.*

31. In paragraphs 5 and 6 (above), Baker LJ captures the essence of the tension discussed. The application of these principles in the context of war inevitably requires sensitive application. Nonetheless, properly analysed, the applicable principles remain and rather than indicating a need for departure from them, in fact, reinforce their breadth, importance, and adaptability. They continue to provide a rigorous and flexible framework, albeit that in the circumstances of war their application may, as I have indicated, require a degree of nuance.

32. It is also important to recognise that risk may be multifocal. Where it is, the court is required to look at the allegations individually but assess them cumulatively. In ***Re B (Children)*** **[2022] 3 WLR 1315**, Moylan LJ:

> *"[70] The authorities make clear that the court is evaluating whether there is a grave risk based on the allegations relied on*

> *by the taking parent as a whole, not individually. There may, of course, be distinct strands which have to be analysed separately but the court must not overlook the need to consider the cumulative effect of those allegations for the purpose of evaluating the nature and level of any grave risk(s) that might potentially be established as well as the protective measures available to address such risk(s)."*

33. Counsel have referred me to the domestic case law as well as to a number of US cases, notably in the context of return orders to Israel, at the time of the second intifada (2000-2005): ***Freir v Freir* 969 F.Supp. 436 (E.D.Mich.1996)** and ***Silverman v Silverman*, 338 F.3d 886 (8th Cir. 2003)**. I was also taken to the case of ***Amalin Hazbun Escaf v Isidoro Rodriquez,*** a decision of the US District Court for the Eastern District of Virginia, concerning an application under the Hague Convention and the International Child Abduction Remedies Act, relating to risk of kidnapping and violence in Colombia in that period. For completeness, I have considered ***Re S (Abduction: Custody Rights)* [2002] EWCA Civ 809; [2002] 2 FLR 815** and ***Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] AC 1288**. In the latter case, the House of Lords declined to disturb the rejection, at first instance, of an Article 13(b) defence predicated on the assertion of Zimbabwe as *'a failed state'*. It is not necessary to undertake an exegesis of the case law, it establishes only one principle, namely that each individual case requires to be considered on its own particular facts, focused on the circumstances of the subject child.

34. It must be remembered that the Russian-Ukrainian War really began in February 2014. Following Ukraine's Revolution of Dignity, Russia occupied and annexed Crimea from Ukraine and supported pro-Russian separatists fighting the Ukrainian military in the Donbas war. Accordingly, since 2015, Ukraine has, inevitably, declared to the Hague Conference that it cannot comply with its obligations under the 1980 Hague Convention in those areas where it can no longer exert control. It is manifest that this does not impact, in any way, upon the receiving state under the Convention. Thus, the English courts have not been prevented from ordering summary return of children to Ukraine, see ***Q v R* [2022] EWHC 2961 (Fam)** and ***Re N (A Child), Re (Ukraine: Art. 13(b))* [2024] EWHC 871 (Fam)**.

35. Though Ms Renton has emphasised the delays in achieving access to the family courts in Kyiv, I note that the US State Department 2024 Annual Report on International Parental Child Abduction states *"the judicial authorities of Ukraine routinely reached timely decisions"*. In relation to Ukraine, the report concludes: *"Department Recommendations: To the extent possible, given the ongoing Russian invasion, the Department and the Ukrainian Central Authority will continue the effective processing and resolution of cases under the Convention"*.

36. For reasons which I will turn to shortly, I permitted the instruction of an expert witness in this case, Dr Roman Yedeliev, International Law and Associate Professor at the International Law Department of Taras Shevchenko National University of

Kyiv. His report contained the following passage and supports the view of the US State Department:

> *"Courts in Kyiv are operating as usual. It is important to understand that the international armed conflict has been ongoing in Ukraine for ten years. Naturally, the scale of challenges has changed since the full-scale invasion. However, the judicial system remains stable in regions where active hostilities are not taking place. The jurisdiction of Kyiv courts has not changed, and they continue to administer justice. The current dynamics of court proceedings show that they are comparable to the period before the full-scale invasion".*

37. Ms Renton put to Dr Yedeliev that the delays in the court process were more extensive than he had suggested. He accepted that he was not in a position to provide any up to date data on this and thus not able to contradict Ms Renton's assertion. On 8th May 2024, F filed a statement with attached exhibits. This document is 330 pages. The courts have repeatedly stated that the filing of voluminous material in these applications is strongly to be deprecated. I repeat, this is a summary jurisdiction. For it to be effective, cases must be listed quickly. For this to happen, case management must exert tight control over the documentation. Judicial reading time, built into the estimated length of hearing, is rarely allocated to these cases and judgment writing time is a chimera. Solicitors who file material of this quantity must realise that they simply do not assist their clients, it is more likely that important points become lost in the volume of information. Equally, it generates a sense of inequality for the opposing party. In this sphere, concise, focused evidence on the relevant issues is even more than usually necessary. In every sense, less is more!

38. The force of much of F's documentation was to advance what I will, for convenience, call a 'pessimistic' view of life in Kyiv, emphasising the risk to S of returning there. One of the consequences of filing this lengthy material was that the lawyers acting for M sought to counter it by seeking to instruct an expert who could advise on the realities of day-to-day life there. The agreed instructions, which I will return to below, went wider than that. To achieve parity between the parties and because I perceived there to be some potential utility in this line of enquiry, I granted leave for Dr Yedeliev to be instructed. I have explained how the expert came to be instructed in this case because I wish to signal, in the clearest possible terms, that such instructions should, in my judgement, be regarded as exceptional and rarely necessary. The key elements of the evidence and those upon which I have relied, were largely available directly from the parties and could, to my mind, have been presented, succinctly, in their own statements. This is not intended, in any way, to be critical of Dr Yedeliev, whose evidence was thoughtful and carefully presented, though I agree with Ms Renton that there was, at times, a detectable nationalism in his approach. All this, however, simply indicates that the issue we are concerned with is, of itself, likely to be unreceptive to expert assessment.

39. In the United Kingdom, there is regular media coverage of the war in Ukraine. Ms Renton makes the following submission:

> *"All news reporting, domestically and internationally, as exhibited to F's statement, demonstrates the risks posed by living in Kyiv. The court should place considerable weight on this evidence"*.

40. One of the difficulties, for a court, in evaluating references, by the parties, to media reports and indeed the reports of some external bodies or academic commentary, is evaluating the accuracy of the core information. It is, for example, relevant to note that F's own access to intelligence in the early months of 2022, which influenced the decision to go to Italy, proved to be inaccurate. Kyiv did not topple in weeks and the war has proved to be far more protracted than the intelligence he had access to had led him to anticipate. It is also relevant that F, despite his own heightened risk, felt sufficiently confident, both to return to Kyiv and to retain property there at the end of last year. Further, it is a universal feature of war that truth is its first casualty. The pervasiveness of this point is illustrated by the fact that it was first made by Aeschylus (Agamemnon: *"The first casualty of war is the truth"*, 458 BC). Information placed into the public domain by both Ukraine and Russia will, inevitably, be influenced by strategic expediency. Propaganda is a weapon of war.

41. M is presently living in Ukraine and travelled to London for this hearing. As I have stated, she runs her business in Kyiv. It is necessary, when coming to London, for her to travel to Poland and to fly from Polish airports. This is one of many restrictions caused by the war to day-to-day life in Kyiv. By way of further example, sometimes children's education has to be conducted in bunkers or air raid shelters. M told me that people make the best of things. It is almost trite to say that a nation at war generates resilience. I sensed something of this in the mother's own written and oral evidence. Though there have been missile attacks on Kyiv (e.g., power station) they have been infrequent. The primary risk would appear to be shrapnel injuries from missiles shot down by Ukraine anti-aircraft fire. F's case, properly analysed, is that Russian forces are resurgent and that Ukraine's ability to resist is diminished. F contends that the summer months are likely to see an escalation in the war generally and with Kyiv potentially exposed to greater onslaught. This future risk is articulated in Ms Renton and Mr Langford's skeleton argument in these terms. They highlight the following paragraph in bold print and so therefore do I:

> ***"It is a wide spread view that Putin is gearing up for another attack, which is likely to take place over the Summer, and that as a result the war will become more substantial and harder to contain, and that attacks are likely to get progressively worse The Economist has talked of Russia launching "a new major offensive" with the arrival of Summer. President Zelensky has also voiced his view that the beginning of the Summer 2024 would be a probable date for a new major offensive by Russia, in an interview with CBS***

> ***TV Channel It is also important to note that Russia's military is dominant as regards size and funding…"***

42. There is simply no way of evaluating the accuracy of this forecast beyond recognising its undoubted plausibility. It is, however, the broadest of generalisations nor does it cast much light on whether life in Kyiv is likely to change to a point where the combat poses a grave risk of harm to S.

43. In their arguments, Ms Renton and Mr Langford place considerable emphasis on the advice of the Foreign, Commonwealth & Development Office (FCDO), which states:

> *"The FCDO now advises against all but essential travel to the western regions (oblasts) of Zakarpattia, Ivano-Frankivsk, Ternopil, and Chernivtsi, and continues to advise against all travel to the rest of Ukraine ('Warnings and insurance' and 'Regional risks' page)".*

Ms Renton, in her written submissions, stressed that the source of the information informing this advice is stated on the FCDO website as deriving from *"local knowledge from UK embassies abroad"*; *"information provided by the local authorities in each country"; "in some cases, information gathered by the intelligence services"*. This led her to submit that the Court, when resolving their question of 'grave risk to S', should place *"significant weight"* on the FCDO travel guidance. In her oral submissions, Ms Renton went further. It was contended that the Court should require very strong evidence to depart from it.

44. This submission fails to engage either with the objective of the FCDO guidance or those whom it is intended to address. I do not consider that the FCDO advice comes close to supporting the weight Ms Renton places upon it. It is inevitably the case that foreign travellers face a different and heightened risk from that of Ukrainian nationals who have lived, daily, with the challenges and privations of war for some time and have adapted their lives in response to it. Both Dr Yedeliev and M told me, for example, that some people in Kyiv (which M confirmed included her family) had installed generators as a backup during electricity cuts. This makes life much easier and safer. The UK traveller may not have access to such resources.

45. Many of us might imagine that call to shelters in an air raid, or when missiles are airborne overhead, is in response to sirens. Though sirens are still sounded, in fact, the citizens of Kyiv rely on and are familiar with mobile phone alerts, generated by government apps. Dr Yedeliev suggested that these might not always be speedily accessible to foreign travellers or that they might even be unaware of them. There are other obvious challenges, for example, in relation to language. The risk matrix is, therefore, wholly different for UK nationals. The guidance is prepared for an entirely different purpose from the exercise that I am engaged in here. Whilst it may have some place in the broader evidential canvas, it most certainly does not assume the elevated role Ms Renton contends for it. Neither would the FCDO expect their guidance to be used in the way that Ms Renton asserts it should be. It not written with

this in mind. Indeed, the FCDO would, I am confident, be alarmed at their advice being construed as, in any way, restrictive of the movements of a Ukrainian national. Those evaluating risk to themselves and their families when their country is at war, will inevitably weigh into the balance the importance to them of remaining in their homeland with family, friends and neighbours. Remaining may, itself, be an act of national solidarity. There are also practical considerations. Here, M's home, business and livelihood remains in Kyiv.

46. Ms Guha submits that much of the evidence that I have considered in relation to determining the question of habitual residence has further resonance in that it indicates that S feels safe in her home. Her attachment to it contraindicates any anxiety. I think this is an insightful point and I agree with it.

47. Ms Guha places great emphasis on the expert evidence and in particular, Dr Yedeliev's view that Kyiv, with sensible precautions, carries no greater statistical risk of injury or death by Russian missile attack than injury as a result of a car accident. On this point, she makes the following submission:

> *"This conclusion, by an expert living and working in Kyiv, critically analysing the publicly available information, puts many of the other cases concerning Ukraine into perspective – F attempts to drown the court with a mountain of press articles fall flat when faced with this analysis".*

48. With respect to Ms Guha, for the reasons I have already referred to, I do not find myself relying heavily on Dr Yedeliev's report. I do not need to. I find the parents' evidence and lived experiences, both as they recount in the witness box and in their statements, provides a secure evidential base for determining the key issue. The chronology of the parents' respective visits to Kyiv (and their duration) also illuminates their attitude to risk, as, to some degree, does M's determination to remain in Kyiv herself. I should add that when put to the assay, that core evidence, on all this, reveals a rather surprising degree of common ground between the parents. This is because, as I have foreshadowed above, F's essential objection to his daughter's return, when properly analysed, is his anxiety, surrounding escalating future conflict most particularly, over the coming summer months. As illustrated in para. 41 above, this is the primary focus of Ms Renton's argument.

49. Ultimately, whilst her reasoning is undoubtedly plausible, it is nonetheless speculative. Moreover, it does not establish a threat to Kyiv itself. The information available is far too generalised. It does not, from the perspective of S, come close to establishing the *"high threshold"* emphasised by Baker LJ in ***Re IG*** (supra). Generalisations of this kind were deprecated by Williams J in ***Q v R*** **[2022] EWHC 2961 (Fam),** where he highlighted the unsatisfactory nature of a *"general or broad-brush approach"*, where a *"finer brush"* is required. I, with respect, agree with that approach.

50. Following the conclusion of the hearing, Ms Guha and Mr Bennett discovered and submitted a further authority: ***IF v JG* [2023] IEHC 495**. This is a High Court decision from the Republic of Ireland. It involved a decision to return a child to Ukraine and a case in which expert evidence had been solicited. Ms Renton and Mr Langford submitted a note, in response, the force of which is satisfactorily summarised in their last paragraph:

> *"It is submitted that this newly identified judgment from 2023 does not assist the court with the extent to which the FCDO travel advice is relevant to the Art. 13(b) analysis when the court is considering an application for a summary return of a child to Ukraine".*

51. I agree with that submission. For all the reasons that I have discussed above, I am strongly of the view that these cases are both situational and child-specific and that the comparative authorities ultimately demonstrate this. I do, however, consider Ms Justice Gearty's approach to protective measures for the child to be attractive:

> *[8.6] "In R. v. R. [2015] IECA 265 Finlay Geoghegan J. emphasised the trust to be put in the courts of the child's habitual residence to protect the child even in a situation where physical harm was a risk faced by that child. The Court must, therefore, consider the facilities available in Ukraine to assess and to mitigate the risk presenting. It is also necessary to consider her family's ability to protect Daryna or to mitigate any risk to her, including the possibility of sensible or pragmatic solutions which might address any concerns that the Respondent has in the event of a return".*

52. I am satisfied that the evidence establishes that Kyiv remains a functioning city. As I have stated, whilst the expert evidence buttresses this, it is established primarily on the evidence of the parents. There may be black outs, periods when children must be educated in shelters and delays in gaining access to the court, may be longer than the US State Department Annual Report (supra) suggests, but what is clear is that the pillars of Kyiv's civic infrastructure remain intact. This in itself supports a conclusion that it has, so far, weathered the war effectively. I do not consider that the Court should be drawn into a speculative and generalised examination as to the likely evolution of the war over the summer months. I do not consider the Court should regard itself as in a position to do so. I do not consider that this generalised evidence achieves the *"high threshold required"*. I would go further and say that it does not come close to it.

53. In any event, I am clear that her family are very well placed to protect S and in a strong position to mitigate any risk to her should the situation in Kyiv start to deteriorate. Though the parental conflict has distracted the focus of both parents from the needs of both their children, I have no doubt that they have the real capacity to

construct sensible and pragmatic solutions if a point comes where M considers that S would be safer outside Ukraine. For the time being, S needs the safety and stability of her home and her family, this is only capable of being met with her mother in Kyiv and accordingly, I order her summary return.