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Neutral Citation Number: [2024] EWHC 871 (Fam)

Case No: FD24P00700

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

17 April 2024

Before:

JOHN MCKENDRICK KC

(Sitting as a Deputy Judge of the High Court)

Between:

A FATHER

Applicant

- and -

A MOTHER

Respondent

Re N (A Child) (Ukraine: Art. 13 (b))

Ms Katy Chokowry (instructed by Williscroft & Co) appeared for the applicant

Mr Mani Basi (instructed by Russel Cooke) appeared for the respondent

Hearing Date: 10 April 2024

APPROVED JUDGMENT

This judgment was handed down remotely at 14:00 on 17.04.24 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

The Deputy Judge:

Introduction

1. By way of an application dated 8 February 2024 and made pursuant to the Child Abduction and Custody Act 1985 (incorporating, by Schedule 1, the 1980 Hague Convention on the Civil Aspects of International Child Abduction, hereafter the "Hague Convention") the applicant seeks the summary return of his son to Ukraine. I shall refer to his son, born in August 2012 and aged twelve years and eight months, as N. The respondent to the application is N's mother.
2. The applicant has been represented by Ms Katy Chokowry, counsel and the respondent by Mr Mani Basi, counsel. The case has been well prepared by the solicitor teams. The standard of the advocacy has been both expert and excellent; providing the court with considerable assistance in this difficult case.
3. At the hearing on 10 April 2024 I raised the need for any FPR PD 3AA measures and then heard submissions on the written evidence. The applicant attended the hearing remotely and the respondent in person. Both were assisted by interpreters. I reserved my decision. I became aware of a further attack on Ukraine on 11 April 2024 through open source material and invited further submissions on 12 April 2024, which I received on 12 and 15 April 2024.
4. The identity of the parties, N, the hometown in Ukraine and a certain civil facility are all anonymised for the purposes of seeking to protect the identity, and, as far as is possible, the location of the parties. The parties were provided a draft embargoed anonymised judgment with a confidential schedule and both parties submitted the judgment should be published in an anonymised form.

The Background

5. These proceedings concern three victims of the war of aggression against Ukraine: N and his parents. My focus is on N, who has lived through the turmoil of war. Whilst the war began in February 2014, N has been particularly impacted by the assault which began in February 2022. It is against this sad background that a decision must be made about whether N should remain in England with his mother or whether he should be returned to Ukraine to his father, to permit the courts of Ukraine to make substantive

welfare decisions about him. I shall refer to the applicant as the father and the respondent as the mother.

6. The parties and N are Ukrainian nationals. The parties married in September 2011. N was born in Ukraine. He has lived there save for a period from February 2022 to March 2023. Since December 2023, he has been with the mother in the north of England. In February 2022, upon Russia continuing its attack from eastern to central Ukraine, the parties decided that the mother and N should leave Ukraine and seek refuge elsewhere. The father, being of conscription age, was unable to leave. In February 2022, the mother and N travelled to a third country. In around July 2022, the mother and N travelled to England under the 'Homes for Ukraine scheme'. They lived with a host family in the north of England. In October 2022, the mother and N travelled to Ukraine to visit the father. They spent a week there. At some stage the mother formed a new relationship in England. The father states that the parties agreed that N would finish his academic year in England in July 2023, before returning to Ukraine to live. On 5 March 2023, the day before travelling to Ukraine to visit the father with N, the mother informed the father that she wanted a divorce. The mother informed N of her decision on that day. N was upset by the mother's decision and her new relationship. On 6 March 2023, the mother and N travelled to Ukraine. The mother chose to rent a flat nearby whilst N stayed with his father. On 2 April 2023, the mother returned to England. N studied for and sat an exam in June 2023 for admission to his local school. He was admitted to the school. He is proud of that.
7. On 28 June 2023, the mother initiated divorce proceedings in the X District Court. In August 2023, the mother returned to Ukraine and lived separately from the father and N. The father states that the mother spent time with N for much of this time. The mother sought the father's permission to travel to Poland with N for Christmas. She promised him that they would return to celebrate New Year together. The father was deceived into giving his consent to N leaving Ukraine on 21 December 2023. The father was unable to contact N from 21 December 2023. On 24 December 2023, N was able to message the father. His message is set out below.
8. On 6 February 2024, the ICACU instructed the father's solicitors to initiate these proceedings. The father's application in this court was issued on 8 February 2024. On

9 February 2024, the court made a passport order and the orders made were subsequently served on the mother on 15 February 2024. On 7 March 2024 the mother filed her Answer to the application relying on one issue only:

The Respondent states that if a return Order is made there is a grave risk that his return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

9. That is the issue the court is required to determine in these summary proceedings. I am not conducting a full welfare analysis of N's situation or in which country he should live in the long term.

Summary of the Legal Principles

Hague Convention Purpose

10. The objective of the Hague Convention is set out in the preamble:

"Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,"

11. Article 12 of the Hague Convention provides (emphasis added):

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

12. The HCCH 1980 Child Abduction Convention Guide to Good Practice ("the Good Practice Guide") makes clear the wider purpose of the Convention and the need for any court considering these issues to have firmly in mind the principles of international

comity between jurisdictions which underpin the Hague Convention. I remind myself of paragraphs 14, 15 and 16 of the Good Practice Guide (with emphasis added):

"The second underlying concept is that the wrongful removal or retention of a child is prejudicial to the child's welfare and that, save for the limited exceptions provided for in the Convention, it will be in the best interests of the child to return to the State of habitual residence.

The third underlying concept is that, as a rule, the courts of the child's State of habitual residence are best placed to determine the merits of a custody dispute (which typically involves a comprehensive "best interests" assessment) as, inter alia, they generally will have fuller and easier access to the information and evidence relevant to the making of such determinations. Therefore, the return of the wrongfully removed or retained child to his or her State of habitual residence not only restores the status quo ante, but it allows for the resolution of any issues related to the custody of, or access to, the child, including the possible relocation of the child to another State, by the court that is best placed to assess effectively the child's best interests. This third underlying concept is founded on international comity, which requires that the Contracting Parties

"[...] be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them – those of the child's habitual residence – are in principle best placed to decide upon questions of custody and access

The above-mentioned purpose of the Convention and underlying concepts define the narrow scope of the Convention, which deals exclusively with the prompt return of wrongfully removed or retained children to their State of habitual residence, subject only to the limited exceptions provided for by the Convention. In doing so, rights of custody existing in the State of habitual residence are respected in the other Contracting Parties. In dealing with the prompt return of children, the Convention does not deal with the merits of custody and access, which are reserved for the authorities of the State of habitual residence (see para. 15 above)."

13. Ms Chokowry also draws to my attention the analysis of the Hague Convention by Mostyn J in *B v B* [\[2014\] EWHC 1804](#) at paragraph 2 and 3 (with my emphasis added):

The Hague Convention of 1980 is arguably the most successful ever international treaty and it has over 90 subscribers to it, over half the countries in the world. The underlying and central foundation of the Convention is that, where a child has been unilaterally removed from the land of her habitual residence in breach of someone's rights of custody, then she should be swiftly returned to that country for the courts of that country to decide on her long-term future.

.....

The Convention does not order a child who has been removed in the circumstances I have described to live with anybody. The Convention does not provide that the parent who is left behind should, on the return of the child, have contact or access in any particular way. The Convention does not provide that, when an order for return to the child's homeland is made, the child should stay there indefinitely. All the Convention provides is that the child should be returned for the specific purpose and limited period to enable the court of her homeland to decide on her long-term future. That is all it decides.

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

14. The law in respect of the defence of grave risk of harm or intolerability pursuant to Article 13(b) was considered by the Supreme Court in *Re E (Children) (Abduction: Custody Appeal)* [\[2011\] UKSC 27](#); [\[2012\] 1 AC 144](#). The principles from the Supreme court have been considered on another of occasions by the Court of Appeal, see for example *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 \(Fam\)](#) MacDonald J helpfully summarised the relevant principles at paragraphs 29 and 30:

"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).

In *Re E*, the Supreme Court made clear that in examining whether the exception in Art 13(b) has been made out, the court is required to evaluate the evidence against the civil standard of proof, namely the ordinary balance of probabilities whilst being mindful of the limitations involved in the summary nature of the Convention process. Within the context of this tension between the need to evaluate the evidence against the civil standard of proof and the summary nature

of the proceedings, the Supreme Court further made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as grounding the defence under Art 13(b). Rather, the court should 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."

15. Ms Chokowry relied on the decision of Baker LJ (with the agreement of King and Lewis LJJ) in *Re IG (A Child) (Child Abduction: habitual residence: Article 13 (b))* [2021] EWCA 1123 and his Lordship's summary of the legal principles:

The relevant principles are, in summary, as follows.

- (1) The terms of Article 13(b) are by their very nature restricted in their scope. The defence has a high threshold, demonstrated by the use of the words "grave" and "intolerable".
- (2) The focus is on the child. The issue is the risk to the child in the event of his or her return.
- (3) The separation of the child from the abducting parent can establish the required grave risk.
- (4) When the allegations on which the abducting parent relies to establish grave risk are disputed, the court should first establish whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then establish how the child can be protected from the risk.
- (5) In assessing these matters, the court must be mindful of the limitations involved in the summary nature of the Hague process. It will rarely be appropriate to hear oral evidence of the allegations made under Article 13(b) and so neither the allegations nor their rebuttal are usually tested in cross-examination.
- (6) That does not mean, however, that no evaluative assessment of the allegations should be undertaken by the court. The court must examine in concrete terms the situation in which the child would be on return. In analysing whether the allegations are of sufficient detail and substance to give rise to the grave risk, the judge will

have to consider whether the evidence enables him or her confidently to discount the possibility that they do.

(7) If the judge concludes that the allegations would potentially establish the existence of an Article 13(b) risk, he or she must then carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to the risk.

(8) In many cases, sufficient protection will be afforded by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting State to protect him once he is there.

(9) In deciding what weight can be placed on undertakings, the court has to take into account the extent to which they are likely to be effective, both in terms of compliance and in terms of the consequences, including remedies for enforcement in the requesting State, in the absence of compliance.

(10) As has been made clear by the Practice Guidance on "Case Management and Mediation of International Child Abduction Proceedings" issued by the President of the Family Division on 13 March 2018, the question of specific protective measures must be addressed at the earliest opportunity, including by obtaining information as to the protective measures that are available, or could be put in place, to meet the alleged identified risks.

16. Mr Basi referred me to a case which dealt with the issue of adjourning a hearing for the purposes of gathering further evidence. He cited *Re GP (A Child) (Abduction): Consideration of Evidence* [2017] EWCA Civ 1677, [2018] 1 FLR 892.

17. Ms Chokowry reminded me of the proper approach the court should take to protective measures, as explained by Cobb J sitting in the Court of Appeal (with the agreement of Moylan and Lewis LJ) in *G v T* [2023] EWCA Civ 1415 at paragraphs 45 to 57. I quote one section although I have reminded myself of all the principles set out in this erudite summary. Paragraph 48 states *inter alia* (with my own emphasis in bold):

Protective measures are those measures which are designed to address the issues of grave risk or intolerability raised within the article 13(b) exception; they may take one of many forms. In this regard, the HCCH 2020 Good Practice Guide offers this view at [44] and [47]:

"Protective measures may be available and readily accessible in the State of habitual residence of the child or, in some cases, may need to be put in place in advance of the return of the child. In the latter case, specific protective measures should only be put in place where necessary strictly and directly to address the grave risk. **They are not to be imposed as a matter of course and should be of a time-limited nature that ends when the State of habitual residence of the child is able to determine what, if any, protective measures are appropriate for the child**" (HCCH 2020 Good Practice Guide at [44]).

Discretion

18. If one of the Article 13 exceptions is made out the court has a discretion whether or not to order the child's summary return. The leading case on the exercise of the discretion remains *In re M and Another (Children) (Abduction: Rights of Custody)* [\[2007\] UKHL 55](#); [\[2008\] 1 AC 1288](#). The headnote states:

That when exercising the discretion under the Convention there were general policy considerations, such as the swift return of abducted children, comity between contracting states and the deterrence of abduction, which might be weighed against the interests of the child in the individual case; that the Convention discretion was at large and the court was entitled to take into account the various aspects of the Convention policy alongside the circumstances which gave the court a discretion in the first place, and the wider considerations of the child's rights and welfare; that the weight to be given to the Convention considerations and to the interests of the child would vary enormously, as would the extent to which it would be appropriate to investigate such other welfare considerations; that it did not necessarily follow that the Convention objectives should always be given any more weight than any other consideration; and that the further away one got from the speedy return envisaged by the Convention the less weighty those general Convention objectives must be, since the major objective of the Convention could not be met.

That in cases where the child objected to being returned the range of considerations might be even wider than those under the other exceptions to ordering immediate return; that taking account of a child's views did not mean that those views would always be determinative or even presumptively so, but that was far from saying that a child's objections should only prevail in the most exceptional circumstances; and that the older the child was the greater the weight her objections were likely to carry.

19. If intolerability is made out, Lady Hale described it as being 'inconceivable' that the court would nonetheless exercise its discretion and return a child, see *Re M and Another*.

The Evidence

20. There is limited dispute between the mother and the father in respect of many of the core facts. This case requires to be determined on the basis of an evaluation of the future risk of harm to N. For that reason I can briefly summarise the evidence.

The Mother

21. The mother has filed two witness statements. In her first statement she sets out the background to her marriage and makes allegations of the controlling nature of the father. She states that in February 2022 when Russian attacks intensified the family were living in her apartment in X Town which was near the airport which was a Russian target and the block shook from nearby explosions. She, a friend, her friend's son and N, with the father's full agreement, took the decision to leave and eventually they came to the UK and settled in the north of England. She took the view it was safe enough to return to X Town for a one week visit in October 2022. N had been missing his father, his dog and his friends. She returned again with N in March 2023. She says this was for a visit of around a month. She rented an apartment for herself and N stayed with the father. From almost the outset N made clear he did not want to return. The mother says the father stated he had lost her and would not lose N too. The mother states she is worried what the father has said to N.

22. She states she could not remain in a 'warzone' and she returned to the north of England. She says she was blocked from having contact with N during this period. She says: "This was an incredibly difficult time. [The father] was acting in a very controlling and manipulative way, and he wasn't able to recognise the need for [N] to have a full and meaningful relationship with me. I feared for my relationship with my son." In August 2023 she returned to X Town and rented an apartment. She was frightened as she stated "she knew it was not safe". N stayed with her on Saturday nights, she wanted to have N with her more, but she says the father did not permit this. She visited Poland in October 2023 and states:

"An incident occurred during this trip which really made me worry about N and his emotional wellbeing. Somebody rang the doorbell of the apartment we were staying in. N suddenly became very frightened and distressed, and he begged me not to answer the door and not to make any sounds. This really shocked me and I asked N why he reacted like this. N told me that this is what he and his father do when someone comes to their door. N told me that [the father] is frightened that he will be called to fight in the war so he instructed N to essentially hide and stay quiet when someone comes to their home unexpectedly.

23. She returned from Poland to X Town, however she states she slept badly during this time because of air raid sirens and was woken repeatedly by explosions. She determined she would arrange another trip to Poland and from there she would return with N to England. She took N to Poland with the father's consent for Christmas, promising to be back for New Year. Instead she took N from Poland back to England. She states N's behaviour has changed in 2024, which she attributes to the proceedings. His behaviour has become difficult and she thinks the father is manipulating him. She states she will not return to Ukraine if N is returned and that it would be heart breaking to be separated from N, but she was "constantly tense and anxious" and was "living in constant fear and wasn't sleeping" in X Town.

24. She refers in her statement to the safety of X Town. She links two open source news articles of air strikes on X Town by the Russians which killed and injured people. The last was in November 2022. She exhibits a message from the mayor of X Town about

an attack in November. She quotes from the FCDO travel advice. She expresses her concern the father will be called up to fight. She sets out her concerns about N's psychological welfare of living in a war zone.

25. Her own evidence is: "During my return to [X Town] between August and December 2023 I was repeatedly being woken up by the sound of explosions. As I wasn't living with them, I would worry about whether [the father] and [N] would hear the sirens and whether they would be able to get to safety should anything happen. When there was a danger of drones, [the father and N] would hide in the toilet. When there was a danger of missile strikes, they would go to the basement of the apartment block, or to a bomb shelter in the centre of the city. No one should have to live this way."
26. She states that the father had been controlling. She states she was pushed out of N's life in 2023 and could not speak with him for two months. The father would not let N spend time with her as she wanted.
27. She filed a second witness statement in response to the Cafcass report which states *inter alia*: "It was incredibly difficult for me to read the report. It is heart breaking to read how [N] sees me at the moment. I know that [N] is angry with me, but he does not understand that everything I have done has been for him, to protect him. Before [the father] made this application for [N]'s return to Ukraine, N and I were close, but it seems that there was no mention of our happy times together during his discussion with Cafcass."
28. There is also evidence in the papers of the mother's new partner being violent towards her in front of N and a suggestion the relationship has ended.

The Father

29. The father has filed two witness statements. His first statement states he does not recognise the mother's description of their thirteen year marriage which he says was based on love, equality and respect. He says it only deteriorated in February 2023 when the mother began a relationship with someone else in England. He states they did not live near an airport and the house did not shake from explosions and there were no hostilities in X Town, although he notes on the second day of the Russian further

invasion they moved as a family to Western Ukraine. He exhibits an official certificate of the Council of X Town dated 5 March 2023 which states that since 1 January 2023 in the territory of X Town there has been no damage to civil sites or “residential buildings” “as a result of the emergency situation of a military nature...caused by an armed aggression of the Russian Federation..”

30. He agrees that the March 2023 visit was for the purposes of a trip and the plan was for N to finish his schooling at the end of the academic year in the north of England and then return to X Town. However, he states N made very clear he did not want to live with the mother and her new partner in England in a telephone call before he returned. He repeated this in tears in person in X Town. The father states that N wanted to enter a ‘technical lyceum’ where nearly all his friends attended school. There were three days of examinations for this in June 2023. N wanted to stay and study for these exams as he had fallen behind in school work. The father states the mother returned to England to further her new relationship not because X Town was then unsafe. He exhibits a message from her which tells him she is returning to England and that it is his time to care for N. She states she will come in the summer and whilst she offers to take N back to England she thinks he will be “able to handle it [looking after N].” There is no mention of the dangers of X Town of her wish to take N back to England because it is unsafe.

31. The father states N refused to speak with his mother because he was so angry she left him and his father to be with her new partner in England. A message N sent his mother is exhibited which, when translated, states: *“Do you know what you have done with me. I simply wanted to live, be excited with the family. And you don’t give a fuck. I have no sense to live any more, it’s kind of better for me to die. And you even don’t fucking care about me, why bitch to like that. Now, my Dad and I are freaking sad. We don’t have a family. Because you made such a life for us. And this is my last message to you, you made a hole in my heart.”* The mother then reiterates how much she loves N and states: *“I know that now you are happy as you are with friend and with your Dad who missed you very much. Have fun and enjoy life.”*

32. The father states that things between him, the mother and N were cordial. He taught her to drive and they did family things together and went to lunches and dinners with friends

in restaurants. He recalls the mother's concern about N being scared about people coming to the door, but views that as part of her plan to take N away. He says N spoke to him about this and he had no such concerns. The father states he is exempt from military service and a certificate to that effect is exhibited.

33. The father describes the abduction over Christmas 2023. He states that the mother lied to N and told him the hotel had cancelled his reservation and that she suggested they go to Liverpool to see the Liverpool versus Arsenal game. However when they landed in [north of England] she forced him back to the previous town and forbade N contacting his father. He exhibits the messages from N which N was eventually able to contact him. It appears N wrote that: "Yesterday, I cried out everything. I hit myself on the head 200 times, beat mum, shouted..." In another message he states he was "dragged forcibly" by "mum and devil". Devil is, I believe, a reference to the mother's new partner.
34. Exhibited to the father's witness statement is an email which is said be from the man the mother formed a relationship with. It is a cruel message. It ends: "*Now you have nothing and you will have nothing until the end of your short, sad and lonely life.*"
35. The father states that life has almost entirely returned to pre-war normality. He puts it at 95 % but notes there is a curfew from midnight until 5 am. He states that all government agencies, diplomatic missions, banks, school, higher education institutions, shops, shopping centres, café, restaurants, cinemas, theatres discos, sports tournaments are open in the region where X Town is situated. He states there are shelters at N's school and their home and they use and follow the safety rules. His evidence is there are no "serious risks" that would put N at risk of physical or mental harm.
36. His second witness statement sets out protective measures which are detailed below. I was also sent some videos and photographs of X Town taken by the father which purported to show the town was peaceful, ordered and quiet. That was certainly the impression I had when the recordings were made and the photographs taken, but I can only place very limited weight on this evidence to determine grave risk of harm as a snapshot cannot provide the wider context of risk.

37. The father's solicitor also filed a witness statement and exhibited the Ukrainian Central Authority's letter which led to these proceedings. The letter notes that X Town is not included in the Government list of territories where hostilities are taking place. It states: "all the conditions for safe living are currently in place. No military operations were and are not being conducted on the territory of [X Town] therefore there is no serious risk that the return will put the child at risk of physical or mental harm or otherwise create an intolerable situation for the child."
38. The father has issued proceedings before the Ukrainian courts seeking an order that his son be returned to reside in Ukraine. There will be a hearing in those proceedings on 26 May 2024. I have no translated papers from those proceedings and cannot be clear whether that hearing is a procedural or substantive one.

Cafcass

39. I have a most helpful report from Ms Demery dated 19 March 2024. She met with N alone at the RCJ on 8 March 2024 for approximately ninety minutes. She noted N is fluent in English but prefers to speak Ukrainian. To help him relax she asked him about his hobbies. He said he enjoys football and supports X Town's team. He did not want to play for the town in the north of England again. The report records:

"[N] said he wants to go home to [X Town] explaining that he spent three months in the summer there studying to obtain a place at the best school in the city and was successful. He did not go out to play with his friends because of his studies, and that many of his friends attend that school. He told me he lived with his father and only saw his mother at weekends because he was studying so hard. He described being so much happier living with his dad. He does not think his mum was in Ukraine the whole time, as she likes being in the United Kingdom, whereas he does not. He said he would be happier if his father, whom he misses, were in the UK, but he would still miss his friends, his football team and his dog, a Jack Russell called [Z]."

40. Ms Demery recounts that N was angry with his mother about the events in Poland in December 2023. Her report states: "he reiterated angrily, *"but she lied"*" In respect of

his father he states he “has always been closer to his father, whom he confided in whenever [he] had any worries. He said his father has said he can stay in the UK if he wants to, but he does not.” She said his mum is kind sometimes and tries to hug him but he does not want her to. Ms Demery records:

“I asked how he would feel if the judge said he had to return to Ukraine. His response was *“I would feel very, very happy. I would be sad if he said I had to stay in the United Kingdom.”*

41. The report contains a letter N wrote to the judge. It reiterates how hard N says he worked to get into his school in X Town. He tells me he joined a good school [in Ukraine] and his friends are there. He tells me he wants to go to Ukraine because he misses his dad, his friend and his dog. He tells me he misses home (Ukraine) and he does not want to live here (UK). She describes his wishes and feelings as:

“[N] is unequivocal in his wishes and feelings. It is his fervent wish to return to Ukraine. He misses his father, extended family, friends, dog, and his lifestyle there. He had only positive things to say about his life in Ukraine despite it being a war zone, and he appeared to dismiss the risk. [N] clearly feels responsible for his father whom he believes needs him, and this is likely to impact upon his wishes and feelings.”

42. Ms Demery thoughtfully analyses N’s age and maturity and tries to understand his anger. She notes he is struggling to appreciate his mother’s legitimate concerns. She concludes:

“Nevertheless, [N] impresses as an intelligent and articulate young boy whose range of vocabulary and ability to express himself verbally suggest that his cognitive maturity is commensurate with his chronological ages. In my view, that while [N] has reached an age and level of maturity when it is appropriate to attach significant weight to his views, this has to be balanced against the potential risk of harm given the war in Ukraine.”

43. Ms Demery notes a number of factors in her advice but does not opine on whether there should be a return order or not, noting N needs both parents.

Ukraine

44. Several recent cases have considered the issue of returning children from England to Ukraine. In *Q v R* [2022] EWHC 2961 (Fam) Williams J, in a 1980 Hague Convention case, was clear that it is not appropriate to treat the ongoing hostilities as automatically establishing a grave risk of harm to the child. Instead, the approach to be taken to the evaluation of grave risk is as follows, at paragraph 54:

It seems to me one has to avoid generalities, and in so far as is possible evaluate the particular risk to this particular child in a return to this particular area, rather than to apply a general or a broad brush; one must apply a rather more detailed and finer brush to this. Of course, if it were suggested that E were to return to Izyum or one of the other areas which has just been liberated, or which may soon be more directly in an area of active war, would plainly bring with it a grave risk of harm. However, when a return is to somewhere quite different, that requires a different consideration.”

45. In *Re Z (Children) (Article 13b: Return to Kyiv)* [2023] EWHC 602, Mr Dexter Dias KC, sitting as a Deputy High Court Judge, in the context of a 1980 Hague Convention case, adopted the reasoning of Williams J (above) and went on to find that it was common ground between the parties that the children would be at grave risk of harm in Kyiv. The father had sought permission to withdraw his application and the judgment was given in that context. Mr Dias KC made the following assessment of Kyiv in March 2023:

“There is, I judge, plainly a grave risk that the children would be exposed to physical harm if they returned to Kyiv. Ms Gray mentioned at the end of her oral submissions that there would likely be a risk of psychological harm if returning children to a city where there were regular missile strikes. I can entirely foresee this to be true when civilian buildings and infrastructures are being targeted by a hostile enemy. A moment's thought at what the living reality

of life in Kyiv might look like for the two children indicates that this submission has great force. However, I indicated that if this basis were being relied upon, or if it was the exclusive basis for resistance, then I would need further evidence. That, however, was unnecessary as I found that the physical harm element was unquestionably established by the mother on the uniform and consistent evidence.”

46. The father of these children then applied for the children to visit him in Ukraine. In *Re Z and X (Children) (Visit to Ukraine)* [2024] EWHC 314 (Fam) Cobb J assessed that application against the principles contained in the Children Act 1989. Cobb J concluded on the evidence that the risks in respect of Transcarpathia were as follows (paragraph 27):

“In light of all of that I have read and heard, I am prepared to accept that Transcarpathia is not intrinsically unsafe at present; as indicated above, the FCDO is not warning against all travel there, but against all "but essential" travel to this area. It seems unlikely that conflict will break out in the region now on the information before me, although it cannot of course be completely ruled out.”

47. Cobb J was clearly concerned however about the possibility of the father in this case taking the children to Kyiv because of the war related risk in the capital. Ultimately the application was refused largely based on the children’s wishes and feelings and the length of the journey for the purposes of a short visit and some practical issues.

Submissions

48. Mr Basi submits, N faces either a grave risk of harm or would face an intolerable situation because: (i) of being returned to a war zone with the risk of injury or death; (ii) he faces emotional or psychological harm because of the war and in particular because of fears his father might be conscripted into the army to fight; (iii) he would suffer because of the separation from his mother; and (iv) the father’s controlling and coercive behaviour of the mother would place N at risk of grave harm. Mr Basi accepted N was habitually resident in Ukraine in December 2023 and that the father was

exercising custody rights. He accepted the abduction was carried out using deceit. He submitted that if a return order was made the return should be stayed or deferred. He cited case law in support.

49. Ms Chokowry submitted the mother had failed to establish on the evidence that a return of N to his hometown in April 2024 would involve a grave risk of harm or would otherwise be intolerable. She invited me to make a return order forthwith and submitted there should be no stay or deferral of the return order. I raised the observation of the rules normally requiring a formal application for a stay and she agreed and submitted this would be the proper course in circumstances where it is not clear what form of hearing will take place in Ukraine on 26 May 2024. Ms Chokowry reminds me that: *“Ukraine is a signatory to the 1996 Hague Convention and these undertakings are therefore directly recognised and enforceable pursuant to the 1996 HC. In addition, the court is in a position to make protective orders considered urgent to regulate the situation on return until such time as the Ukrainian courts hear the matter: Art 11.”*

Analysis

50. This is a difficult decision. This court is not the best forum to determine the risks to N of retuning to Ukraine, whilst the Ukrainian courts determine his long term welfare. Whilst there are helpful cases on Ukraine and whilst there have been many authorities summarising the relevant principles, I remind myself of the core learning enunciated by Lady Hale in *re D supra* at paragraph 52 with my emphasis added:

"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".

.....

No-one intended that an instrument designed to secure the protection of children from the harmful effects of international child abduction should itself be turned into an instrument of harm.

Separation of N From His Mother

51. I deal with Mr Basi's sub-defence points (iii) and (iv) first. Although I make clear I am considering them holistically and together and I have not considered them in a siloed or linear fashion. I am not persuaded that N's separation from his mother would place him in an intolerable position or would otherwise involve a grave risk of harm. The Cafcass evidence is entirely clear he wishes to live with his father in Ukraine. He wants to go to the grammar school in X Town in respect of which he emphasis how hard he worked to pass the entrance test and observes himself the sacrifices he made in 2023 to pass this important test he had set himself. He misses his football team and he misses his dog. After returning to X Town in March 2023, he has been settled and happy and his main carer was his father. He was not living with his mother. Apart from a period of some weeks where he refused to speak with his mother, he had regular contact with her. I have no doubt I can and should place considerable weight on N's ascertainable wishes and feelings. He is an angry young man. He is directing much of his anger at his mother, but it seems very likely he is upset arising out of the circumstances in which a war of aggression has 'upended' his life and led to him having had to leave his country. In addition this young person has also had to deal, at a sensitive age, with his parents' separation and divorce. He may blame some of the latter on the former, I am not sure. It may take some time for N to work through his anguish and upset. This is largely all part of the consequences of the war being fought in Ukraine.

52. Furthermore, in the light of Ms Demery's evidence, whilst he might miss his mother, his identity as a Ukrainian who wants to study and live in Ukraine with his Ukrainian family and friends outweighs the risk of any psychological harm from being separated from his mother. There is a real danger that his hurt may grow or intensify if he remains in England, separated from his father and his Ukrainian identity and wider life.

53. Therefore as I consider the return of this particular child, N, in these particular circumstances, as summarised above, to Ukraine, I am not satisfied the respondent mother has proven on the evidence available to me that N would be place in an intolerable situation or face a grave risk of harm.

Coercive and Controlling Behaviour

54. In terms of the allegations of controlling behaviour, I need not determine the truth of them, but taking them at their highest and assuming them to be true and focusing on the

future risk to N in Ukraine, in my judgment, these can be managed by orders of the Ukrainian courts, any order I make in respect of contract pursuant to Article 11 and the protective measures offered by the father, which I accept and which would be placed in an order. The parents largely successfully co-parented N after it was clear they were separated and divorcing between March and December 2023. N lived with his father and for most of the period and had regular contact with his mother, when his anger towards her subsided. The father gave evidence they undertook activities as a family. The mother did not dispute this. The evidence does not establish that any controlling behaviours of the father would place N at grave risk of harm or would otherwise be intolerable for him.

55. Furthermore the following protective measure offered by the father would sufficiently protect N until such time as the Ukrainian courts can deal with matters:

- a. Not to attend the airport or any place of travel on the arrival of N and the mother when returning to Ukraine (if the respondent returns with him);
- b. Not to intimidate, harass or pester the mother;
- c. Not to attend at any place where the father knows the mother to be living without prior written agreement;
- d. In the event that the respondent returns with N, not to attempt to remove N from the mother's care, save for agreed contact.
- e. To pay for the travel of N and the mother to return to Ukraine;
- f. To provide accommodation in X Town for the mother and N on their return for the first month, should she require it.
- g. In the event that N is in my care, to facilitate contact as may be agreed between the mother and the father or ordered by the court in Ukraine.

56. In addition the father offers an undertaking not to assist in any prosecution of the mother for N's abduction. With some hesitation, I will accept that undertaking if N is returned.

57. I have also considered these issue (iii) and (iv) holistically and together and when I combine these factors the mother's defence is not made out. This is largely dictated by N's strong and consistently articulated wishes and feelings, his anger when his mother left in March 2023 and his anger when deceived and taken to England in December

2023. Furthermore he positively wants to be in Ukraine with father, his dog and his friends. The 1980 Convention should not become an instrument of harm to N.

Grave Risk of Physical Harm

58. The troubling issue for the court to resolve is the extent of risk to N of the on-going war in X Town. That, as I have set out, is a twofold risk: the risk of physical harm and the risk of emotional or psychological harm. Do either or both of these amount to a grave risk of harm to N or intolerability? It is helpful to consider first physical harm in X Town as that helps to set the context for the assessment of psychological harm. I adopt the approach of Williams J set out above and am considering return not to Ukraine as a whole but a return to X Town. Risk of physical harm must be considered, depending upon where N would reside, until such time as the Ukrainian courts make long term welfare decisions for him.

59. I asked the parties to tell me the population of X Town and I believe they agree it is around 30, 000 people. As far as I am aware seven civilians have died in X Town since February 2022. Fifty have been injured although I am not clear on the split of civilian to military injuries.

60. The factors which establish a risk of physical harm are:

- a. The UK's Foreign Commonwealth and Development Office advised against all travel to the part of Ukraine where X Town is situated. It states: *"There is an ongoing risk of harm to British nationals from Russian attacks across all of Ukraine, including from missiles and drones that hit unintended targets or from falling debris"*;
- b. A military unit was hit in X Town by a Russian missile in July 2022 and 15 people were injured.
- c. X Town was hit by a Russian missile in November 2022, which led to the deaths of 7 civilians and 35 injured. I read a link which showed pictures of destroyed buildings in X Town because of the attack on this date and which described a children's playground being badly damaged. The article suggest X Town was targeted because of certain civil facilities.

- d. X Town has a civil facility (hereafter the “C Facility”) which may be of interest to the Russian armed forces (I have deliberately not described it or named it);
- e. the father’s home is on the mother’s case two miles from the C Facility and on the father’s case it is four to five kilometres away;
- f. the information from the Mayor’s Office indicated that there are 67 shelters for civilians in X Town;
- g. the mother’s leave to remain in the UK has been extended until January 2025;
- h. X Town is close to the capital, Kyiv, but not part of its administrative region;
- i. the mother’s evidence of hostile attacks around X Town (albeit her contemporaneous reasons as set out in messages for leaving Ukraine in March 2023 set out different reasons);
- j. Open source BBC news report state that a major power plant 31 miles from Kyiv was destroyed by Russian armed forces targeting it with 80 missiles and drones on 11 April 2024.¹ I understand from the BBC report no person was killed or injured. The report states that Russia is deliberately targeting Ukrainian energy production sites.

61. The factors relied on by the father which demonstrate a lessened risk:

- a. N and the father lived in X Town from March to December 2023 without any incident of physical harm;
- b. According to the report of the Mayor’s Office of X Town there have been no incidents or attacks or any form of Russian aggression since January 2023;
- c. The official Ukrainian Government report exhibited to the father’s witness statement makes no reference to X Town being in an area of hostilities;

¹ I made clear to the parties at the hearing on 10 April 2024 that I would not conduct any internet based research myself but would only consider the open source and other written evidence provide by the parties. However, this news story came to my attention the day following the hearing and I sent counsel the link to it and sought their submissions on this news item and its relevance to the issues. I received short emailed further written submissions.

- d. The Ukrainian Central Authority in their letter of request in these proceedings states return to Ukraine is safe;
- e. The father's experience and evidence is that it is safe for his son and that when he was concerned about his safety he acted appropriately to agree to his son and wife travelling overseas and onwards to England in February 2022;
- f. The contemporaneous written evidence in text messages from the mother does not support her case she left in March 2023 because X Town was not safe.

62. The father's protective measure offered is: "to make arrangements for [N] to be removed to a place of safety in the event that the war situation in [X Town] escalates. Mr Basi on behalf of his client was sceptical about this.

63. In my judgement there are risks to N of residing, even for a short period until the Ukrainian courts resolve matters, in X Town. I am not able to go further than to say there is a low risk of very serious harm, including death. 103 homicides took place in Greater London in 2023 with its vast population. 7 people were killed by Russian aggression out of a population of 30,000 since February 2022 in X Town. It would be improper to assess risk by carrying out mathematical comparisons and that is not how I assess the risk to N. If N were returned to X Town, I do not know what the statistical risk of death or injury to him as a result of Russian aggression would be. I do not know how that compares with misadventure elsewhere, for example, in England. I am however, clear that X Town is close to Kyiv. Experienced judges assessing risks at different times for different children have been concerned about the risks in the Ukrainian capital. I am particularly concerned about C Facility and the extent to which it may become a target for a Russian missile or air strike. I accept the FCDO assessment of the risks from missiles and drones and falling debris. I also accept it is likely the Russian armed forces may target civilian infrastructure of importance to the Ukrainian war effort. Having considered the evidence as best I can, I conclude that returning N to X Town would place him at low risk of being a civilian casualty or fatality of a Russian air strike on X Town or one that poorly targets the C Facility. In my judgement this amounts to a grave risk of harm. As MacDonald J sets out, 'grave' applies to the risk, but there is a common sense read across to the harm envisaged by the Convention as

well. Whilst the risk is low, the seriousness of the harm is very grave. The court cannot allow N, a child, to return to those low risks. No child should be expected to tolerate a low risk of being put in harm's way by being maimed or killed by a stray missile or drone. It is no answer to this application to observe many Ukrainian children run that risk every day. I am focused on N, who is currently in England.

64. However, that does not determine the father's application. What has been influential in my analysis of risk is the 11 April 2024 air strike on the energy plant south of Kyiv. It has reinforced the risks of living near the C Facility in X Town. The father's evidence was not presented in the knowledge of this attack. His solicitor made the briefest of written submissions in a short timescale following the 11 April 2024 attack. The father needs to absorb that, and this judgment. He has given evidence he will give an undertaking to relocate if the war escalates near X Town. The court is being asked to return N to Ukraine for the purposes of permitting the Ukrainian courts to determine his long term welfare. As Williams J made clear the assessment of Article 13 (b) risk is specific to the area within Ukraine where the child is being returned.

65. In the light of this conclusion based on very recent open source material I do not have the father's evidence in respect of, or the mother's evidence in response to, N residing in another part of Ukraine and the circumstances which would include education, etc. The decision whether or not to adjourn determination of the return order application and make directions for further evidence on this narrow issue is a case management one applying the factors set out in the FPR overriding objective which includes having regard to N's welfare. Henderson LJ held in *GP* at paragraph 62:

“If the judge felt that he had insufficient information to answer these questions, he should in my view have adjourned the hearing so that more detailed evidence could be obtained, for example about the financial position of the mother and the practicalities of an application to commute the mother's sentence of imprisonment to community service. It is true that expedition is of the essence of procedure under the Hague Convention, but the need to achieve a just outcome is even more important.”

66. A just outcome for all the parties in this difficult case is essential. N continues to reside with his mother in England who has the benefit of legal aid. An adjournment has little prejudice to her, although I appreciate it prolongs the stressful proceedings.

Decision

67. I direct that the father has permission to file and serve a witness statement limited to 10 pages which provides him the opportunity to provide evidence of where N would reside, other than X Town, until the Ukrainian courts can consider his best interests. The mother will be directed to respond, should a witness statement be filed. If the father does not file and serve a witness statement or otherwise indicates he cannot or will not make alternative arrangements for N other than X Town, then his application will stand dismissed and the mother's Article 13 (b) defence will have been made out on the basis of grave risk of physical harm. For the avoidance of doubt, in such circumstances, I would decline to exercise my discretion to return N to Ukraine as it would be inconceivable to return him to X Town given the risks, notwithstanding his wishes and feelings and the harmful nature of his abduction. N's physical safety would take priority.

68. I invite the parties to agree a directions order to deal with the further evidence and the court's further determination of the issues, ideally on the papers. I have not dealt with the mother's further Article 13 (b) psychological harm defence, as it is necessary to consider this – with due regard to a holistic analysis, alongside the evidence that supports sub-issues (iii) and (iv) - when I understand the alternative residential and other arrangements which may be proposed by the father.

69. I end by asking the mother and father to reflect on what has been set out above (there will be a direction for translation of the judgment into Ukrainian forthwith). It is important for N to be heard and it may be a comfort to him to know that his parents are capable of compromise to make a decision together as his mum and dad which puts him first. N needs both his father and his mother in his life. It is not yet too late for them to agree something and for N to feel listened to. Compromise and agreement now may make re-building relationships within this divided family easier. As the course of the war remains uncertain, and may become yet more challenging, N will need the support

of both his parents and everything they can offer him, to offset the turmoil of war that has thrown his young life into chaos.

70. I thank all solicitors and counsel and ask that they draft an order to give effect to the decisions contained in this judgment.