Neutral Citation Number: [2022] EWFC 145.

Case No: FD22P00548

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

IN THE MATTER OF THE SENIOR COURTS ACT 1981

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 November 2022

Before:

MR DAVID LOCK QC
SITTING AS A DEPUTY HIGH COURT JUDGE

Between:

AB	**Applicant**
- and –	
CD	Respondent
	Respondent

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Mr. Paul Hepher (instructed by Passmores) for the Applicant
The Respondent in person

Hearing dates: 21, 22 and 23 November 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr David Lock KC:

1. This is an application by AB, ("**The Father**") for the summary return to Bulgaria of his daughter X, who was born on 15 February 2018 and is now aged 4 years 9 months. The application is brought under the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("**the Convention**") against the mother, CD ("**the Mother**"). Both Bulgaria and the United Kingdom are signatory states to the Convention, and the Convention is largely given domestic legal effect in the UK by the Child Abduction and Custody Act 1985 ("**the 1985 Act**").

2. Although X is not yet 5 years old, she has spent time living for extended periods in both Bulgaria and in the United Kingdom and has been the subject of numerous court applications in both the UK and in Bulgaria. I have no doubt that life would be far better for X if her parents had spent half as much time and money focusing on working together to provide for X's future as they have spent focusing on litigating about their parental rights. Neither parent has been wholly successful or wholly unsuccessful in the various pieces of litigation to date, but it seems to me that it must be in X's interests to bring this extensive litigation to a conclusion. It must therefore be in her interests to close off the option for the parents to continue to litigate about X's future in both the UK and Bulgaria. It must be better for one set of courts to be required to make child arrangement decisions. Mr Justice Cobb decided that the issues would be primarily decided by the Bulgarian courts in a judgment he gave on 6 November 2021. That was before the Mother took matters into her own hands by travelling with X to England in June 2022 and unilaterally changing her country of residence. I am clear that Mr Justice Cobb was correct and that the action of the Mother in bringing X to England in June 2022 should not change that position. I thus order that X shall return to Bulgaria so that the Bulgarian courts can make child arrangement decisions in relation to X.

3. The Applicant Father was born in Sofia, Bulgaria on 28th August 1983.. The Mother was born on 11 June 1984 in Plovdiv, Bulgaria. The Mother is living at a property in which the Mother and Father have property interests in London.

4. The Father and Mother met in the UK where he was studying for his PhD and the Mother was in the UK on an international Exchange Programme. The Father had come to live in England in about 2010 and the Mother had come to England in about 2014. Both were living in England prior to the events I set out below, but it is clear from the evidence that they both maintained strong links with Bulgaria, including with their parents (and hence X's grandparents) who all live in Bulgaria.

5. They married in September 2016 in Bulgaria. X was born on 15th February 2018 in the United Kingdom but, shortly after her birth, she travelled with her parents to Bulgaria. On 19 March 2018 X was given a Bulgarian birth certificate (in addition to her UK birth certificate). Her parents applied for her to have a Bulgarian passport and this was awarded to her. I understand that her parents have also applied for X to have a UK passport although the Mother says that this document has been "lost". At an earlier stage of these proceedings it was agreed that the parents' solicitors would write to the UKPA to seek a cancellation of that passport. It thus appears that the only passport X presently holds is her Bulgarian passport and this presently held by the Tipstaff.

6. There is no agreement between the Mother and the Father as to how much time X spent living in Bulgaria and how much time she spent living in the UK between her birth and December 2019. It is not necessary for me to make findings of fact about that dispute and I do not do so. But it is one of the few areas of common ground in this case that the Father has spent an extended period of time working for a London NHS Trust ("**the Trust**"). However, there came a time when he was permitted to undertake this work remotely from Bulgaria. It is unclear precisely when the Father returned to live in Bulgaria on a full time basis but, save for a period when he was effectively stuck in the UK because his passport was retained by the Tipstaff pursuant to orders made by this court, I accept that he has been primarily resident in Bulgaria since early 2020 and has been there on a full time basis for at least the last year. He says that he has now ceased working for the Trust but that is disputed by the Mother. It is not necessary for me to resolve that issue because, regardless as to who the Father is working for, I accept that he is now habitually resident in Bulgaria.

7. Two matters are reasonably clear from the evidence following X's birth. First, X developed a series of health problems and she has been under the close supervision of doctors throughout her short life. There is no criticism of the Mother's devotion to X or any concern about her management of X's health. However, the need for X to have regular access to medical services is part of the background of this case. I should also mention that, as part of the Bulgarian proceedings described below, the Bulgarian authorities have undertaken a positive parenting assessment of the Father. I accept that the Mother does not accept that conclusion.

8. Secondly, it appears that the relationship between the Mother and the Father deteriorated following X's birth. It is not necessary to make any definitive findings about the cause of the breakdown in the relationship between the parents and I do not do so. The factual position between the parties was summarised as follows by Mr Justice Cobb at paragraphs 8 and 9 in a judgment he gave in the wardship proceedings dated 6 November 2020:

> *"8. The marriage deteriorated during 2018 and 2019, with alleged domestic abuse on both sides, occasioning the involvement of the police at times. The parties effectively separated at the end of the year. On 18 December 2019, the father travelled to Bulgaria; it had originally been planned that the mother and [X] would travel with them, but they did not, and followed on 29 December 2019. Shortly before the mother travelled, she saw a social worker who reported:*
>
>> *"Referral from Health Visitor raising concern that [the mother] was experiencing on-going psychological and financial abuse from the father. MASH duty social worker explored the concerns with [the mother] who confirmed that she was experiencing emotional and financial abuse from the father as well as controlling behaviour. She denied that any further physical assault had occurred since the summer. [The mother] declined support from Safecore and also asked that the father not be contacted as she felt that this would put her at risk of further domestic abuse. [The mother] advised that the couple planned to visit Bulgaria the following week and <u>she and [X] were not planning on returning to the UK.</u> The duty social worker provided the relevant advice and alerted the Health visitor*

of the plans. The duty social worker observed that should [the mother] return to the UK then further support and intervention may need to be considered (underlining added).

9. The Mother's case now (contrary to the impression given to the social worker – see [8] above) is that this trip to Bulgaria was only ever intended to be a holiday, and she expected that she and the father would return to London together on 5 January 2020. Shortly before the due date for the return, it is agreed that the father revoked his authority for [X] to travel, and he filed this revocation with the Bulgarian border police. The mother believes that the father took this step in order to oblige the mother and [X] to remain in Bulgaria, and thereby strengthen his case that the Bulgarian courts should deal with the divorce proceedings which by then he intended to launch; she believes that he saw a financial advantage to himself in the Bulgarian courts dealing to base herself in Bulgaria; further, or alternatively, he felt that the mother was emotionally unstable and revoked his agreement for her to travel in order that the mother would engage with the court process in Bulgaria"

9. I have seen the documents which showed that the Father had exercised his rights under Bulgarian law to withdraw his consent to X travelling back to the UK. The Mother is deeply critical of that decision and claims that it was taken for malevolent reasons to force her to stay in Bulgaria and thus allow the Father to litigate about the future child arrangements in Bulgaria rather than in England. There is no satisfactory response from the Father on this point and that claim may be correct but I do not need to rule on the point. However, I accept the evidence from the Bulgarian lawyer who acts a legal expert in this case that, as a married father with parental rights, the Father was entitled to take that step. The Bulgarian lawyer explains (and I accept) that it would have been open to the Mother to apply to the courts in Bulgaria under paragraph 127a of the Bulgarian Family Code for the Court to override the Father's refusal to allow the Mother to travel to the UK with X. That is a step the Mother did not take and she has never explained why she did not make that application.

10. It is not necessary for the purposes of this judgment to describe the full extent of the litigation in both Bulgaria and England. Following the service on the Mother of the Father's travel ban, the Mother commenced divorce proceedings in England. Those

were issued on 29 January 2019 and later re-issued on 20 February 2020. On 4 February the Father issued divorce proceedings in the Varna Regional Court in Bulgaria. I note that, at this time the Mother issued divorce proceedings in the UK even though she was living with X in Bulgaria and the Father issued divorce proceedings in Bulgaria although, at this time, he was living in England. On 16 February 2020 the Mother attempted to leave Bulgaria with X but was prevented from doing so because of the restrictions that the Father had put in place.

11. The Mother responded to the decision of the authorities in Bulgaria to prevent X travelling by commencing wardship proceedings in London. Her application came before Mrs Justice Judd who, based on the information available to her on an *ex parte* basis, made provisional orders to make X a ward of court and to require the Father to execute documents in Bulgaria to permit the Mother to bring X back to the UK. The Judge also made a passport order to require the Father to surrender his passport. The Father was represented when the wardship proceedings came back before the Court on 27 March and directions were made.

12. The wardship proceedings took a convoluted course for a variety of reasons which are not germane to this application. The Father's passport was eventually returned to him as a result of decision made by Mr Justice Cobb on 6 November 2020. I read that judgment as being critical of the way in which the application for a passport order was made by the Mother, namely as part of an attempt by the Mother to put pressure on the Father to agree to X being able to leave Bulgaria with the Mother. Cobb J decided that this application had been made for an improper purpose and discharged that part of the order. However, at that stage, Cobb J was persuaded that he should continue an order that the Father execute the necessary documents in Bulgaria to enable X to travel to the UK with her Mother. The Judge however reversed his position on that part of the case in a subsequent decision and the final position, which was eventually reached after a series of hearings and two extensive judgments from Mr Justice Cobb, was that the proceedings were effectively stayed by consent until the Bulgarian Court had reached a decision about X's place of habitual residence. The Judge noted at paragraph 14(i) of his judgment of 16 August 2021 that:

"The Bulgarian Court is well-placed to consider the issue, and all the judgments and orders filed from the Bulgarian proceedings confirm to my mind that it has taken its responsibilities in this case extremely conscientiously and approached the case just as this court would have done"

13. The reason that the Bulgarian Court was seized of the issue of X's place of habitual residence was because on 15 January 2021, the Mother exercised her right under Article 29 of the Convention to apply to the Court in Bulgaria for the summary return of X from Bulgaria to the United Kingdom. Her argument, as I understand matters, was that X had been habitually resident in the UK prior to what she alleges was a temporary visit to Bulgaria in December 2019 and that the Father had wrongfully forced X to remain in Bulgaria by purporting to exercise his parental rights to prevent X leaving Bulgaria. That application was dismissed on 22 January 2021, on the basis that X was not "unlawfully" retained in Bulgaria. As I understand the court's reasoning, the application was dismissed because court considered that the Father was acting within his legal rights under Bulgarian law to prevent X leaving Bulgaria and thus the child was not "wrongfully" retained in Bulgaria. The court appears to have decided that there was no wrongful retention of X by the Father in Bulgaria but that the Mother's proper remedy under Bulgarian law was an application under paragraph 127a of the Family Code for the court to override the Father's lack of consent. It followed that there was no wrongful retention of X in Bulgaria for the purposes of the 1980 Hague Convention. The Mother successfully appealed the decision of the Bulgarian court to reject her Hague Convention application and a re-hearing of her Hague Convention application began on 14 June 2021 but was adjourned part-heard. A resumed hearing on 12 July was ineffective, and the case was again adjourned part-heard to 27 September 2021. However, that hearing did not conclude the matter and the Mother has not substantively engaged with those proceedings at any point since her successful appeal. Accordingly, those proceedings have not yet concluded substantially because of the Mother's lack of engagement.

14. I should mention that there have also been two sets of non-molestation proceedings in the English courts, one brought by the Mother and the other brought by the Father.

15. Meanwhile, X continued to live in Bulgaria. I have relatively little detail about Bulgaria's day to day life in Bulgaria except that I note she was living in Bulgaria with a combination of her Mother and her maternal grandparents continuously from December 2019 until June 2022, a period of two and a half years. The evidence suggests that the Mother left Bulgaria on 5 June 2022 by crossing the Ruse Danube Bridge into Romania with her parents (who subsequently returned to Bulgaria). It appears that she was able to do this because the border guards did not give effect to the travel ban which continued to apply to X. From Romania, the Mother and X travelled to London.

16. These proceedings were commenced soon afterwards in which the Father is seeking a summary return order to return X to Bulgaria. As part of the Mother's defence to this application she has suggested that the Father was not exercising his rights of custody at the time of the child's removal from Bulgaria. I have no hesitation in rejecting that submission. The Father was prevented from seeing his daughter by the actions of the Mother, not as a result of a decision he made not to exercise his parental rights. He was actively seeking orders from the Court in Bulgaria in an attempt to become involved in X's life again. I do not consider that the Mother is entitled to take advantage of her own actions in preventing the Father seeing the child as a basis for suggesting that the Father's lack of engagement with X means that he was not exercising his rights of custody.

17. The second issue I have to decide is whether X's removal from Bulgaria on 5 June was wrongful for the purposes of the Convention. A removal is wrongful in Convention terms if the removal was "*in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention*". I accept the evidence of the jointly instructed expert on Bulgarian law that removing X from Bulgaria without the Father's consent was a breach of the Father's rights under Bulgarian law. Following the circulation of a draft of this judgment the Mother has repeatedly asserted that she did not break the law in Bulgaria by taking X out of the country in June 2022. She has asked me to reconsider this point and I have done so. However, having carefully reconsidered the evidence, I cannot accept the Mother's case that she was acting lawfully under Bulgarian law in taking X out of the country

when the Father was objecting to X leaving Bulgaria. I have reached that view for two reasons. First, during the hearing the Mother challenged the opinions of the Bulgarian lawyer but there is no other evidence to suggest that the law in Bulgaria is otherwise than as stated by the legal expert. Secondly, I note that the authorities in Bulgaria stopped the Mother from leaving the country with X when she tried to do so, based on the Father's objections to the child leaving the country. If the Mother was within her legal rights under Bulgarian law in travelling with X to London, I would have expected her to have challenged the "unlawful" attempts by the authorities in Bulgaria to prevent X leaving. However, the Mother did not apply to the Bulgarian court for an order that she was entitled to leave Bulgaria with X notwithstanding the Father's objections. Instead, the Mother sought orders from the Courts in London in wardship proceedings to secure an order from the Court in London to require the Father to remove his objections in Bulgaria to X travelling. Those applications only made sense if it is assumed that the Mother could not lawfully remove X from Bulgaria whilst the Father was maintaining his objections. Thus, I conclude that, assuming X was habitually resident in Bulgaria on 5 June 2022, the Mother's removal of X on 5 June 2022 by taking X to Romania (and then on to England) was a wrongful removal for the purposes of the Convention.

18. That leads to the third issue, namely where was X habitually resident on 5 June 2022 because, even if the Mother's act in removing X from Bulgaria was unlawful under Bulgarian law, it will not have been a wrongful removal for the purposes of the Convention unless X was habitually resident in Bulgaria at the time that the Mother caused X to cross the border out of Bulgaria.

19. The evidence shows that X was physically present in Bulgaria from December 2019 until June 2022. X was only being cared for by the Mother but there is a dearth of detailed information about X's life in Bulgaria over this period. The Mother says:

> *"I had to keep moving her from one place to another: from my brother's flat to my parents' house, from their house to my grandmother's flat and then back to my parents' house. X never settled. I was still living and working in England and I never started work in Bulgaria. I was expecting the courts to resolve the matter; however, as she needed me and had a separation anxiety, I was spending significant time in*

Bulgaria to care for her. She never attended nursery or school in Bulgaria, but was educated by me, mostly in English by the books that I brought her. My parents did the best they could to take her to parks and care for her whenever I returned to the UK, but they live in a small village and so had to travel to the city so she could play in different places"

20. The Mother later said:

> *"While X was retained there X had to change a few places to live in, moving between my brother's flat … and my parents' house in a village, moving for a short period to my grandmother's flat and then moving to my parents' house in … again. X never settled and in fact she was expecting to return home in the UK"*

21. The Mother also explains the reasons why X did not attend nursery in Bulgaria as follows:

> *"She always wanted to be with me, she was at first quite young to go to a nursery, besides there was the pandemic with significant disruptions in the work of nurseries"*

22. Thus, instead of spending time in nursery, X appears to have spend extensive amounts of time with her wider maternal family in X, particularly when her Mother was absent because of her need to be in London.

23. This evidence is very general and does not provide any real detail about X's day to day life in Bulgaria. However, it shows that X was spending a significant amount of time with her Mother, grandparents and with members of her extended family on her Mother's side. It is also not clear how much of the time X spent being cared for by her Mother and how much of this time the Mother spent in the UK both pursuing litigation here and being in the UK in connection with her work. However, it appears clear that there were periods during the period from December 2019 until June 2022 when the Mother had left X in the care of her parents or other members of her family whilst she spent time in the UK. The Father has been denied any form direct contact with his daughter since February 2020 and so all of the caring duties in relation to X have been discharged by the Mother and her parents. The Father has applied to the

court in Bulgaria to allow him contact (amongst other matters) but that application has not progressed substantially because of the Mother's Hague Convention application. However, there is due to be a hearing on 5 December 2022 in the Bulgarian court to determine interim contact and possibly residence. The Mother informs me that she has made an application for permission for X to come to live with her in the UK and that that matter will also be decided on 5 December 2022.

24. It is the Mother's case that X was habitually resident in the UK prior to December 2019 and that, despite living in Bulgaria with her Mother and, at times, with her grandparents for a continuous period of two and a half years up to June 2022, X never acquired a habitual residence in Bulgaria. I consider that this submission is entirely without merit and I reject it.

25. The law on the habitual residence of a child for the purposes of the Convention (and for other purposes) has been examined by the Court of Appeal on countless occasions and by the Supreme Court on at least 5 occasions. Habitual residence is a matter of fact, not a matter of law. I accept that the Mother did not want to be in Bulgaria after January 2020 but, for reasons that are unexplained, she failed to make an application to the courts in Bulgaria for permission from the court to enable her to "return" (as she would see it) to live with X in London. Instead, she made a novel application under the Hague Convention which remains undecided in the Bulgarian courts. Meanwhile, X continued to live on a day to day basis in Bulgaria as part of what appears to be her extended family.

26. The approach I am required to take was set out by Moylan LJ in *In re M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] 4 WLR 137 at paragraph 45 as follows:

> *"It has been established for some time that the correct approach to the issue of habitual residence is the same as that adopted by the Court of Justice of the European Union ("CJEU"). Accordingly, in A v A [2014] AC 1, at para 48, Lady Hale DPSC quoted from the operative part of the CJEU's judgment in Proceedings brought by A (Case C-523/07) EU:C:2009:225; [2010] Fam 42 at p 69:*

"2. The concept of 'habitual residence' under article 8(1) of Council Regulation (EC) No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case."

27. Moylan LJ made the following further observations at paragraph 48 and 49:

"48. What is meant by "some degree" of integration? As Lord Wilson JSC said in In re B [2016] AC 606 , at para 39, there does not have to be "full integration in the environment of the new state … only a degree of it". He also said: "It is clear that in certain circumstances the requisite degree of integration can occur quickly". In In re LC , Lady Hale DPSC, at para 60, referred to the "essential question" as being "whether the child has achieved a sufficient degree of integration into a social and family environment in the country in question for his or her residence there to be termed 'habitual'.

49. As referred to above, another relevant factor when analysing the nature and quality of the residence is its "stability". This can be seen from In re R [2016] AC 76 in which Lord Reed JSC referred to both the degree of integration and the stability of the residence. In that case the mother (who was Scottish) and the children, with the father's agreement, had moved from their home in France (the father was French) to live in Scotland for a year. The issue was whether, having arrived in Scotland in July 2013, the children were habitually resident in France or Scotland in November 2013. At first instance they were found still to be habitually resident in France. On appeal, this decision was overturned and they were found to be habitually resident in Scotland.

50. As explained by Lord Reed JSC, at para 9, an Extra Division of the Inner House of the Court of Session had overturned the lower court's determination because the judge had treated "a shared parental intention to move permanently to Scotland as an essential element" when considering whether the children were habitually resident in Scotland. This decision was upheld by the Supreme Court because, applying A v A , it was "the stability of the residence that is important, not whether it is of a permanent character", at para 16. There was "no requirement that the child should have been resident in the country in question for a particular period of time" nor was there any requirement "that there should be an intention on the part of one or both parents to reside there permanently or indefinitely"".

28. By June 2022, X had lived for more than half of her life in Bulgaria. She was constantly living in Bulgaria in the period between December 2019 and June 2022 and was part of an extended family there. Although I note the observations that the Mother has made about seeking to persuade her to learn English and to stay in touch with English culture, I have to assess her habitual residence from the child's perspective. Hayden J explained in *In re B (Custody Rights: Habitual Residence)* [2016] 4 WLR 156 that "*It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent*". Further Hayden J said:

"Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely"

29. X was living as part of an extended family in Bulgaria, and it seems to me abundantly clear that, by June 2022, X had become habitually resident in Bulgaria and had been habitually resident in that country for a considerable period of time. Although there is an absence of reliable evidence about her day to day living arrangements, it is clear

from documents that the Father has obtained that, for example, X was seeing doctors on a regular basis in Bulgaria. It is unclear where X was living and the Mother's evidence on this is wholly unsatisfactory because there is evidence that the Bulgarian Social Services made repeated attempts to contact the Mother at her registered address in order to make progress on a welfare report in connection with the Bulgarian proceedings. All those attempts were unsuccessful and the evidence suggests that the Mother did not engage to any meaningful extent with the Bulgarian Social Services at any point. Whilst I accept that there is an absence of evidence about X's life in Bulgaria, I cannot accept that a child who lives in a country with relatives for a period of two and a half years has not achieved a degree of settlement. In my judgment, notwithstanding the lack of precise evidence, the only sensible conclusion is that X was living a sufficiently settled life in Bulgaria with her Mother and grand-parents so that she acquired habitual residence in Bulgaria.

30. The Mother has urged me not to make any findings that will prejudice her Hague Convention case before the Court in Bulgaria. I cannot do that because I cannot allow the potential consequences for the positions that the parties have taken in other litigation to prevent me to reaching conclusions on factual and legal issues which I have to decide to determine this case. In this case the Mother has positively advanced a case that X was not habitually resident in Bulgaria at any time up to June 2022. Hence, to decide this case, it is necessary for me to rule on that issue. For the reasons stated above, I find, as a fact, that, for the purposes of the law of England and Wales, X acquired habitual residence in Bulgaria by, at latest, June 2022 and probably a long time before that. It is not necessary for me to decide whether that finding binds the courts in Bulgaria about where X was habitually resident at any time for the purposes of Bulgarian law and I do not do so. Equally, I do not need to decide precisely when X acquired habitual residence prior to June 2022 and I shall not do so.

31. Given that I have found that the Mother wrongfully removed X from Bulgaria for the purposes of Article 3 of the Convention, I have a duty to make a return order under article 12 of the Convention unless the Mother is able to establish that she comes within an exception set out in the Convention. The only exception relied upon by the Mother is under Article 13(b) which provides:

""Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

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."

32. I have rejected the Mother's case that the father was "*not actually exercising the custody rights at the time of removal or retention".* He was prevented from having contact his daughter by decisions taken by the Mother and was seeking to have that situation changed by the courts in Bulgaria. The Mother cannot, in my judgment, rely on her own actions in excluding the Father from the child's life to found a case that the Father was not exercising custody rights, particularly where those actions were being challenged by the Father.

33. The Mother advances a case under Article 13(b) that a return to Bulgaria would present a "*grave risk that … her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation".* During the hearing I pressed the Mother, who appeared in person on the first day of the hearing, on the issue as to whether she had made a decision what she would do if I made a return order. She told me that she could not return to Bulgaria but equally would never allow a situation where she was separated from her daughter. Those are, of course, potential contradictory positions. Her final position was, as I understand matters, that she had not made a decision what she would do if I made a return order and, if that happened, she would "seek legal advice". My sense from her answers is that she would do everything she could to resist travelling back to Bulgaria but would probably choose to do so rather than being separated from her daughter. In that situation it appears to me that no case is being made under article 13(b) that a return would be intolerable for X because it would lead to her being separated from her primary carer.

34. The obvious problem for the Mother in running an article 13(b) case is that, prior to June 2022, she lived with X in Bulgaria for two and a half years and that this stay in Bulgaria does not appear to have resulted in any significant residual problems for X. On the contrary, the Mothers evidence is that X is developing as a happy, sociable child who is able to make friends and develop relationships with both adults and other children. It seems to me that, if the situation in Bulgaria prior to June 2022 was "intolerable" for X, it is highly unlikely that she would have developed as a happy, sociable child.

35. The Mother's complaints about the threats to her in Bulgaria are all cast in very general terms and none of them engage with the problem that none of these threats materialised during the recent period of her stay in Bulgaria, albeit she was only staying in Bulgaria at this time because of the actions of the Father in refusing his consent for X to leave the country. The Mother has not engaged with the fact that she obtained the equivalent of a non-molestation order against the Father in Bulgaria (which he actively opposed and where the courts ruled against him) and there is no evidence that the Father has acted in breach of that order.

36. There is extensive jurisprudence on the approach to be taken where an article 13(b) defence is raised. This has recently been summarised by Mr Justice Macdonald in *MB v TB* [2019] EWHC 1019 (Fam). The Judge said at paragraph 31:

> *"The applicable principles may be summarised as follows:*
>
> > *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 the court will look very critically at such an assertion and will, among other things, ask if it can be dispelled. However, in principle, such anxieties can found the defence under Art 13(b).

32. The Supreme Court 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 ground the defence under Art 13(b) . Rather, the court should assume the risk of harm at its highest on the evidence available to the court and then, if that risk meets the test in Art 13(b) , go on to consider whether protective measures sufficient to mitigate harm are identified. It follows that if, having considered the risk of harm at its highest on the available evidence, the court considers that it does not meet the imperatives of Art 13(b) , the court is not obliged to go on to consider the question of protective measures.

37. The nature of the Mother's concerns is set out in her recent witness statement. She says:

> *"I cannot live in Bulgaria, I feel threatened there not only by the father but also by his connections, who are dangerous and powerful people. He has surrounded himself with people of great influence, such as politicians, and I am worried about what they can do against me and X if he so instigates. I have no work or home in Bulgaria and X needs me as her mother and primary carer, not my family in Bulgaria"*

38. In my judgment, having carefully considered all of the evidence, I consider that there is no reliable evidence to support the concerns that X would find life in Bulgaria intolerable or otherwise, as a matter of fact, to bring the case within article 13(b). Notwithstanding any lack of objective evidential foundation, MacDonald J explains at paragraph 31(vi) of the above judgment that the fears of a returning parent may be real despite the lack of an objective foundation. However, the article 13(b) defence is about the intolerability of the return for the child, not the fears of a return for a returning parent. I accept that the fears of the parent can, in some circumstances, make life intolerable for the child but this is not one of those cases. In my judgment, if I order a return (and the Mother returns with X as appears most likely), the Mother will be returning to largely identical domestic circumstances to the domestic circumstances she left on 5 June 2022. The Mother is protected by a non-molestation injunction which has not been breached. I therefore do not accept that any fears that the Mother has about the Father's actions will undermine her ability to be an effective and loving parent for X. If there was to be any doubt about that, the Father has offered a series of undertakings to meet her concerns.

39. The Mother has also accused the Father of attempting to have her arrested due to the decision taken by the Mother to flee Bulgaria with X. I accept the evidence of the Bulgarian legal expert that, even though travelling out of Bulgaria with X was a breach of the Father's civil rights as a parent, the Mother will have committed no criminal offence in so doing. I thus reject the Mother's case that X will face an intolerable situation because her Mother may be arrested for having taken her to the UK. Whilst I accept that the Father may have made a criminal complaint about her conduct, the Father has agreed to withdraw that complaint and, in any event, the material events do

not amount to an offence under the criminal law in Bulgaria. However, I do not accept that it would be intolerable for X if her Mother had to spend time answering police complaints because, if that happened, X would be returning to her maternal family and is entirely familiar with a situation where she is looked after by members of her maternal family whilst her mother is away engaged in other matters.

40. The Mother also complains about hostility between her extended family and the Father's extended family and the fact that the paternal grandparents have made an application for contact with X. I fully accept that there may have been incidents in the past between members of the families, but I do not accept that the evidence advanced by the Mother, even assuming it is all true, comes anywhere near to crossing the high threshold needed to establish an article 13(b) defence. The fact that the paternal grandparents have made an application to the court in Bulgaria for contact with X (which has not yet been adjudicated upon) cannot possibly bring the case within article 13(b). I therefore reject this case because, having carefully considered all of the points made by the Mother in her evidence, I do not consider that a case under Article 13(b) has been established. However, if I were to be wrong in that, in my judgment is entirely met by the protective measures that the Father has offered and thus, even if such a defence were to be raised on the facts (which it is not), given the protective measures I would not have exercised my discretion to refrain from ordering X's return.

41. Finally, the Mother submits that her human rights and those of her child will be violated if I make a return order. Article 20 of the Convention provides:

> *"The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."*

42. Article 20 of the Convention was not originally part of the Convention which was incorporated into UK law by the 1985 Act because that provision is not included in Schedule 1 to the 1985 Act. However, as Lady Hale explained in *Re M (Children) (Abduction: Rights of Custody)* [2008] UKHL 55 at paragraph 65:

"Article 20 is not incorporated into the Child Abduction and Custody Act 1985. At that stage, there was no human rights instrument incorporated into United Kingdom domestic law. The Human Rights Act 1998 has now given the rights set out in the European Convention legal effect in this country. By virtue of section 6 of the 1998 Act, it is unlawful for the court, as a public authority, to act in a way which is incompatible with a person's Convention rights. In this way, the court is bound to give effect to the Convention rights in Hague Convention cases just as in any other. Article 20 has been given domestic effect by a different route"

43. I therefore reject the Father's submissions that it is not open to the Mother to advance a case that a return order would breach her or her daughter's human rights. The court is a public authority for the purposes of section 6 of the Human Rights Act 1998 and, in making every decision, the court has to proceed on the basis that the human rights of those who are before it and potentially others are engaged by decisions that the court makes. Section 6 prohibits any public authority from acting in breach of ECHR rights. It follows that there is a legal constraint on the scope of decision making open to the court in that no decisions should be made which amount to a breach of the human rights of any person who is affected by any decision that the court makes.

44. The primary right on which the Mother seeks to rely is article 8, namely the right to respect for her home and personal life. I accept that the article 8 rights of the Mother and X are engaged by any decision made in this case. I also accept that the Father's article 8 rights are engaged. The balance between those rights gives the court a wide margin for discretionary decision making as the Council of Europe guide to Article 8 explains. It provides:

"324. Regard for family unity and for family reunification in the event of separation are inherent considerations in the right to respect for family life under Article 8 (Strand Lobben and Others v. Norway [GC], § 204; see also Abdi Ibrahim v. Norway [GC], § 145). The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life within the meaning of Article 8 of the Convention (even if the relationship between the parents has broken down), and domestic

measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention (Monory v. Romania and Hungary, § 70; Zorica Jovanović v. Serbia, § 68; Kutzner v. Germany, § 58; Elsholz v. Germany [GC], § 43; K. and T. v. Finland [GC], § 151). The parent's conduct can be a factor taken into consideration by the Court (Katsikeros v. Greece, § 57, a case where the Court found the reasons given by the domestic courts, in relation to contact arrangements, to be relevant and sufficient, §§ 56-63).

325. The Court has found that an applicant's secret and extrajudicial abduction and arbitrary detention resulted in the deprivation of mutual enjoyment between family members and was therefore a violation of Article 8 (El-Masri v. the former Yugoslav Republic of Macedonia [GC], §§ 248-250). The Court has also found a violation of Article 8 where the applicant was kept in isolation for more than a year, separated from his family, who did not have any information on his situation (Nasr and Ghali v. Italy, § 305)"

45. The primary issue I have to decide is whether to make a return order so that child arrangements should be determined by a court in Bulgaria or by the courts in England. The Mother's case is, in effect, that the approach mandated by the Hague Convention to resolution of the competing rights of parents are in breach of article 8 ECHR. No authority is cited for that proposition, and I reject it. It seems to me that the Convention contains a carefully measured set of balancing features which allows a court to give full effect to the rights of both parents in making this decision. The rights of the Mother do not take automatic precedence over the rights of the Father. She acted unlawfully under Bulgarian law in taking X out of Bulgaria and has failed in her attempt to establish that she comes within any of the narrow exceptions under the Convention which can justify a refusal by this court to correct that legal wrong. I also consider that the Mother has not made out a case that a return order would breach her article 3 rights or those of her child because, if the Mother has not established a breach of her article 8 rights, it must follow that there is no breach of her rights under article 3.

46. I therefore find in favour of the Father and will make a forthwith return order so as to allow the court in Bulgaria to consider child arrangements on 5 December 2022.

47. The Mother has sought permission to appeal this decision to the Court of Appeal and has send various emails to the court setting out why she considers the decision is unlawful. Whilst I accept that it is difficult for a litigant in person to identify points of law, none of these emails appear to me to raise any point of law which has any realistic chance of success. I therefore refuse permission to appeal. I also make it clear that the order I have made for the child's return takes effect as of the date of the order and that, unless a stay of that order is granted by the Court of Appeal, it continues to have effect notwithstanding any application that the Mother may make for permission to appeal.