

IN THE HIGH COURT FAMILY DIVISION

[2019] EWHC 479 (Fam)

FD19P00014

Before:

HER HONOUR JUDGE HILLIER
SITTING AS A JUDGE OF THE HIGH COURT

B E T W E E N:

DG (Father)

and

AG(Mother)

IMPORTANT NOTICE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

MR. ALISTAIR PERKINS appeared on behalf of the Applicant
instructed by Makin Dixon

The Respondent appeared in person

JUDGMENT

The judge has directed that this written judgment should be used rather than a transcript.

Judgment in respect of application to adjourn

1. The application before me is made by the father seeking an order requiring the return of his daughter X to the Czech Republic pursuant to the 1980 Hague Convention on the Civil Aspects of International Child Abduction [the 1980 Convention] which is given domestic effect in England and Wales by the Child Abduction and Custody Act 1985 as supplemented by BIIA.
2. The respondent is the child's mother.
3. The father is represented by Mr Alistair Perkins of Counsel. His client is not present but there is a Polish interpreter at court thus enabling Mr Perkins to take instructions by telephone.
4. The respondent mother has attended court today. She is assisted by a Czech interpreter. At the commencement of the proceedings both the interpreter and the mother were sworn to ensure that her submissions can be counted as part of her evidence because other than an email to the applicant's lawyer she has not filed evidence or defences to the application as directed by the court on three occasions.
5. The mother has appeared in person on one occasion at this court and has also appeared by telephone on another occasion. At both of those hearings she has been encouraged by the court to seek legal representation and the procedure for these applications made under the Hague Convention 1980 has been explained to her.
6. I have explained the procedure again this morning to her and made reference to it throughout the course of the day in simple terms.
7. Mr Perkins told me that when he asked the mother this morning if she was represented, she said that she had booked a lawyer but that that lawyer had not turned up. She had also said she could not

remember the name of the lawyer or the firm where the lawyer was based.

8. The mother explained to me that she had booked a lawyer: *“My lawyer was supposed to be here. I don’t know her name. I can’t read English.”*
9. The mother replied to adjourn these proceedings so that she could be legally represented. She said *“I can represent myself but it’s not quite right is it?”*
10. I asked the mother when she had contacted a lawyer. She said she thought it was after she had appeared at court on the last occasion. She said that she had obtained the number from a list of firms that had been sent to her. Mr Perkins confirmed that the standard letter with details of solicitors who are frequently used in these cases was sent not once but twice to the mother. The mother said that she would like a lawyer because she would like to stay in the UK because she now has a flat to live in and has obtained a nursery place for her daughter.
11. Mr Perkins opposed the application to adjourn. He submitted that the mother had in her possession a translated copy of the relevant provisions of Hague Convention 1980 and that he had directed her to Article 11 which sets out the six-week timescale for these proceedings. He reminded me of the Courts’ duty to act expeditiously and pointed out that the six weeks expired last Wednesday, 20 February 2019. He submitted that adjournment would mean that the case would be listed in the middle of April at the earliest.
12. Mr Perkins submitted that although the mother cannot speak English, she is assisted by a woman called L who had emailed on

her behalf as recently as 4pm yesterday. It is clear to me that L has a reasonable grasp of English from her communications.

13. I have carefully considered the mother's application for an adjournment. It is far from ideal that in technical proceedings of this nature a person represents themselves. It is however clear to me that on at least two occasions the mother has been encouraged by the court to seek legal representation and she has been given two lists of suitable solicitors. She has a friend who can assist her who has a sufficient grasp of English.
14. I was unimpressed by the mother's description of having booked a lawyer. Her suggestion that she had telephoned somebody who she did not know and who had agreed to attend and represent her today was unconvincing. I'm satisfied that she has had plenty of opportunity to seek and obtain legal representation for these proceedings.
15. I am also satisfied that although these matters are 'technical' proceedings that on at least two occasions and again this morning I have explained them to her -namely the obligation to return under the Hague Convention a child who is habitually resident in another state where that child is removed without consent or court authority unless a defence is properly raised thus engaging a discretion.
16. I propose to hear the case and to explain to the mother as clearly as possible the relevant matters that I have to consider and to give her the opportunity to make submissions on each of the points. It seems to me that delay is not in anybody's interest and that further delay would undoubtedly mean that the proceedings would fall far outside the six weeks target time limit. I also find it would be unlikely to produce legal representation because I'm not

satisfied that the mother has taken any steps at all in order to seek representation and nor would she in future.

Judgment in respect of the application.

17. The issues which I am required to determine are as follows:
 - a) whether the child was habitually resident in the Czech Republic prior to her removal to England in 2018, so as to engage the powers and obligations conferred by the 1980 Convention; and
 - b) if the 1980 Convention is engaged, whether the mother, who opposes the return of the child to the Czech Republic, can establish that such a return would give rise to a situation described in article 13b of the 1980 Convention.
18. In reaching my conclusions I have read the trial bundle prepared by the applicant's solicitors and a separate bundle containing a skeleton argument prepared by the applicant's Counsel together with various legal authorities upon which he relied. I have also heard Counsel's submissions and heard the mother, carefully questioning her to ensure she has had the opportunity to make her case.

Litigation background

19. In November 2018, following the return of the parties' son to the Czech Republic from the UK the father instructed the central authority in the Czech Republic to seek the summary return of the subject child. Instructions were received by Makin Dixon Solicitors from ICACU to make the application in late December 2018 and the application for summary return was made on 10 January 2019.

20. On 10 January a location order was made by his Honour Judge Richards and directions were given for the respondent mother to file and serve an answer to the application setting out any defence she seeks to rely upon together with a statement in support.
21. The location order was executed on 21 January and the respondent was personally served with the court bundle and the sealed order of 10 January on 23 January. At a hearing on 28 January before Mr Justice Francis the mother attended in person. Unfortunately despite a Czech interpreter being directed by the previous order, no one attended but the mother was assisted by her cousin who interpreted for her in court. At that hearing the mother indicated that she may wish to raise a defence of consent. The proceedings were adjourned to enable the mother to obtain independent legal advice and for the mother to be assisted by an interpreter. She was given additional time until 2pm on 4 February to file and serve her answer setting out the details of her defence. The matter returned to court before Mr Justice Cohen on 6 February. The mother contacted the court the day before indicating that she was unwell and would not be able to attend in person. Arrangements were made by the court for her to participate in the hearing via telephone assisted by the court appointed Czech interpreter and the matter was listed before me today with a time estimate of one day. An extension of time was granted to the respondent mother to file an answer by 14 February setting out the defences upon which she relies together with any witness statement in support and a schedule of protective measures sought.
22. The order records that Mr Justice Cohen confirmed to and explained to the mother that the father does not seek to separate the child from her but that the application to the court seeks

summary return to the Czech Republic, ideally with her accompanying the child. It is also recorded that the mother informed the court that she opposes the father's application for summary return but details of any defence are not given. The mother agreed at that hearing that she would make the child available for indirect contact via Facebook three times a week. The court directed that the mother must confirm to the father's solicitors whether she was going to assert that her removal from the Czech Republic was lawful by 11 February.

23. Anticipating that she might assert that the removal was lawful and therefore not in breach of the father's custody rights, a request was made to the Central Authority of the Czech Republic to provide information in relation to whether the removal was or was not in breach of those rights of custody in accordance with Article 3 of the 1980 Convention.
24. The mother has not filed any document in respect of the proceedings.
25. The father was directed to file his evidence and schedule of protective measures under article 11 of the 1996 Hague Convention or, where appropriate, undertakings, that he is willing to offer in the event that the child is returned to the Czech Republic by 21 February.
26. It was also determined at that hearing that the child is too young for her views to be ascertained by a Cafcass officer and that her voice could be adequately heard through the evidence of her parents.

Background

27. The applicant father is a Polish national who was born in Poland in 1974. The respondent was born in the Czech Republic in 1978 and the subject female child born in 2014 in the Czech Republic. She has a Czech identification card valid until September 2019. The parents were married in July 1997 and separated in or around April 2018. The subject child is the youngest of their four children. In addition to this daughter they have two sons, one born in 1997 and one in 2004, and a daughter born in 1998.
28. The family lived together until April 2018 in the Czech Republic at which time the mother moved out of the family home with this child and she was later joined by the youngest son and the other daughter. The applicant father says that she told him that she was going on holiday with a friend, and that he later found out that she had left him for another man. She says she told him she was leaving him.
29. The applicant father states that the mother issued court proceedings in the Czech Republic for a divorce and to resolve arrangements concerning the children, however it is his position that the court proceedings were cancelled because she did not attend a hearing. It is therefore his position that they remain married. The mother agreed that she had not concluded the proceedings in the Czech Republic.
30. No arrangements were made for contact between the father and the children, however the mother told the father that they were living in the Czech Republic about 5 ½ hours away from the family home. In his statement the father says that in August 2018 he discovered from the mother's sister that the mother was living in England with her boyfriend and the three children. The mother told me that she could not remember when she came to the UK. The

father states that at the end of September 2018 his son contacted him and said that he wanted to return to the Czech Republic. The father contacted his older daughter and together they made arrangements for his son to return to the Czech Republic. The son arrived in the Czech Republic on 1 October 2018 and the father met him at Prague airport. He remains living with his father with his older brother.

31. The applicant father retained some contact with his older daughter who intends to return to live in the Czech Republic.

32. It is the father's case that he did not consent to the removal of his daughter from the Czech Republic and he seeks summary return of the child to the Czech Republic, preferably with her mother. He asserts that he has full rights of legal custody as a matter of Czech law and that these were properly exercised under Article 3 prior to removal.

Evidence

33. The father filed a short statement on 21 February. He confirmed that he had not received an answer from the respondent mother but confirmed that in the event that the court returns the child to the Czech Republic he was willing to give undertakings to the court as follows:

A -not to support any criminal proceedings for the punishment of the respondent in respect of any wrongful removal;

B -not to attend at the airport when the respondent returns to the Czech Republic;

C -not to attend any address the respondent resides in the Czech Republic save for agreed collections for periods of contact;

D- not to separate the daughter from the respondent's care and control save for agreed periods of contact until the first hearing of proceedings in the Czech Republic;

E- to pay for the costs of any flight for her return to the Czech Republic; and

F- if required, or ordered to do so, he would also be prepared to pay for the respondent mother's flight. This was amended to cover the older daughter's flight if the mother stated that she would not return.

34. On 4 February the mother sent an email to the father's solicitors. She said as follows

"I would be very happy if my daughter stay with me in England because I wouldn't be happy if she was in Czech Republic with her dad because in Czech Republic it's lots of racism. I know this because I have lived there and when I was little in school was lots of racism. I want for my little girl... Good future that I'm planning for her. I came in England for good life, I came in England so my little girl finish her school and have good future. I have thought about this a lot and I was thinking if she was with her dad it wouldn't be good because she is only four years old, and my husband is working from 6am till 6pm. I have another two sons that is with their dad one is still in school the other one is working as well. So who would care about her when everyone is not at home, no one. So I really don't know how it would be with her when she's with her dad. I really don't want my daughter to take from me because I'm her mother. I'm more happy father to come to England and visit his daughter I never

said no. It's her dad and I don't want my daughter to be without her dad. She's starting nursery here in a new town where I just moved, I'm trying my best for my daughter."

35. The mother told me that she left her husband in April 2016 correcting this to 2018. She said that initially she took her youngest daughter and then she was joined by her youngest son and her elder daughter. She said that when she left her husband, she told him that she was leaving as the marriage was at an end. She moved about 5 ½ hours away from the family home and was working as a cleaner. She lived with her new partner and they had a two bedroomed flat. She earned 10,000 crowns a month and the rent was 8000 however they were able to live in that flat because her boyfriend was also working. She remains with him.
36. The mother was unable to tell me when she came to the UK. She said that she had started divorce proceedings in the Czech Republic and firstly said that they had been completed but then corrected herself to say that she didn't attend the court hearing so she accepted that the divorce had not gone through. The mother said that she did not prevent the father having contact with the children and if he was willing to travel he could have gone to see them. She said that she had told him on the phone that she wanted to go abroad and that he didn't answer her. I asked her if he had been annoyed at the suggestion and she said that he had but she thought that that was because her boyfriend is younger than her husband.
37. The mother was clear that at no time had her husband agreed that she could remove the children to the UK, and she agreed that there was no court order that allowed her to do so. She told me that

she had thought that since the UK is part of the European Union she could travel freely.

38. I asked the mother whether she was asserting that there was any risk from the father if her daughter is to return to the Czech Republic and she confirmed that there is not. I asked her whether she would return to the Czech Republic if I ordered that her daughter was to return. She said that she did not know whether she would.
39. The mother said to me that she thought that the daughter would suffer psychological harm if she was returned to live with her father. She said that the child is 4 years old and is used to living with her. She said that she had nowhere to return to in the Czech Republic and that she could not go back to her family as she is estranged from them, she said there was no reason for her to go back. She and her partner came to the UK to start a family. She felt that if she returned there are no jobs in the Czech Republic and that she would be unable to find work.
40. The mother told me that if she did not return and I determine the child must return the child could return with her older sister. She said: "*She's her sister, I'm not going to stop it*"
41. The mother said that she felt that her daughter would be the subject of racist comments at school. I asked her why she had been willing for her son to return there if there was such a problem. She replied that he has problems with people saying that his mum is a gypsy. She feels that society in the UK is less judgemental of her Roma culture. She said that she has recently signed a joint tenancy for a flat in central England together with her partner and has registered the child to attend nursery. The document she gave to me to prove this indicated that on the transfer request she had put

her boyfriend down as the child's father. The tenancy agreement is for a council property and is dated January 2019.

42. The bundle also contains a letter from M K, a Czech lawyer. The lawyer enclosed a certificate on the applicable law of the Czech Republic, pursuant to article 8d of the Convention. According to the provisions of the Civil Code a parent with parental responsibility has the right to determine the place of residence of the child. Parental responsibility is exercised by both parents in mutual accord and if they cannot agree on a set significant matter (which the law specifically states is the determination of the place of residence of a child), the matter shall be resolved by a court. This confirms that as the father has responsibility for the daughter which was not limited, his consent or a court decision replacing that consent would be needed in order for the removal of the child from the Czech Republic to the UK to be lawful.

Analysis

43. In his skeleton argument Mr Perkins sets out five issues for determination at this hearing. Firstly, whether the initial removal of the child from the Czech Republic was wrongful within the terms of Article 3 of the 1980 Convention? Secondly, whether the presumption of the return of the child forthwith to the Czech Republic is engaged pursuant to article 12 of the 1980 Convention? Thirdly whether the mother has proved any defence to the return on the balance of probabilities? Fourthly what measures of protection are required in relation to the child's necessities on her arrival in the Czech Republic to last until the courts in that jurisdiction becomes

seized of the issues in relation to her welfare? And finally, the timing of her return to the Czech Republic.

44. I shall consider each of these issues in turn following a short consideration of Hague Convention principles and the issue of habitual residence.

Hague Convention principles

45. The 1980 Convention principles were set out by the Baroness Hale and Lord Wilson in ***Re E (Children) (Abduction: custody appeal) [2011] UK SC 27***. The first objective of the 1980 Convention is to deter either parent from taking the law into their own hands and pre-empting the result of any dispute between them about the future upbringing of their children. If an abduction takes place, the second objective is to restore the child as soon as possible to their home country so that any dispute can be resolved there. There is no provision expressly requiring a court hearing a 1980 Convention case to make the best interests of the child its primary consideration. The upbringing of the child is not in itself an issue in the case- the proceedings are about where the child should be when that issue is decided. That is not to say that the best interests of the individual child are not considered, they should be the forefront of the whole exercise. It is clear that both the convention and BIA were devised with the best interests of children generally, and of the individual children involved in such proceedings, as a primary consideration

Habitual residence

46. The law in respect of habitual residence is conveniently summarised by Mr Justice Hayden in ***Re B (Habitual residence) [2016] EWHC 2174***

- "i) *The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (A v A and Another (Children: Habitual Residence (Reunite International Child Abduction Centre and others intervening)) [2013] UKSC 60, [2014] 1 AC ["A v A"], adopting the European test);*
- ii) *The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual enquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (A v A; In re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening) [2013] UKSC 75, [2014] AC 1017 ["In re L"]);*
- iii) *In common with the other rules of jurisdiction in Brussels IIR its meaning is 'shaped in the light of the best interests of the child, in particular on the criterion of proximity'. Proximity in this context means 'the practical connection between the child and the country concerned': A v A (para 80(ii)); Re B (A Child) (Habitual Residence: Inherent Jurisdiction) [2016] UKSC 4, [2016] AC 606 ["In re B"] (para 42) applying Mercredi v Chaffe (Case C-497/10PPU) EU:C:2010:829, [2012] Fam 22 at para 46);*
- iv) *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: In re R (Children) (Reunite International Child Abduction Centre intervening) [2015] UKSC 35, [2016] AC 76 ("In re R");*
- v) *A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (In re LC (Children) (Reunite International Child Abduction Centre intervening) [2014] UKSC 1, [2014] AC 1038 ("In re LC"). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration;*
- vi) *Parental intention is relevant to the assessment, but not determinative (In re L, In re R and In re B);*

vii) *It will be highly unusual for a child to have no habitual residence. Usually a child loses a pre-existing habitual residence at the same time as gaining a new one (In re B); (emphasis added);*

viii) *In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move (In re B – see in particular the guidance at para 46);*

ix) *It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there (In re R and earlier in In re L and Mercredi);*

x) *The relevant question is whether a child has achieved some degree of integration in social and family environment; it is not necessary for a child to be fully integrated before becoming habitually resident (In re R) (emphasis added);*

xi) *The requisite degree of integration can, in certain circumstances, develop quite quickly (Art 9 of BIIIR envisages within 3 months). It is possible to acquire a new habitual residence in a single day (A v A; In re B). In the latter case Lord Wilson referred (para 45) those 'first roots' which represent the requisite degree of integration and which a child will 'probably' put down 'quite quickly' following a move;*

xii) *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 (In re R).*

xiii) *The structure of Brussels IIa, and particularly Recital 12 to the Regulation, demonstrates that it is in a child's best interests to have a habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have*

no habitual residence; As such, 'if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has a habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former'(In re B supra)"

47. The father contends that this little girl was habitually resident in the Czech Republic in 2018 when her birth mother brought her to this jurisdiction and the mother agreed in court today that this was the case.

48. These parents had been married and had lived together for 21 years in the Czech Republic. This child was born in the Czech Republic and lived her whole life there until removal. She was settled and integrated into the Czech Republic before she was removed. I'm satisfied that she was habitually resident there.

Article 3

49. It is clear to me that when the child was removed from the Czech Republic by her mother it was in breach of the father's custody rights which he was exercising or would have so exercised were it not for his for the removal of the child to the other side of the country. The parties remained married and the information in the bundle demonstrates that his custody rights included the right to determine where the child should live. The mother chose to abandon the divorce proceeding she started in the Czech Republic and no determination had therefore been made about any aspect of those rights.

Article 12

50. Is the presumption of the return of the child forthwith to the Czech Republic engaged pursuant to article 12 of the 1980 Convention? These proceedings were commenced either nine

months or five months after the child's removal but in any event were commenced "*less than one year... from the date of the removal*". Article 12 therefore provides that this Court "*shall order the return of the child forthwith*" unless the mother establishes that one of the exceptions in article 13 has been proved on the balance of probabilities and persuades the court to use its discretion against a forthwith return.

Article 13

Consent

51. At an early stage in these proceedings the mother indicated that she may rely on a defence that the father consented to the removal of this child to the UK in 2018. Before me she made it clear that he had not consented and she accepted that there was no order in place entitling her to remove the children.

52. I am satisfied that the removal of the child from the Czech Republic was without the knowledge or consent of the father. The issue of consent therefore does not arise.

Grave risk of harm/intolerable situation

53. Whilst the mother has not formally raised any article 13 defence her email to the father's solicitor raised two matters. The first is that Czech society and in particular the area where her daughter would go to school is racist and therefore the child would be subject to racism. The second matter is that if the child were living with her father there would be nobody to look after her when he and the elder children were working or at school. In addition, she today raised the issue of risk of grave emotional harm by separation and

of intolerability if she returns as she will not have anywhere to live or work.

54. The mother has not raised any issue about the father's care of either of the sons who are living with him at the former family home.

55. Article 13b provides that the authorities of the requested state are not bound to order the return of the child where "*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*".

56. MacDonald J set out the court's approach to Article 13(b) in ***BK v NK (Suspension of Return Order)*** [\[2016\] EWHC 2496](#) [paragraph 45]:

"The law in respect of the defence of harm or intolerability under Art 13(b) was examined and clarified by the Supreme Court in Re E (Children) (Child Abduction: Custody Appeal) [\[2011\] 2 FLR 758](#). 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 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, as in this case, Art 13(b) of BIIa applies, the court cannot refuse to return a child on the basis of Art 13(b) of the Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return). 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)."*

57. In GP (A Child) [2017] EWCA Civ 1677, the Court of Appeal considered the application of the test in Article 13(b) and stated [paragraph 61-62]:

"In order to decide whether this test was satisfied, it was in my opinion necessary for the judge to examine in concrete terms the situation that would actually face GP on her return to Italy. What would happen when she and her mother stepped off the plane? Would her mother be arrested? Where would they go, and what would they live on?..."

62. *The judge had no answer to these questions, although he was rightly satisfied that the transition for GP would inevitably be uncomfortable. He said*

that the mother would have to bear some of the costs, but did not explore at all what those costs would be, or how in practice she would be able to meet them, both in the period immediately after their arrival, and in the short to medium term while GP's custody and welfare were under consideration by the Italian court. In my opinion these matters all needed careful examination, and although it was not incumbent on the judge to set out the evidence in detail, it was necessary for him to state the conclusions he had reached about how GP could reasonably expect to be accommodated, maintained and educated upon her return to Italy, and what would happen to her if the mother was imprisoned."

58. The Court of Appeal in **Re C (Children) (Abduction: Article 13(b))** [\[2018\] EWCA Civ 2834](#) once more considered Article 13(b) and stated the following with respect to protective measures [paragraph 41]:

"I would also note that the measures being considered are, potentially, anything which might impact on the matters relied upon in support of the Article 13(b) defence and, for example, can include general features of the home state such as access to courts and other state services. The expression "protective measures" is a broad concept and is not confined to specific measures such as the father proposed in this case. It can include, as I have said, any "measure" which might address the risk being advanced by the respondent, including "relying on the courts of the requesting state". Accordingly, the general right to seek the assistance of the court or other state authorities might in some cases be sufficient to persuade a court that there was not a grave risk within Article 13(b)."

59. MacDonald J in **AT v SS** [\[2015\] EWHC2703 \(Fam\)](#) considered the position where the mother refused to return with a child to the Netherlands and it was likely that the child would, as a result, be placed temporarily in foster care. Paragraph 34 contains his analysis of the approach the court should adopt and the relevant parts read as follows:

"...Having regard to the principle of comity, it is well established that in judging whether there is a grave risk following return for the purposes of Art 13(b) of the Hague Convention, the court should accept that, unless the contrary is proved, the administrative, judicial and social services in the requesting State are as adept as protecting children as they are in the requested State (see Re H (Abduction: Grave Risk) [\[2003\] EWCA Civ 355](#), [2003] 2 FLR 141, Re M (Abduction: Intolerable Situation) [2000] 1 FLR 930 and Re L (Abduction: Pending Criminal Proceedings) [1999] 1 FLR 433). As regards a return to a placement in care in the requesting State, where the requesting State has adequate procedures for protecting the child, and accepting that each case must turn on its own facts, it is unlikely that a parent will be able to successfully oppose a return on the basis that the child is being returned into temporary public care pending the courts making a substantive welfare decision (see Re M (Abduction: Intolerable Situation) [2000] 1 FLR 930 and Re S (Abduction: Return to Care) [1999] 1 FLR 843). Once again however, each case will turn on its own facts."

60. Paragraph 36 of **Re E [(Children) (Abduction: Custody Appeal)]** [\[2011\] UKSC 27](#) sets out the court's approach to allegations of domestic abuse in 1980 Convention proceedings:

"...The court should first ask 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 ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measure, the court may have no option but to do the best it can to resolve the disputed issues..."

61. That approach must also extend to other allegations of abusive behaviour, for example, towards children themselves.

62. As Mr Perkins pointed out in his skeleton argument the court must focus on the circumstances that the child would meet if a return

order was made. The situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home.

63. The approach taken is to examine any matters raised by the mother to decide whether they are sufficient to establish the Article 13b exception. If the evidence is sufficient to establish the article 13b exception I must turn to consider the available protective measures, including the undertakings offered by the father. If those available protective measures are sufficient to ameliorate the risk that it is asserted exists, then they negate the defence raised (such that the exception is found not to be established).

64. The Czech Republic and the UK are currently both subject to Brussels IIa regulations.

65. Mr Perkins submits that the mother's case at its highest is that the child would be subjected to racism in the Czech Republic and that she would live with her father who is working which would mean that she would be left "home alone". He submits that even if that case is accepted without question the facts asserted do not come anywhere near to the necessary hurdle to engage article 13b. Having taken instructions from his client, Mr Perkins confirmed that if the mother does not return to the Czech Republic the father will be the primary carer for their daughter who would travel with her elder sister. The father states that he would be supported in caring for the child by her 21-year-old sister and by his parents who do not work and who are aged 55 and 60. The father made it clear that he did not wish to separate the child from her mother. The father asserts that if a return order was made and the mother returns to

the Czech Republic with their daughter, she could stay with her siblings who live close to the family home.

66. In the event that the mother successfully invokes article 13b Mr Perkins submits the following matters in relation to the discretionary element that I must consider whether or not to order immediate return. He submits that this is a classic “hot pursuit” Hague Convention case following an abduction. Until the child was wrongfully removed, she had spent all her life living in the Czech Republic and had been separated from her elder siblings who now live or will soon all live in the Czech Republic. He submits that prior to the removal child had an important, substantial and subsisting relationship with her father and members of the paternal family, whereas in this country indirect electronic contact had been infrequent and there had been no direct contact at all. He also submitted that the mother is able to make an application to facilitate permanent relocation to England before the cheque caught either on an interim basis pending a final determination or ultimately. He reinforces this by submitting that she had started divorce proceedings in the Czech Republic and had accessed the court system at that time. He therefore submits that the court should not use its discretion against ordering the child summary return.

67. In this case the burden of proof lies with the mother as the person who opposes the child’s return. It is for her to produce evidence to substantiate one of the exceptions and to prove it on the ordinary balance of probabilities. It has been made clear to the mother at previous hearings that the burden is on her to raise a defence to summary return. She had not done so and other than the short email has not filed any evidence at all in relation to her position.

68. Any risk to a child raised in respect of article 13b must be “grave”. Nothing which the mother has raised in this case reaches a level of seriousness as to be anywhere near to “grave”. Physical and psychological harm are included but it is a sad fact that in most countries’ children will be exposed to racism of some form or another. It is clear to me that the reason the mother came to this country was in order to have what she regards as a “better life” and like many others she would be classified as an economic migrant. She has raised nothing about the home circumstances in the Czech Republic which would cause me to be satisfied that there is any risk of psychological harm caused by racism that would be so significant as to be categorised as grave.
69. I have also considered the issue of whether the child would be placed in “an intolerable situation”. In **Re E** (*above*) it was said that 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*”. In this case the mother raises the question of who would look after the child during the day, suggesting in effect that the child needs would be neglected if she is returned.
70. The father’s position in respect of this is that either the mother could return with the child and look after the child whilst living in her family home and working to support herself as she did before she came to this country or he would act as the primary carer supported by his family. I am satisfied that in neither circumstance would the child be exposed to any risk of harm or placed in an otherwise intolerable situation.
71. I have carefully considered whether the mother has proved on a balance of probabilities that the child would suffer grave emotional

harm by separation from her. If the mother decides not to return, I'm satisfied that the child will suffer distress and emotional upheaval from being separated from her primary carer however that distress will no doubt be mitigated by her return to a familiar environment. She is four and half years old and has recently had a period of instability. It would appear that she has lived in at least one place other than home in the Czech Republic and either two or three places in the UK. She has already been through the "*rough and tumble*" referred to by Baroness Hale in the case of **Re E**. She would either be returning with her mother as primary carer or to a close-knit paternal family. The case put forward by the mother does not come anywhere near the test of a grave risk of emotional harm.

72. In my assessment the proposed return would not be a return to an intolerable situation. Intolerable is a strong word. I am satisfied that if the mother returned, whilst life would be hard for her, she is a resourceful woman who is able to get a job and support herself and her daughter as she demonstrated during the period, she has chosen not to specify between leaving her husband and coming to the UK. Whilst the situation would not be ideal for her, especially as she came to the UK for a "*good life*" and has obtained a council flat in central England, what she puts forward is no more than a lifestyle choice.

73. The Czech Republic is in the European Union and I must pay regard to judicial comity. There is no evidence that she would be destitute or unable to work in the Czech Republic.

74. In all the circumstances of this case the mother has failed to raise any potential defence under article 13b which would mean that my discretion was engaged in whether to return the child. I make it clear that in the event that such discretion had been engaged, I

would have exercised it firmly in respect of return so that the child would be placed in the Czech Republic whilst her future welfare was determined.

That is my judgment

HHJ Hillier

27 February 2019