



Neutral Citation Number: [2024] EWHC 2593 (Fam)

Case No: FD24P00190

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/10/2024

Before :

MISS KATIE GOLLOP
SITTING AS A DEPUTY HIGH COURT JUDGE

Between :

	Mr SD	<u>Applicant</u>
	- and -	
	Ms MM	<u>Respondent</u>

Mr Mani Singh Basi (instructed by MSB Solicitors) for the Applicant
Mr James Nottage (instructed by Dawson Cornwell LLP) for the Respondent

Hearing dates: 14th August 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 16th October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MISS KATIE GOLLOP SITTING AS A DEPUTY HIGH COURT JUDGE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. The anonymity of the children and the 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.

Miss Katie Gollop :

1. This is an application made by a father pursuant to the 1980 Hague Convention on the Civil Aspects of International Child Abduction (“the 1980 Convention”). He seeks the summary return to Romania of two children who were removed from that country to England by their mother, the respondent, on 6 February 2024. Both parties and the children are Romanian citizens and passport holders and Romania and the UK are both parties to the 1980 Convention. The children are a boy (“R”) and a girl (“S”) aged almost 10 and almost 8 years old respectively (both have birthdays in late September). The mother opposes the application.

Attendance and Representation

2. The father attended the final hearing before me on 14 August 2024 remotely from Romania and he had an interpreter. The mother attended court in person. It was clear that her spoken English is very good and her reliance on the interpreter present in court was minimal.
3. The father was represented by Mr Basi, counsel. The mother was represented by Mr Nottage, pupil barrister, instructed by Dawson Cornwell LLP. I am particularly indebted to Mr Nottage, who has provided his services *pro bono*, and to at Dawson Cornwell LLP who have worked on the case and instructed him largely *pro bono*. It is through their highly professional, good offices that the issues have been narrowed and submissions presented with clarity and precision.

The Procedural Background

4. The parties were married when the children were born. They separated in around October 2022 and divorced about a year later. Although they made a number of child centred decisions together, there were court proceedings in Romania in connection with the divorce and with child arrangements including residence, contact and education. After the divorce, the children lived with their mother and stayed with their father for a long weekend every fortnight. As I will explain, the Romanian court proceedings remain live.
5. For some months prior to removing them from Romania, the mother’s view was that the children would benefit from being raised and educated in England. The father was giving that possibility serious consideration when, towards the end of 2023, the parties’ ability to make shared decisions about the children became impaired. At the end of December, he withdrew his previous consent to the children going abroad for holidays with their mother. He also refused to agree to her relocating them to England and them starting school here.
6. On 12 January 2024, the mother made an urgent application seeking the Romanian court’s consent to her moving the children to the UK for a period of around 3 years so that they could be educated in England. The father opposed that application and there

was a hearing on 19 January 2024. In a written judgment delivered on 22 January 2024 (which I have read) the Romanian court dismissed the mother's application, partly on the ground that the condition of urgency was not met. She was given 5 days within which to file any appeal.

7. The mother accepts that when she removed the children from Romania to England two weeks later, they were habitually resident in Romania. She also accepts that she brought them to England without the father's knowledge or consent and at a time when he was exercising rights of custody. She further accepts that at the time of their removal the court in Romania was seized of the dispute about where they should live and be educated.
8. In the course of the final hearing before me on 14 August 2024, Mr Nottage advised that the mother's instructions were that in April 2024, she had issued a fresh application in the Romanian court seeking its consent to her remaining in England with the children. She had not mentioned this application before despite making statements in these proceedings on 10 June, 19 July and 9 August. The father knew nothing about it, not having been served with the application by either the mother's lawyers in Romania or the Romanian court. I was told that there is as yet no hearing date.
9. On 22 May 2024, the father made his summary return application. Passport orders were made on 24 May and executed on 29 May. There was a hearing in June at which the mother was unrepresented and her pro bono team came on board thereafter with the assistance of Mr Basi and Advocate.

The Mother's Defence to Summary Return

10. The general rule, found in Art 12 of the 1980 Convention, is that following a wrongful removal, "*the authority concerned shall order the return of the child forthwith.*" Art 13 of the 1980 Convention ("Art 13") contains a number of exceptions to that general rule.
11. The basis on which the mother opposes summary return has altered in the course of the application as the evidence has developed and she has had access to legal advice. At the start of the hearing, Mr Nottage informed me that she no longer pursued the child's objection exception which she had originally relied upon in relation to both children and then, latterly, in relation to S alone.
12. In respect of R, she continued to rely on the Art 13b exception as she had done from the outset. Pursuant to this exception, the requested State is not bound to order the return of the child if the person opposing return establishes that:
 - b) *there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation*
13. Mr Nottage explained that her opposition to S's return now depended solely on the Art 13b exception being made out in relation to R: if the court were to decline to return R

to Romania, it would be wrong, he submitted, to order that S be summarily returned as the effect would be to separate siblings with a close bond.

The Evidence

14. I read the bundle which included the parties' witness statements, a "child's objections" report from Miss Callaghan of the Cafcass, a witness statement from each party in response to that report, and interpreted decisions of some judgments of the courts in Romania. I was provided with excellent Skeleton Arguments on behalf of each party and an agreed chronology of the proceedings in Romania prepared by the father's team. The parties agreed that no oral evidence was necessary and I heard none. I heard oral submissions over the course of half a day and reserved my decision.

The Facts

15. A number of matters that were unclear in or missing from the written evidence were clarified in court by both parties. At the end of the hearing, all of the following facts were either agreed or not in dispute:
- a) Shortly before he turned 4, R was diagnosed by a child psychiatrist with Asperger's Syndrome;
 - b) That diagnosis entitled R to disability benefits and what is referred to in Romanian court documents as a "rehabilitation plan" which I was told identifies areas of additional educational need amongst other things;
 - c) R had therapy for a year from age 4 to 5 years and made considerable progress as a result;
 - d) Taking his disability related needs into account (and on the mother's part at least thinking ahead about the possibility of one day moving as a family to England), the parents agreed that R would attend the International School in Romania ("the International School") where the classes were taught in English and the curriculum was also English;
 - e) One child's attendance there cost roughly 1,000 Euros per month and R's school fees were funded in full by the parents, both of whom worked, with no contribution from the Romanian state;
 - f) R attended the International School for three years: reception, Year 1 and Year 2;
 - g) At the end of Year 2 (summer 2022) a school place needed to be found for S starting in September 2022 and it was around that time that the parties separated;

- h) Upon separation, the parents could not afford to send two children to the International School and a decision had to be made about whether to send them to different schools, or whether to find a less expensive private school which both could attend. The parents chose the second option and in September 2022 R and S started at a Romanian private school (School 2) where the curriculum was Romanian but there were additional classes taught in English each day;
- i) The cost of sending two children to School 2 was approximately the same as sending one child to the International School;
- j) After one academic year, the father queried whether the children were deriving an educational benefit from private school commensurate with the financial outlay. There was a financial context to that query: finalisation of the divorce proceedings (which occurred in October 2023) was not far off and it was part of the court ordered settlement that every month, around a third of his salary would be paid to the mother making his contribution to the children's School 2 fees unaffordable for him;
- k) Against that background the parents agreed that in September 2023 the children would move from School 2 to a Romanian state school which was not fee paying;
- l) This was a considerable change for R. During the course of the September 2023 term, his mother's observation was that he was struggling to keep up, frustrated, unhappy, angry, refusing to write or participate in class, and at risk of losing confidence and developing a dislike of school;
- m) In support, she produced worksheets sent to her by R's Romanian state school teacher that R had failed to complete, angry face pictures he had drawn which she considered reflected his emotional state, and a letter from one of his teachers at School 2 which corroborated her concerns and recommended a return to a school that taught an English curriculum in English;
- n) R's father did not think that the move had been as bad as the mother suggested. He identified a particular problem with R not doing his homework and thought that with consistent parental support and encouragement at home, the homework would be completed and things would improve;
- o) R and S attended the same primary school on arrival in England in early February 2024 and in mid-April, they moved to another state primary which has a Learning Support department catering for children with additional needs ("the current school");
- p) R's July 2024 report from the current school states that he is working at the expected level in reading, maths, science, computing, design and technology,

geography, history, music, PE and RE and was working towards the expected level in writing;

- q) The mother says the current school has been assessing whether he has any special educational needs arising from Asperger's Syndrome and that it may offer him additional support if he returns in September;
 - r) Since arrival in England, the mother, R and S have been living with a relative of the mother's and they spend a lot of time with her extended family and cousins of a similar age to R and S. The mother reports that the children are settled in and outside school, making friends, and generally integrated into life in England, attending swimming, tennis and after school clubs;
 - s) Looking back, the mother's view was that of the three schools R attended in Romania, the International School was the best fit, School 2 was not as good for him educationally but did not negatively impact his emotional state, and the Romanian state school did not meet his educational needs, he was unable to keep up, and attending there made him angry and unhappy;
 - t) The mother works both a full time and a part time job remotely from England for two employers in Romania. With those two incomes, her total earnings would enable her to cover the whole of the cost of R's school fees at School 2;
 - u) She would prefer that the children attend the same school as they are close.
16. Pursuant to an Order made by Sir Jonathan Cohen on 12 June 2024 when the mother was unrepresented and still relying on a child's objections defence to summary return, on 1 July Miss Callaghan of Cafcass had separate meetings with S and with R and prepared a report.
17. The report is less relevant now that a child's objections defence is not pursued but some aspects assist with an understanding of each child's perspective. Each of them expressed love for both parents, each spoke warmly about relatives in Romania, each had aspects of life in England and Romania that they liked, both were enjoying their current school and enjoying spending time with relatives in England. Neither made any negative comment about their father or generally about Romania. R said one reason why he likes living in England is because he has more toys here. In Miss Callaghan's assessment, his English was good and he was focussed throughout their conversation answering questions thoughtfully and maintaining eye contact. There was a suggestion that he prefers his school in England to his school in Romania and saw it as "better". However, when asked directly if there was anything he would be worried about if he went back to Romania he said, "No, nothing."

The Law

18. I have set out above the relevant parts of Art 12 and Art 13(b) of the 1980 Hague Convention. Counsel drew my attention to *Re IG (A Child) (Child Abduction:*

Habitual Residence: Article 13(b)) [2021] EWCA Civ 1123, [2022] 1 FCR 589 and Baker LJ ‘s summary of the relevant principles which I have taken into consideration.

19. I have also been taken to *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 where, at paragraph 8, it was explained that:

“The first object of the Convention is to deter either parent (or indeed anyone else) from taking the law into their own hands and pre-empting the result of any dispute between them about the future upbringing of their children. If an abduction does take place, the next object is to restore the children as soon as possible to their home country, so that any dispute can be determined there. The left-behind parent should not be put to the trouble and expense of coming to the requested state in order for factual disputes to be resolved there. The abducting parent should not gain an unfair advantage by having that dispute determined in the place to which she has come.”

20. At paragraph 84 of his judgment in *A (Children) (Abduction: Article 13(b))* [2021] EWCA Civ 939 at §84), Moylan LJ said:

*“It also hardly needs restating that, as set out in *Re E* at [52] and repeated in *re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257 at [6], the terms of Article 13(b) are "by their very nature restricted in their scope". It has a high threshold demonstrated by the use of the words "grave" and "intolerable".”*

21. He went on to address the correct approach to the defence at paragraphs 94 – 96. Paragraph 94 is particularly instructive in this case:

*“94. In the Guide to Good Practice, at [40], it is suggested that the court should first "consider whether the assertions are of such a nature and of sufficient detail and substance, that they could constitute a grave risk" before then determining, if they could, whether the grave risk exception is established by reference to all circumstances of the case. In analysing whether the allegations are of sufficient detail and substance, the judge will have to consider whether, to adopt what Black LJ said in *Re K*, "the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an Article 13(b) risk". In making this determination, and to explain what I meant in *Re C*, I would endorse what MacDonald J said in *Uhd v McKay (Abduction: Publicity)* [2019] 2 FLR 1159, at [70], namely that "the assumptions made by the court with respect to the maximum level of risk must be reasoned and reasonable assumptions" (my emphasis). If they are not "reasoned and reasonable", I would suggest that the court can confidently discount the possibility that they give rise to an Article 13(b) risk.”*

22. I note Macdonald J’s helpful summary of the applicable Art 13(b) principles in paragraph 67 of *Uhd v McKay*:

“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.”

23. Romania and the UK are signatories to the 1996 Hague Convention on the Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (“the 1996 Hague Convention”) as well as the 1980 Hague Convention. As the removal of R and S to the UK was wrongful, Art 7 of the 1996 Convention is engaged. The effect of its engagement in these proceedings is that Romania retains jurisdiction of all welfare matters concerning the children and the courts in England and Wales can take only such urgent measures as are necessary to protect them. Neither party suggests that urgent measures are required in these proceedings.

Analysis

24. Having read the bundle, the Skeleton Arguments and listened to submissions, I find that the mother has not made out the Art 13(b) exception. It follows that I must order the summary return of R and S to the jurisdiction of Romania.

25. Her case is that there is a grave risk that R will be exposed to psychological harm or otherwise placed in an intolerable situation should I order that he be returned to that jurisdiction. She does not suggest that there is any aspect of R's life in Romania that will or might expose him to that grave risk or situation of intolerability other than re-attendance at a Romanian state school. The father does not agree that R's attendance at a Romanian state school harmed him or was as negative as the mother asserts. He submits that she is attempting to leverage R's diagnosis with the aim of achieving in this jurisdiction the outcome she failed to obtain in the Romanian court in January 2024.
26. It is not for me, within this summary process, to make factual findings about how R experienced life at any school, or to determine whether the mother's evidence about her perception of the educational and psychological effect on him of attending Romanian state school is genuine or reliable. There is no internal inconsistency in the mother's evidence on that issue, or any other matter, that enables me confidently to discount the possibility that a return to Romanian state school gives rise to an Art 13(b) risk for R. My task then is to determine whether, if the mother's assertions about the effect on R of Romanian state school are true, there would be a grave risk of harm or a situation of intolerability for him if he were to return to Romania.
27. I accept that the evidence adduced by the mother gives rise to the possibility that from September 2023 to early February 2024 R was struggling to access the curriculum, disengaged from learning, opting out of doing the work he was set, falling behind, unhappy, and angry. I also accept that the same evidence gives rise to the possibility that if, on return to Romania, R would again be required to attend a Romanian state school, he might again experience that same negative psychological impact which could be described as psychological harm.
28. However, in my judgment R's experience of Romanian state school, as described by his mother and supported by the letter from his teacher at School 2, does not reach such a level of seriousness that it can be characterised as grave, nor could the description of his experience be characterised as a situation which he should not be expected to tolerate. It follows that I do not find that there is a grave risk that R's return to Romania would expose him to a grave risk of psychological harm or psychological harm that is grave, or otherwise place him in an intolerable situation.
29. In so determining, I take into account Miss Callaghan's question as to whether there was anything R would worry about if he were to return to Romania and his answer that there was not. I accept that that was an open question, not a narrow and directed one asking whether he would be worried about returning to the school he was attending when he left. That said, given what Miss Callaghan reports about his thoughtful engagement during their conversation, had he found attendance at that school so awful that he could not tolerate going back there, I think it likely that he would have told her that going back there was a worry for him.
30. If I am wrong and re-attendance at a Romanian state school would give rise to the possibility of grave harm or a situation that would be intolerable for R, there is an

additional reason for rejecting the Art 13b defence. I have to look to the future and at all of the relevant circumstances and consider the specific situation for R on return to Romania. There is, in my judgment, no prospect of him being required to re-attend Romanian state school on return. The mother has the means to pay for a place for him at School 2, or another Romanian private school. I was reminded that her ability to meet that cost herself depends on her working the two jobs I have described. However, I was not presented with any evidence to suggest that she was struggling to cope with the two jobs or that either of them was at risk. She is highly motivated to ensure that R avoids what she sees as the harmful effect on him of Romanian state school. I have no doubt that when R returns to Romania he will attend a private school for at least such time as it takes the Romanian courts to determine his best interests in relation to residence and education.

31. I am told that the Romanian school year starts on 15 September 2024. As the father notes, there is time for educational arrangements to be made and for the children to be prepared for their departure from England and return to Romania carefully and calmly. Very properly, he does not press for their immediate return but suggests that they should be back in Romania no later than the end of August. I agree.
32. The issue of protective measures does not arise for determination. However, I am asked to record that the father had offered to fund accommodation and support costs in the event that the mother lacked means which, she accepts, she does not. In addition, regardless of the fact that the Art 13(b) defence is not made out, the father offers:
 - a. To fund the costs of return flights to Romania for the children;
 - b. To fund the cost of his own travel to collect the children should the mother not return;
 - c. Not to support any criminal or civil action in Romania against the Respondent
in respect of the unlawful removal of the children;
 - d. Not to use or threaten violence against the Respondent, and not to intimidate,
harass or pester her, and not encourage a third party to do so.
33. I give permission for all of the documents in these proceedings to be made available to the relevant court in Romania. It would make sense for the mother's lawyers in Romania to lodge the translation of this judgment and the Order as they have conducted the mother's current application concerning the children's welfare but either party can and should do so. If an order cannot be agreed, I will convene a further hearing so that return arrangements can be made.