Neutral Citation Number: [2020] EWHC 1476 (Fam)

Case No: FD20P00199

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Sitting Remotely

Date: 08/06/2020

Before:

THE HONOURABLE MR JUSTICE MACDONALD

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Between :

G	**Applicant**
- and -	
D	**First Respondent**
-and-	
E and N (By their Children's Guardian)	**Second and Third Respondents**
-and-	
Trafford Borough Council	**Fourth Respondent**

Mr Brian Jubb (instructed by **MSB Solicitors**) for the **Applicant**
Ms Fiona Holloran (instructed by **AFG Law**) for the **First Respondent**
Mr Gordon Semple (instructed by **Waddell, Taylor Bryan Solicitors**) for the **Second and Third Respondents**
Ms Samantha Birtles (instructed by the **Local Authority Solicitor**) for the **Fourth Respondent**

Hearing dates: 4 June 2020

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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. Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 10.30am on 8 June 2020.

THE HONOURABLE MR JUSTICE MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

INTRODUCTION

1. In this matter the applicant father, G, applies under the Child Abduction and Custody Act 1985 for a summary return order pursuant to the provisions of the 1980 Hague Convention in respect of E, who is seven years old and N, who is nearly four years old. The children were born in Belgium and had always lived in Belgium until the mother moved the children to England following a period of approximately 6 weeks in Spain in circumstances I shall come to. The father is represented by counsel, Mr Brian Jubb. The father issued his application under the Children Abduction and Custody Act 1985 on 27 March 2020.

2. The respondents to that application are the mother, G, represented by counsel, Ms Fiona Holloran and Trafford Borough Council represented by counsel Ms Samantha Birtles. The children are parties to the proceedings under the 1985 Act and are represented through their Children's Guardian, Sharon Smith, by counsel Mr Gordon Semple.

3. The father's application is made in the context of extant proceedings in respect of the children under Part IV of the Children Act 1989. Those proceedings are currently stayed pending the court's determination of the father's application under the 1985 Act. The family are also known to child protection agencies in Belgium, E having previously spent time in Belgian State care.

4. In determining this application I have had the benefit of reading the bundles prepared for this hearing, reading the comprehensive and helpful written submissions of counsel and hearing oral submissions from counsel. The hearing was conducted remotely by reason of the current limitations placed on the family justice system by the COVID-19 pandemic.

BACKGROUND

5. The mother and the children arrived in England on 5 July 2019. The mother alleged that she was fleeing domestic abuse from the children's father. Prior to this point the mother, who is a Slovakian national, and the children, who are Belgian nationals, had been residing in Spain with the father for a short period. The father is also a Belgian national. The mother is visually impaired. The father has muscular dystrophy, is confined to a wheelchair and has lost the use of one arm. There is evidence to suggest that the reason for the father and the mother visiting Spain with the children was an attempt by them to break away from the drug culture which had become part of their lives in Belgium. There is also a suggestion that the move was to evade the involvement of Belgian social care authorities, who were concerned regarding the care afforded to the children by the parents. Upon the mother's arrival in this jurisdiction the UK Border Force alerted children's services at the local authority in circumstances where the mother had been reported as "missing/vulnerable/at-risk" by the Belgian authorities following the families departure to Spain.

6. The mother arrived in England with a Mr Y who she was reported to have met in Spain whilst staying in a hostel having fled from the father, prior to coming to this jurisdiction. Mr Y reported himself to be the mother's friend who had offered to

support her and the children financially and by providing accommodation after observing the father become physically violent towards both the mother and E. Both Mr Y and the mother confirmed that they did not know each other prior to this point.

7. Police checks were completed on Mr Y prior to the children and the mother being allowed to leave the airport with him. These checks revealed that Mr Y has twenty-six criminal convictions, a diagnosis of bi-polar disorder and had given a history of heroin use and alcohol use. Mr Y openly discussed this with both the local authority and the mother. Despite this information, the mother is said to have gone against professional advice and continued to reside with Mr Y and allowed him to have unsupervised contact with her children. It is said that Mr Y was observed to be highly controlling of the mother and made attempts to obstruct the local authority's intervention when challenged on this. The mother did at one point agree to be moved into a women and children's refuge but returned to Mr Y after three days.

8. With respect to the position of the mother and the children prior to their arrival in this jurisdiction, information has been provided by Interpol stating that there were major concerns about the situation of the mother and the children. The family were being monitored by the Family Justice Centre in Belgium. It was reported that the mother had refused to engage or accept support in Belgium and, as I have alluded to above, had fled to Spain to evade any safeguarding intervention by the Belgian authorities. In Spain the mother was said to be offered support by the authorities but had denied there was any risk to the children. The information from Interpol suggests that there were significant concerns about the children's welfare in both Belgium and Spain and the mother's ability to protect her children.

9. Following the information received from Interpol and the mother's decision to return to Mr Y, a decision was made by the local authority to remove the children from the mother's care and the police exercised their protection powers. The children were placed together in local authority foster care and the local authority sought and obtained an emergency protection order on 23 August 2019. The children were made subject to interim care orders at a hearing on 29 August 2019. At this hearing it was identified that there was an issue as to the substantive jurisdiction of the English court in respect of the children and that consideration needed to be given to this issue and to the application of Council Regulation (EC) No 2201/2003 (hereafter BIIA) to these proceedings.

10. Within this context, the court was asked to consider the issue of the habitual residence of the children. On 3 October HHJ Butler concluded that the children remained habitually resident in Belgium and directed the local authority to liaise, through the Central Authority, with children's protective services in Belgium, to communicate the decision of the court to the Belgian authorities and to discuss the practical or legal steps that may be required to give effect to the intention of the Belgian authorities. Within this context HHJ Butler made a declaration pursuant to Art 17 of BIIA that the English court did not have jurisdiction in this case and, in so far as the court was making any further orders, those orders were being made under the provisions of Art 20 of BIIA. Within this context, the local authority has repeatedly communicated with the Belgian authorities with the assistance of ICACU.

11. By e-mail dated 25 September 2019 the Belgian authorities advised that administrative proceedings are ongoing in Belgium to strike the mother and children

from the Belgian population register for their address in Belgium (which the local authority understands to mean that something akin to the mother's national insurance number has been removed and she is no longer entitled to claim any state benefits in Belgium). As a result of the further enquiries directed by HHJ Butler on 3 October 2019, in further e-mail correspondence dated 6 November the Belgian authorities stated that no member of the family is currently registered in Belgium and they have been deleted for the national register *ex officio*. The Belgian authorities further stated as follows in response to the judgment of HHJ Butler of 3 October 2019:

> "Thank you for the Dutch translation of the judgment of the English court. After thorough consideration, our position is that we will not take any active measures to bring the children back to Belgium, for it appears to be in their least interest. The following arguments are important:
>
> - The parents' background is marked by violence committed at the hands of the father, [G], against the mother. He met her in her native country at the time, both were adherents of the Church of Christ. They had premarital sexual relations, which was in violation of their strict religious beliefs, and he informed her father thereof. As a result, she was disowned by her family and handed over to him. She then repeatedly fell victim to physical violence and it can be posited that he also brought her into contact with drugs. She was entirely dependent on him and he brought her to Belgium, where she led an isolated life. In the meantime, they had two children, but the domestic violence and drug abuse have apparently never stopped, which is why the father was imposed a temporary restraining order in April of 2019, with which he however did not comply. To escape this long spiral of domestic violence, the mother did indeed flee. Our investigation, of which a report was sent to you, has revealed that the father ([G]) is doing drugs and that he is at large. No member of the family is currently registered in Belgium and they have been deleted from the National Register *ex officio*.
>
> - As regards the question whom of the parents is the better fit for these very young children, it goes without saying that the mother is better qualified, provided she receives the necessary support, and definitely not the father. Furthermore, it is also clear that the parents should no longer be together.
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> - During the court hearing of 3 October 2019, the mother indicated that she hopes that she can stay in England. She clearly does not want to return to Belgium at all. Aside from having lived in Belgium for quite some time, she essentially has no connection with the country. Whether or not she will be able to stay in England is unclear to us. She indicates already having taken steps in this direction.
>
> - Thus far there is no Belgian judgment stating that the children should be in Belgium. The Belgian organizations that were involved with the family are voluntary aid organizations. A juvenile judge had not yet been involved in the matter.
>
> We are willing to observe further evolutions, but we will not take any active steps towards the return of the children for the time being. Please inform

> the competent authorities in England of this position in the perspective of the hearing of 18 November 2019."

12. At the hearing on 18 November 2019 the father, who had arrived in England, alleged that he and the mother were again in a relationship. Following the hearing on 18 November 2019, the local authority again wrote to the Belgian authorities and ICACU on 21 November 2019 to update them as to the father now being in England and the father's position that he and mother were in contact and in a relationship. The local authority made clear to the Belgian authorities its safeguarding concerns for the children, asked the Belgian authorities to further consider their position, informed them of the next hearing on 5 December 2019 and notified them that a representative of the Belgian authorities was invited to attend the hearing. No substantive response was received in response before the hearing on the 5th December 2019 although on 29 November 2019 a further short email was received from the Belgian authorities reiterating their view that it would not be in the children's best interests for them to be returned to Belgium.

13. In his judgment of 5 December 2019 HHJ Butler recorded the position with respect to the Belgian authorities as follows:

> "[7] So what has happened since 3rd October 2019? What has happened since then is that the International Child Abduction and Custody Unit have attempted to liaise with the Belgian authorities and have got nowhere. The International Child Abduction and Custody Unit have also had the assistance of legal advice itself. The contents of that advice (and which is very short and in the form of an e-mail) was communicated by me to the parties on 3rd October 2019, or possibly 18th November 2019, I cannot remember, but the parties are aware that the conclusion reached is that there is little else that ICACU can do. The local authority have been in communication with the Belgian authorities through ICACU. [The Local Authority's advocate] has confirmed today the Local Authority had being doing its utmost both via ICACU and directly with the Belgian authorities via e-mail in order to try and resolve the apparent impasse which has developed in terms of jurisdiction."

14. Within this context, and having referred to the communication dated 25 September 2019 by which the Belgian authorities advised that administrative proceedings are ongoing in Belgium to strike the mother and children from the Belgian population register for their address in Genk and the further e-mail correspondence dated 6 November no member of the family is currently registered in Belgium and they have been deleted for the national *register ex officio*, at the conclusion of the hearing on 5 December 2019 HHJ Butler concluded that:

> "In my judgment, what that clearly indicates is that the Belgian authorities are most determined that this mother should not return to Belgium."

15. Having regard to the stance of the Belgian authorities, HHJ Butler permitted the local authority to withdraw its first application for care orders and the local authority lodged a fresh application for care orders on 3 December 2020. Within this context, at the hearing on the 5 December 2019 the court made a declaration that at the time the fresh set of care proceedings had been issued the mother and children had lost

their habitual residence in Belgium. Within this context, the court assumed jurisdiction to make substantive welfare decisions in respect of the children on the basis of the children's physical presence in this jurisdiction and under Article 13 of BIIA. The father applied for permission to appeal the order of the 5 December 2019. His application to the Court of Appeal for permission was refused by Moylan LJ on the 21 January 2020.

16. The local authority have completed a parenting assessment of the mother which concludes that mother is unable safely to care for the children. The father did not attend assessment sessions arranged with the social worker on 2 December 2019 and 6 December 2019. The father later informed the social worker that he had failed to attend these sessions as he was high on drugs. With respect to the mother's use of drugs, test results completed on the 28 January 2020 evidenced that the mother used cocaine once per month up until one to two months before the test and approximately five times per month two to three months ago. The mother reports that she was using both heroin and cocaine on a daily basis ten to twelve months ago. The mother also used MDMA in November 2019. The drugs test confirmed that she had not used heroin since May 2019. The father did not engage in drug testing. The mother admitted to the social worker that on 5 December 2020 her and father both took cocaine together.

17. In January 2020 the father chose to return to Belgium. He is said to be waiting to go into a residential unit to receive treatment for his issues with drugs. In his statement the father concedes that he was using drugs until one month ago and acknowledges that he is not able to care for the children. The Belgian authorities have confirmed that father was arrested for possession of drugs in February 2020. Further details have been provided by the Belgian authorities with respect to the father's arrest. When the father was arrested he was with another person taking drugs. That person died and the father was arrested on suspicion of murder and placed in custody. It was later determined that the person who the father was with had died of a drug overdose and the father has been released from custody. It is understood that the father has however, been charged with possession of cocaine and the supply of drugs to another.

18. As I have noted, the father issued his application pursuant to the Children Abduction and Custody Act 1985 on the 27 March 2020. The local authority have notified the Belgian authorities of father's application. The Belgian authorities have confirmed by email dated the 20 April 2020 as follows:

> "The Prosecutor's Office maintains its position that a return of the minors to Belgium would be going against their interests, for multiple reasons:
>
> - The father is known for several criminal offenses, including domestic violence against his ex-partner and mother of the minors. There are also serious substance abuse problems ongoing for several years. Most recently in February of this year, a police report was drawn up against the father for the possessions of drugs, which confirms the ongoing problems. He would therefore appear to be unable to take care of the minors.
>
> - You indicate that "The children are settled in a foster care placement" and "they make good progress and speak English". The PO believes it would be appropriate for the minors to remain in the foster family long term and

> maintain contact with their mother. She seems to have expressed her wishes to stay in the UK and have the minors with her. It is also pointed out that the mother does in fact have no factual connection with Belgium at all. She ended up in Belgium because of her relationship with the father.
>
> - From the standpoint of the minors it certainly seems appropriate for them not to be removed from their familiar surroundings in order to be placed in whole new surroundings in Belgium, while their father is not in a position to take care of them, while the mother is in the UK."

19. On 20 May 2020 the Belgian authorities reiterated their position in an email which stated, in response to further substantive questions being raised as to the detail of protective measures that would be available were the English court to make a return order in circumstances where neither parent was in a position to care for the children, that:

> "Please be informed that, seeing as the position of the Belgian authorities has already been relayed and is quite clear, any arrangements pertaining to the minors in Belgium will need to be made at an *ad hoc* basis, in case the return in the UK is actually ordered".

20. The children continue to make good progress in their foster care placement. They have a close relationship. The children speak English including when they see their mother. The local authority assert that the children are benefitting from receiving safe and stable care and are thriving now that they are not being impacted by their parent's drug addiction and witnessing domestic violence. The children are aware that their mother has given birth to a further child on the 23 May 2020. They have a photo of the baby and both wish to see their baby sister. That child has been placed in foster care. An interim care order was made in relation to that child on the 26 May 2020.

21. There is no issue between the parties that the children were, for the purposes of the application under the 1980 Hague Convention, habitually resident in the jurisdiction of Belgium at the time of their removal therefrom, that at that time the father was exercising his rights of custody and that the mother therefore wrongfully removed the children in breach of the father's rights of custody pursuant to Art 3 of the Convention. As I have already noted, the father's application for permission to appeal the decision of HHJ Butler that the children have now lost their habitual residence in Belgium was dismissed.

SUBMISSIONS

The Father

22. The father seeks for the children are returned to Belgium. He accepts that he is not in a position to care for the children. With respect to the exceptions to summary return provided by Art 13(b) of the 1980 Convention relied on by the mother, whilst acknowledging that the court will approach the mother's written evidence at its highest, the father invites the court to approach her allegations with a high degree of scepticism given what he contends is the mother's lack of candour when dealing with the local authority and other professionals. In any event, Mr Jubb submits that taken at its highest, and in circumstances where if the children were returned to Belgium it

is likely that they would be returned to State care, the risk of harm arising from domestic abuse and drug use is negligible, and certainly not 'grave'.

23. With respect to the impact of the position taken by the Belgian authorities on the analysis under Art 13(b), namely that those authorities do not support a return of the children to Belgium (considering it to be contrary to the children's interests on the basis of their present situation) and that in these circumstances there has been no clear indication from the Belgian authorities that they would implement protective measures of State care for the children should they be returned in circumstances where neither parent is capable of providing them with care (beyond a passing suggestion that *ad hoc* arrangements would be made *if* the English court decided to return the children against the view of the Belgian authorities), Mr Jubb was suitably realistic in his submissions on behalf of the father. Mr Jubb rightly conceded that this situation is relevant when considering whether the terms of Art 13(b) are made out in this case. Within this context, Mr Jubb asks the court to have regard to the fact that the father does not have any control over the position taken by the Belgian authorities, which position Mr Jubb submits places him at a disadvantage and results in the actions of Belgian authorities effectively, to use Mr Jubb's phrase, disabling the father's case and interfering in both his right to a fair trial under Art 6 and his right to respect for family life under Art 8.

The Mother

24. The mother's position is that she wishes to remain living in England. She seeks that the children are returned to her immediate care. She accepts that she has made mistakes in the past when the children were in her care. She is not opposed to the children being made subject to care orders. The mother is opposed to father's application for a return order. As I have noted, on behalf of the mother Ms Holloran submits that the mother can bring herself with the exception to summary return provided by Art 13(b).

25. Within this context, Ms Holloran submits that given the mother's allegations of domestic violence perpetrated by the applicant father and the account of both parents of a highly dysfunctional relationship between them, characterised by serious drug misuse and a chaotic lifestyle to which the children were exposed, any return to such circumstances would be likely to place them at further risk of physical and psychological harm unless robust measures were in place to mitigate or obviate such harm. Ms Holloran has to, and does acknowledge within this context that both parents concede that they cannot care for the children and that, as such, the children would not be returned to the parents care and the risks they present were they to be returned to Belgium. However, Ms Holloran submits that in the very particular circumstances of this case the children would nonetheless still be exposed to a grave risk of harm and an intolerable situation were they to be returned to the jurisdiction of Belgium.

26. In this regard Ms Holloran reminds the court that neither parent is able to identify anyone who could take custody of the children until such times as either of them would be in a position to provide safe and appropriate care and neither parent is able to identify accurately when that would be in any event given their respective longstanding issues. Within this context, Ms Holloran further points out to the court that:

i) As of 25 September 2019 administrative proceedings were ongoing in Belgium to delete the mother and the children from the national register and by 6 November 2019 the Belgian authorities confirmed that 'no member of the family is currently registered in Belgium and they have been deleted from the national register *ex officio*.

ii) There is no evidence before the court that it is it is likely that the Belgian authorities would make arrangements to accommodate the children should they be returned, the evidence rather being that they have not and would not make arrangements to do so in circumstances where they have indicated clearly that they believe a return order to be antithetic to the children's best interests.

iii) That in particular, after seven months of enquiries, it is still not clear who would take custody of the children upon their arrival in Belgium, whether any proceedings would be issued and, if so, by whom, what arrangements would be made for their care and how contact with their mother would be facilitated beyond an indication from the Belgian authorities that unspecified arrangements would be made when necessary or needed.

iv) The 'standard' undertakings offered by the father do not address the complexity of the situation faced by the court, it simply not being within the father's gift to do what would be required.

27. Within the foregoing context, Ms Holloran submits that in circumstances where the Belgian authorities do not support a return of the children to Belgium, considering it to be contrary to the children's interests on the basis of their present situation, and where there has been no indication from the Belgian authorities that they would implement protective measures of State care for the children should they be returned in circumstances where neither parent is capable of providing them with care, beyond a passing suggestion that *ad hoc* arrangements would be made if the English court decided to return the children against the view of the Belgian authorities, the making of a return order in this case would plainly constitute a grave risk of physical or psychological harm or otherwise place the children in an intolerable situation. Ms Holloran submits that this is the inevitable result in the circumstances of this case of moving clearly vulnerable children who have suffered significant harm in the care of their parents from a safe, stable, secure and certain position governed by a framework of protective measures in this jurisdiction to an uncertain, insecure and unstable position in Belgium devoid of any indication of what protective measures might be deployed in that jurisdiction in circumstances where the Belgian authorities object to a return as being antithetic to the children's best interests.

The Local Authority

28. On behalf of the Local Authority Ms Birtles submits that the application by the father for the summary return of the children is made at a later point in time than the vast majority of such applications, the essence of the remedy of summary return being speed and simplicity. Within this context, Ms Birtles submits that the fact that the children have been in England for some 10 months and that, whilst this is thus not a settlement case, the passage of time, the children's experiences and their present secure situation in foster care are highly relevant factors in the assessment of whether

the exception to the requirement to make a summary return order provided for by Art 13(b) of the 1980 Hague Convention is made out.

29. Ms Birtles submits that were they to be returned to the jurisdiction of Belgium it is clear that the children would have to be placed in foster care in circumstances where the father accepts he cannot care for them and the local authority contends the mother is not capable of caring for them. The principle of comity is accepted by Ms Birtles, and the adequacy of the system of Children's Services in Belgium is not put in issue by the local authority. However, Ms Birtles points out that the Belgian authorities have again responded to the questions posed by simply repeating their previous position, which is that they do not support a return, considering it to be contrary to the children's interests on the basis of their present situation. Ms Birtles further submits that, in these circumstances, the court does not have satisfactory evidence as to how the Belgian authorities would institute protective measures for the children were they to be returned, notwithstanding repeated requests for clarification of the same.

30. Within this context, Ms Birtles submits that a return order would result in children who have been in England for almost a year, who are settled and secure in their present placement, who have established routines including education and who have been immersed in the English language to the extent that it has become their first language being moved to a jurisdiction where they are no longer habitually resident, which does not seek the return of the children, which has declined to indicate that it is willing to put in place protective arrangements for the children and which has expressly invited the court to conclude that a return would be entirely antithetical to the children's best interests. In these circumstances, Ms Birtles submits that a return to Belgium would simply be incomprehensible to the children and would, in that context, be plainly psychologically harmful and would place the children in an intolerable situation.

The Children's Guardian

31. The Children's Guardian has provided a report with respect to the father's application. She supports the position of the local authority. The Children's Guardian concludes as follows regarding the question of a grave risk of physical and psychological harm or intolerable situation. As to the children's wishes and feelings, the Children's Guardian relates that E presented as more vocal telling the Children's Guardian that she wishes to live with her mummy or with her foster carers. No reference was made by E to living with her family in Belgium. The Children's Guardian however noted discussions with the children's foster carers to the effect that E recently spoke about her grandmother and that she would like to have contact with her. In discussing this with E, the Children's Guardian noted that she presented as concerned about this due to her no longer remembering how to speak Flemish.

32. On behalf of the children, Mr Semple submits that it is clear from the communication received from the Belgian authorities on 6 November 2019, and set out at paragraph 11 above, that the those authorities took a considered decision that it would not be in the children's best interests for them to be returned to the jurisdiction of Belgium and that the reluctance of the Belgian authorities to indicate any protective measures that may be put in place should the English court order the return of the children stems from that considered decision. Within this context, Mr Semple submits, in effect, that the absence of protective measures that forms the basis of the Art 13(b) defence is in

this case is not the result of an omission or the simple lack of such measures but rather the result of a considered decision on the part of the agencies in the requesting State, which decision has been reiterated each time the local authority has made an enquiry of those agencies.

33. Mr Semple further asserts that it can be properly inferred from the stated position of the Belgian authorities that if the children were returned to the jurisdiction of Belgium and proceedings, or equivalent child protection steps commenced in Belgium, that the Belgian authorities would seek to transfer jurisdiction to England pursuant to Art 15 or to place the children in England subject to the requirements of Art 56 of BIIA. Finally, Mr Semple submits that given the stage at which the care proceedings in relation to the children have reached, proceedings which the English court has substantive jurisdiction to determine, the delay in concluding welfare planning for these children if they were to be returned would be intolerable.

THE LAW

34. The mother seeks to establish that the exception provided by Art 13(b) of the 1980 Convention is made out in this case. Art 13 of the 1980 Hague Convention provides as follows:

> "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.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

35. 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)(Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144. 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, in principle, such anxieties can found the defence under Art 13(b).

36. In *Re E,* the Supreme Court made clear that in examining whether the exception in Art 13(b) has been made out, the court is required to evaluate the evidence against the civil standard of proof, namely the ordinary balance of probabilities whilst being mindful of the limitations involved in the summary nature of the Convention process, which include the fact that it will rarely be the case that the court will hear oral evidence and, accordingly, rare that the allegations or their rebuttal will be tested in cross examination. Within the context of this tension between the need to evaluate the evidence against the civil standard of proof and the summary nature of the proceedings, the Supreme Court further made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as grounding the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm can be identified.

37. However, as I have noted before, the methodology endorsed by the Supreme Court in *Re E* by which the court assumes the risk relied upon to establish the exception under Art 13(b) at its highest is not an exercise that is undertaken in the abstract. The requirement set out in *Re E* for the court to evaluate the evidence against the civil standard of proof whilst taking account of the summary nature of the proceedings, must also mean that the analytical methodology endorsed by the Supreme Court in *Re E* by which the court assumes the risk relied upon at its highest is not an exercise that excludes consideration of relevant evidence before the court. Indeed, in *Re C (Children)(Abduction: Article 13(b)* [2018] EWCA Civ 2834, Moylan LJ held as follows by reference to the judgment of Black LJ (as she then was) in *Re K (1980 Hague Convention: Lithuania)* [2015] EWCA Civ 720:

> "[39] In my view, in adopting this proposed solution, it was not being suggested that no evaluative assessment of the allegations could or should be undertaken by the court. Of course a judge has to be careful when conducting a paper evaluation but this does not mean that there should be no assessment at all about the credibility or substance of the allegations. In *Re W (Abduction: Intolerable Situation)* [2018] 2 FLR 748, I referred to what Black LJ (as she then was) had said in *Re K (1980 Hague Convention: Lithuania)* [2015] EWCA Civ 720 when rejecting an argument that the court was "bound" to follow the approach set out in Re E. On this occasion, I propose to set out what she said in full:
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> > '[52] The judge's rejection of the Article 13b argument was also criticised by the appellant. She was said wrongly to have rejected it without adequate explanation and to have failed to follow the test set out in §36 of Re E in her treatment of the mother's allegations. In summary, the argument was that she should have adopted the "sensible and pragmatic solution" referred to in §36 of Re E and asked herself whether, if the allegations were true, there would be a grave risk within Article 13b and then, whether appropriate protective measures could be put in place to obviate this risk. That would have required evidence as to what protective steps would be possible in Lithuania, the submission went.
> >
> > [53] I do not accept that a judge is bound to take this approach if the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an Article 13b risk. That is what the judge did here. It was for the mother, who opposed the return, to substantiate the Article 13b exception (see Re E supra §32) and for the court to evaluate the evidence within the confines of the summary process. Hogg J found the mother's evidence about what had happened to be inconsistent with her actions in that she had continued her relationship with the father and allowed him to have the care of E, see for example what she said in §37 about the mother not having done anything to corroborate her evidence. She also put the allegations in context, bearing in mind what Mr Power had said about something good having happened in E's parenting, which she took as a demonstration that E would not be at risk if returned to Lithuania (§36). The Article 13b argument had therefore not got off the ground

> in the judge's view. The judgment about the level of risk was a judgment which fell to be made by Hogg J and we should not overturn her judgment on it unless it was not open to her (see the important observations of the Supreme Court on this subject at §35 of Re S, supra). Nothing has been said in argument to demonstrate that the view Hogg J took was not open to her; in the light of it, it was unnecessary for her to look further at the question of protective measures. She would have taken the same view even if the child had been going back to the father's care, but the Article 13b case was weakened further by the fact that the mother had ultimately agreed to return with E.'
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> [40] As was made clear in Re S, at [22], the approach "commended in *Re E* should form part of the court's general process of reasoning in its appraisal of a defence under the article". This appraisal is, itself, general in that it has to take into account all relevant matters which can include measures available in the home state which might ameliorate or obviate the matters relied on in support of the defence. As referred to in *Re D*, at [52], the English courts have sought to address the alleged risk by "extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting state to protect him once he is there. In many cases this will be sufficient" (my emphasis).
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> [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)."

38. In the circumstances, the methodology articulated in *Re E* forms part of the court's general process of reasoning in its appraisal of the exception under Art 13(b) (see *Re S (A Child)(Abduction: Rights of Custody)* [2012] 2 WLR 721), which process will include evaluation of the evidence before the court in a manner commensurate with the summary nature of the proceedings. Within this context, as I observed in *MB v TB (Article 13: Alleged Risk of Oppressive Litigation)* [2019] 2 FLR 866, *TY v HY (Return Order)* [2019] 2 FLR 1284 and *Uhd v McKay (Abduction: Publicity)* [2019] 2 FLR 1159, the assumptions made with respect to the maximum level of risk must be reasoned and reasonable assumptions based on an evaluation that includes consideration of the relevant admissible evidence that is before the court, albeit an evaluation that is undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention.

39. Finally, it is well established that courts should accept that, unless the contrary is proved, the administrative, judicial and social service authorities of the requesting

State are equally as adept in protecting children as they are in the requested State (see for example *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). In this context I note that Lowe and others observe in *International Movement of Children: Law, Practice and Procedure* 2nd Edt. at paragraph 24.55 that:

> "Although, as has been said, it is generally assumed that the authorities of the requesting State can adequately protect the child, if it can be shown that they cannot, or are incapable of or, even unwilling to, offer that protection, then an Art 13(b) case may well succeed. It seems evident, however, that it is hard to establish a grave risk of harm based on speculation as opposed to proven inadequacies in the particular cases."

DISCUSSION

40. Having considered the evidence and submissions in this matter carefully, in the particular circumstances of this unusual case I am satisfied that the mother has made out the exception under Art 13(b) of the 1980 Convention. I am further satisfied that I should not exercise my resulting discretion to make a return order in this case and should dismiss the application of the father. My reasons for so deciding are as follows.

41. This is not a settlement case under Art 12 of the 1980 Convention and I make clear that I have not treated it as such. It is important however, in evaluating in this case whether the exception under Art 13(b) is made out, to begin by paying careful regard to the children's current situation in this jurisdiction, the requested State.

42. The children have now been in this jurisdiction for nearly 12 months. They have been taken into State care and are the subject of care proceedings under Part IV of the Children Act 1989, which proceedings the English court has determined it has jurisdiction to hear pursuant to the relevant provisions of BIIA. Those proceedings are ready for final hearing. Pending the determination of those child protection proceedings, the children have been and remain the subject of effective protective measures comprising a placement in foster care, which placement continues to provide them with secure, safe and consistent care. Both children are said to be thriving in the protective provision constituted by their foster care placement. Subject to the limitations imposed by the COVID-19 pandemic, the children have continued to have contact with their mother. The English court has determined that the children have now lost their habitual residence in Belgium and permission to appeal that decision has been refused by the Court of Appeal.

43. Against this, and looking as I must at the situation as it would be if the children were returned forthwith to Belgium, on their own cases neither parent is in a position to care for the children were they to be returned to the jurisdiction of Belgium. There are no relatives in Belgium who can care for the children were they to be returned to that jurisdiction. Indeed, administrative proceedings have been taken in Belgium to

strike the mother and children from the Belgian population register, no member of the family is currently registered in Belgium and they have been deleted for the national register *ex officio*.

44. Further, the Belgian authorities have repeatedly made clear their view that the children should not be returned to the jurisdiction of Belgium. Within this context, beyond a bare statement that, were the English court to make such an order, unspecified *ad hoc* protective measures would have to be taken, those authorities have declined to indicate what protective measures would be put in place were the English court to order the return of the children pursuant to the provisions of the 1980 Hague Convention. In the circumstances, after repeated enquiries made over a period of seven months via the Belgian Central Authority, to enquiries which the Belgian authorities have diligently responded, this court has no indication of the nature and extent of the protective measures that would be put in place were the children to be returned to Belgium without either parent, as they inevitably would have to be given each parents' concession that neither are able to care for the children and there are no other family members who could do so.

45. Whilst Mr Jubb invited the court to adjourn this matter for further attempts to be made to persuade the Belgian authorities to provide details of the protective measures they would implement were a return order to be made, in light of the repeated and consistent replies received from the Belgian authorities to that very question over a period of some seven months, I am satisfied that an adjournment would not bring any further clarity, in addition to causing further and unwarranted delay to the resolution of these proceedings.

46. In the circumstances, there is no evidence before the court to confirm who would take custody of the children upon their arrival in Belgium, whether any proceedings would be issued and, if so, by whom, what arrangements would be made for their care and how contact with their mother would be facilitated beyond an indication from the Belgian authorities that unspecified arrangements would be made when necessary or needed and only if a return order were made. As Ms Holloran rightly points out, within this context the 'standard' undertakings offered by the father do not address the complexity of the situation faced by the court because, in the circumstances of this case, it is simply not within the father's gift to do what would be required.

47. As I have made clear, this lack of clarity as to protective measures in the requesting state does not stem from a failure by the Belgian authorities to co-operate with the English authorities in answering questions as to protective measures, or from an absence of such protective measures in the jurisdiction in question (the existence of which the principle of comity in any event demands this court assume), but rather from a decision by those authorities not to provide details of protective measures in circumstances where they consider a return of the children to the jurisdiction of Belgium is plainly antithetic to their best interests. As Mr Semple points out, the documents before the court indicate that that decision appears to have been a reasoned one and that the reluctance of the Belgian authorities to indicate protective measures that may be put in place should the English court order the return of the children has its genesis in that reasoned decision.

48. As I have noted above, during the course of his oral submissions Mr Jubb expressed considerable disquiet with respect to the situation I have outlined in the foregoing

paragraph, submitting that the actions of Belgian authorities in choosing not to provide information concerning protective measures have effectively, and again to use Mr Jubb's phrase, disabled the father's case, thereby breaching the father's right to a fair trial under Art 6 and unjustifiably interfering with his rights to respect for private and family life under Art 8.

49. It is possible to have some sympathy with this argument. In taking a decision in an Art 13(b) case to decline to provide information on protective measures based on its assessment of whether it is in a child's best interests to be returned, it might be said that a requesting State, by taking such a decision, in effect acts to determine the application on the basis of a welfare assessment rather than the application being determined by the requested State by reference to the principles in the 1980 Hague Convention. However, it is not for this court to regulate the actions of agencies in a requesting State. In so far as the father seeks to establish that the actions of the *Belgian* authorities have, by reason of the impact of their decision making on these proceedings, breached his Art 6 and Art 8 rights those arguments are not for this court to determine. Within this context, in determining an application under the 1980 Hague Convention this court must proceed on the basis of the information that is, and that is not, available to it.

50. In these circumstances, and having regard to the totality of the information that is, and that is not available to the court in this case, I am satisfied that to order the return of the children to the jurisdiction of Belgium would place them in an intolerable situation for the purposes of Art 13(b). That situation of intolerability is grounded in the stark contrast between the children's current situation in this jurisdiction and the situation that would pertain for the children in the future were they to be returned to Belgium in the circumstances I have outlined above. The making of a return order in this case would remove clearly vulnerable children who have suffered significant harm in the care of their parents from a safe, stable, secure and certain situation governed by a framework of protective measures in this jurisdiction to an entirely uncertain situation in Belgium in which it is not clear where the children will live, who they will be cared for by and what steps will be taken to determine the extant welfare issues in respect of them in a jurisdiction which has declined to indicate that it is willing to put in place protective arrangements for the children, where they are no longer habitually resident and which has expressly invited this court to conclude that a return would be entirely antithetical to their best interests.

51. Within this context, to order the return of the children to Belgium in these circumstances would result in the children moving from a position of certainty, stability and security to a position of manifest uncertainty, instability and insecurity. They would be moved from a situation in which, in the context of neither of their parents having the capacity to care for them, their needs are being met by planned protective measures implemented in the framework of closely timetabled child protection proceedings to a situation in which, by reason of the considered position taken by the authorities in the requesting state, it is unclear whether and which protective measures might be taken. In my judgment that would amount to a situation of intolerability for the children for the purposes of Art 13(b) of the 1980 Hague Convention. Once again this is not a settlement case. However, the court also cannot ignore, as an aspect of intolerability, the manifest emotional and physical disruption to

their current established situation that would be caused to the children were such a move to be sanctioned by this court.

52. I have of course borne carefully in mind that courts should accept, unless the contrary is proved, that the administrative, judicial and social service authorities of the requesting State are equally as adept in protecting children as they are in the requested State. However, as noted by Lowe and others in *International Movement of Children: Law, Practice and Procedure* 2nd Edt. at paragraph 24.55, if it is demonstrated on evidence that the requesting State cannot, or is incapable of or is unwilling to implement protective measures then the criteria set out in Art 13(b) may well be satisfied. In this case, I am satisfied that the evidence clearly establishes, for the reasons I have given, that the absence of information as to protective measures in the requesting State does not stem from a failure by the Belgian authorities to co-operate with the English authorities in answering questions as to protective measures, or from an absence of such protective measures in the jurisdiction in question (the existence of which, once again, the principle of comity in any event demands this court assume), but rather from a decision by those authorities not to provide details of protective measures in circumstances where they consider a return of the children to the jurisdiction of Belgium should not take place.

53. Within this context and for the reasons I have given, I am satisfied that ordering the return of children who cannot be placed in the care of either of their parents from a requested State in which child protection issues are being addressed within properly constituted proceedings whilst child is secure, stable and thriving under protective measures implemented in the requested state to a requesting State that has stated the children should not be returned and has, accordingly, declined to indicate what protective measures would be implemented beyond a bare statement that *ad hoc* arrangements will be made only if a return order is granted would amount to an intolerable situation for the children for the purposes of Art 13(b) of the 1980 Convention.

54. These circumstances give rise to a discretion to order the return of the children to the jurisdiction of Belgium if I consider that it is in each of their best interests so to order notwithstanding that the exception under Art 13(b) is made out. I am satisfied that it is not in either child's best interests to order their return.

55. The children have been in England now for nearly 12 months. That the passage of time, the children's experiences and their present secure situation in foster care are highly relevant factors in the assessment of their best interests when considering the exercise of the court's discretion. As I have set out above, each of the children is thriving in their current placement, speaks English and benefits from receiving safe and stable care. It would not be in either of the children's best interests to disrupt their placements. Both children are now the subject of child protection proceedings which are ready for final determination. To make a return order would disrupt or delay those proceedings and thus delay the determination of the children's long term welfare. This would plainly not be in their best interests. Beyond this, for the reasons I have given, to make a return order would move the children from a settled position of security, safety and uncertainty to a position of manifest uncertainty. This would plainly not be in either child's best interests. Indeed, it is difficult to conceive of a more disruptive step for the children at this point in their young lives. As I have already stated, both children have now lost their habitual residence in Belgium.

Within the foregoing context, I am satisfied that it is not in either of the children's best interests to make return orders notwithstanding that the terms of Art 13(b) are satisfied in this case in the manner I have set out above.

CONCLUSION

56. In conclusion, I am satisfied that the father's application under the Child Abduction and Custody Act 1985 should be dismissed for the reasons I have given. In the circumstances, I dismiss his application and lift the stay on the care proceedings. All parties are agreed that it is appropriate for this matter now to be reallocated to HHJ Butler who will now proceed to determine the proceedings under Part IV of the Children Act 1989.

57. That is my judgment.