



Neutral Citation Number: [2023] EWHC 583 (Fam)

Case No: FD22P00776

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/03/2023

Before :

MR NICHOLAS CUSWORTH KC
(SITTING AS A DEPUTY HIGH COURT JUDGE)

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

**AND IN THE MATTER OF THE CONVENTION ON THE CIVIL ASPECTS OF
INTERNATIONAL CHILD ABDUCTION, THE HAGUE 25 OCTOBER 1980**

AND IN THE MATTER OF THE CHILD Y

Ms Martha Gray for the Applicant
Mr Paul Hepher for the Respondent

Hearing date: 8th March 2023

Judgment

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

.....

MR NICHOLAS CUSWORTH KC (SITTING AS A DEPUTY HIGH COURT JUDGE)

This judgment was handed down in private on 9 March 2023. It consists of 20 paragraphs and has been signed and dated by the judge.

The judge hereby gives leave for it to be reported.

Mr CUSWORTH KC:

1. This case comes before the court for hearing of the mother's application for a stay of an order for the summary return of Y to Romania (B83). That order was made on an application brought under the 1980 Hague Convention, dated 1 December 2022, by Y's father, V. The order is dated 14 February 2022 and has not been appealed by the mother, S. It provided for Y's return to Romania by 12 March 2022, following the hearing of the mother's application of temporary leave to remain in the UK before the Romanian court. The application came before the Romanian court on 22 February 2023 and was dismissed. On 24 February 2023, the mother lodged an appeal against this decision. She seeks a stay pending determination of her appeal.
2. I have read detailed position statements by counsel for both parties, and have heard their respective oral submissions on 8 March 2023. I have also been handed at court a note of Mr Rees KC's judgment of 14 February 2023, which I have read. I have been referred by counsel to a number of authorities on the question of stay, and I have indicated to the parties that to do justice to their respective cases I would prepare a short written judgment, in addition to my having indicated, given the pressure of time before 12 March, what my decision on the application would be, which, after a careful balance, will be to refuse the application.
3. Ms Gray, for the mother seeks a stay of a further 5 weeks from the date of this hearing, to allow the mother's appeal in Romania to be determined. She has no concrete evidence of when the appeal might be listed, or by when a final decision might be rendered. She also indicated that her client would be content with a stay for a lesser period if that was considered suitable by the Court. However, as I pointed out to her, on her own case it was unlikely that the appeal would have been determined in any lesser time, and the justification for the further time, in addition to the 4 weeks before return already granted after 14 February by the trial judge, which was to allow

the mother's interim application in Romania to be determined, would therefore fall away.

4. The parents and child are Romanian nationals. Y was born in Romania (in Bucharest), as were his parents. There is no dispute that Y is habitually resident in Romania, where he was brought up, living with his parents. Proceedings continue before the Court in Romania, where both parties acknowledge primary welfare jurisdiction lies in respect of the child. The mother has made an application for permission for Y permanently relocate to England and Wales, and I am told that there is a first directions hearing on that application listed in Romania on 20 April 2023. I do not know how long thereafter it will be before the application is determined.
5. The background to the parent's marriage, and to the circumstances that led to the application under the Hague Convention 1980 are set out in the judgment of 14 February, and need not be repeated here. The mother in those proceedings made allegations of domestic abuse against the father, which he denies. The court accepted that undertakings should be put in place as appropriate protective measures, which have been offered. As indicated, the mother does not appeal the substantive return order.
6. However, Ms Gray does rely on the last paragraph of Mr Rees' judgment, where he made clear that, in setting a date for Y's return to Romania, an important factor was that the mother's application for temporary leave to remove was listed before the Romanian Court on 22 February 2023 (8 days after the hearing). He found that it was not in the interests of Y, or of the parties, for them to be required to take steps before then. He said that if by 24 February the mother had permission for Y to remain, she could apply to vary or stay the return order, but that absent such permission, she must book flights by 3 March, and return by 12 March. I am told that the flights have been booked for a return on the afternoon of 12 March, in compliance with that order.
7. The parties are agreed that Romania is the court with primary jurisdiction in relation to Y. At present, subject to her right of appeal, the Romanian court has determined that Y should be returned to that country whilst her other welfare-based

applications are determined. The English Court has made a return order, the implementation of which was extended to allow her application in Romania to be allowed to remain here with her son on a temporary basis to be determined. That application has been dismissed. Her appeal against that decision may take 5 weeks, although as there is as yet no date set for any hearing, it may be longer. Mr Hephher, for the father, simply says that applying the tests in the authorities, there are no sufficient grounds for any further stay to the order.

8. Ms Gray argues that Y's welfare would be impacted if he returned to Romania now in a number of ways. She says that he would lose his school place in England – which she says must be surrendered after 20 days absence. On the basis that the current school term ends on 31 March, as is her client's case, that would entail Y missing some 15 days of school until the end of term if he left on 12 March. The new term, she said, begins on 17 April, which would mean that the 20 days would not elapse until the end of that week – 21 April – which is more than 6 weeks from today. That would suggest that the asserted threat to Y's school position is more illusory than real, as she is seeking no more than a 5-week adjournment.
9. However, when this became clear, and after taking instructions, Ms Gray maintained that the mother, if she were to return to Romania with Y, would have to make a fresh interim application for permission to remove him before she could return, notwithstanding her extant appeal proceedings against the court's previous refusal. That could apparently take many weeks more, which might well she now says take any return even in the event of a successful appeal to a date beyond 21 April. I do not know whether that is the case, but that was the basis on which it was finally put that Y's place at his English school might be put at risk.
10. Further, Ms Gray argued that the mother's own job in England would be lost if she had now to return to Romania, but that if she were able to stay, and her appeal were to succeed, then that could be avoided.
11. Whilst she says that she and her Romanian lawyer consider that she has a good prospect of success on appeal, I cannot at this brief hearing form any view as to its

merits. Mr Hepher says that the Romanian Court's determination appears to be a full and careful judgment, in that it fully sets out the rival parties' contentions. But, unlike the position in an English Appeal where the broad merits may be clear on any stay application, I cannot judge the basis upon which the appellate court in Romania will act, nor, other than in relation to a broad consideration of welfare, the appellate issues in play.

12. Mr Hepher, for his part, suggested that Y could benefit from some time staying with his father – a position which the mother in the Romanian proceedings has encouraged – and that he would not therefore suffer, even if his return to Romania does prove to be temporary because the mother ultimately succeeds in her appeal.

13. I have considered the following authorities: *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065; *G v G (Secretary OF State for the Home Department)* [2021] UKSC 9; *Re N (Children: Interim Order/Stay)* [2020] EWCA Civ 1070; *In re HH (A Child: Stay of Order pending Appeal)* [2022] EWHC 3369 (Fam); *BK v NK* [2016] EWHC 2496 (Fam); and *E v Q* [2019] EWHC 3939 (Fam). From them, I can derive the following principles applicable to this case:

- a. The court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay [*Hammond Suddard*].
- b. As a general proposition, the Court should be slow to stay an application 'prior to any determination'. This is entirely consistent with the aims and objectives of the 1980 Hague Convention including the obligations of expedition and priority [*G v G*]. Here, of course, the determination has already taken place.
- c. A short-term stay to enable an application to be considered by an appeal court before an order is put into effect is to be distinguished from a stay pending a decision on permission to appeal. A stay pending appeal will be considered in accordance with the principles set out in *Hammond Suddart*. By contrast, a

short-term stay is a purely practical remedy - ‘a narrow opportunity’ to approach this court so that the opportunity for a successful appeal is not unfairly eroded [*Re N*].

- d. Art 12 of the 1980 Hague Convention provides for a child’s return ‘forthwith’ where there has been a wrongful removal. Whilst the Court has the power to stay or suspend the operation of that order pending steps being taken in the court of the child’s habitual residence, this power is one to be exercised only in exceptional circumstances [*BK v NK*].
- e. Where the strength or otherwise of the applicant’s prospects on appeal cannot be determined when a stay is sought, the court need only be satisfied that the grounds of appeal are not fanciful. Instead, the court should be focussing on whether the refusal of such an interim stay would stifle the proposed appeal or render it nugatory [*Re HH*].
- f. The jurisdiction to postpone or suspend needs to be exercised in terms of the overriding policy of the Convention and where the particular factual circumstances demand it. Normally, it will be to allow time to settle an individual’s affairs, not to defer indefinitely the return pending the outcome of foreign proceedings [*E v Q*].

14. In this case, I am satisfied that the first short-term stay has already been afforded to the mother by Mr Rees KC, when he extended the time for implementation of his return order by a full month to allow the mother to make her application for interim permission to remain with Y in England before the Romanian court. That court is now fully seised of the issues relating to Y’s welfare, and is currently requiring his return to that jurisdiction whilst his longer term future is being decided. I do not know what the mother’s prospects on appeal might be, and must therefore focus, amongst all of the circumstances of this case, on whether the refusal of the mother’s stay application would stifle her proposed appeal or render it nugatory.

15. In this case, I am not so satisfied.

- a. The mother has confirmed to me, through Ms Gray, that if a stay is refused and the return order remains effective, she would continue with her Romanian appeal from that country. That does suggest that she would not consider her prospects stifled, even after a return.
 - b. For Y to return to Romania now, 3 weeks before the end of the English term, would not deprive him of his school place within the 5-week window that the mother herself is asking for. It would also leave the mother with more than a month before the commencement of the next term on 17 April to prosecute her Romanian appeal and if necessary, contact his English school to confirm that he would be returning to take up his place. On her case, that is more than sufficient time.
 - c. There is no clear evidence before me that the mother's position would be more complicated in Romania if she had already returned; and that even if her appeal succeeds she would have to make a fresh application which would take further time, to allow her to bring Y back. If that were the case, it should have been a part of her case from the outset, and be effectively evidenced.
16. From Y's perspective, it is relevant that the mother's Romanian case has been that he should be able to travel between the 2 countries, spending time with both parents. This suggests that a few weeks spent there now, if that is what transpires, is unlikely to be unduly disruptive.
17. I must also remind myself of the general Convention considerations, and the fact that in this case a return order has been made, has not been appealed, and has already been extended for 4 weeks to allow the mother's application in Romania to proceed. Despite the mother's assurances, there is no listing yet for her appeal, nor other evidence which confirms the potential timescale for any further decision. Her initial position was for her return to be delayed until 14 days had passed after the outcome of the appeal – which would have been uncertain, but realistically far too long. Ms Gray's offer to submit to a shorter fixed time on her behalf would simply extend time

without any real prospect that the sole purpose of the extension, to await the decision on appeal, would have been achieved.

18. The other factor to bear in mind is the interruption in the relationship between Y and his father which has been caused by his removal by his mother, and that compliance with Mr Rees' order would most swiftly enable that relationship to restabilize. I cannot therefore see any overriding welfare reasons to grant the mother's application for this stay, effectively a further stay after the trial judge's initially granted extension. This is not a case, such as *BK v NK*, where there is a clear welfare-based reason why such a stay should be granted. The date of anticipated departure has been known since 14 February, and the possibility of a further stay in the event that an appeal was required was not raised with the court at that time.

19. In all of the circumstances of this case, I am not satisfied that there exist any sound reasons which might, exceptionally, justify a stay of Mr Rees KC's order. I am not satisfied that the ordered return will serve to stifle the prospects of the mother's appeal in Romania against that Court's refusal of permission for her to remain here with Y whilst her longer term application is determined. I am not satisfied that a return will inevitably cause Y to lose his school place in England, in the event that the mother's appeal is successful. If the mother is unable to remain in her current employment in England, I have no evidence that this will do serious or irreparable damage to her employment prospects for the future, either in England or in Romania. There are clear welfare benefits for Y to be able to have direct contact with his father over the next few weeks, the extent of which can be determined by the Romanian Court upon his return if in dispute.

20. In all of those circumstances, I refuse the mother's application and reconfirm Mr Rees KC's order.

9th March 2023