



Neutral Citation Number: [2022] EWHC 526 (Fam)

Case No: FD21P00511

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/03/2022

Before :

THE HONOURABLE MRS JUSTICE JUDD DBE

Between :

H

- and -

B

Mark Jarman (instructed by **AL Law**) for the **Applicant**

Clare Renton (instructed by **Charles Strachen Solicitors**) for the **Respondent**

Hearing dates: 21st December 2021

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HONOURABLE MRS JUSTICE JUDD DBE

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.

The Hon Mrs Justice Judd :

1.

This is an application by a father pursuant to the 1980 Hague Convention for the return of his son, born in October 2020 to France. It is resisted by the mother.

Background

2.

The parties met in 2018 and have never married. The mother is British and the father is French. In 2019 the mother divided her time between living with the father in France and working in this country where she is a specialist nurse. She returned to England in 2020 and in May of that year discovered she was pregnant. She remained here until the baby was born in October. In December 2020 when the baby was about eight weeks old, she went to France to be with the father.

3.

Mother and baby remained in France until the 1st April 2021. They came here for three weeks, returning to France on 22nd April. On 19th May 2021 the mother once more brought the child back here where they have remained to date. The father issued this application on 2nd August 2021.

The issues

4.

The father's case is that the mother's removal of the child was wrongful within the meaning of Article 3 of the Convention. The court is therefore required under Article 12 to order the return of the child forthwith.

5.

The mother accepts that the father has custody rights with respect to the child but asserts that on 19th May the child was not habitually resident in France. In the event that the court concludes otherwise, she argues that there is a grave risk that an order for return would subject the child to physical or psychological harm, or otherwise place him in an intolerable situation (Article 13b).

6.

The father is prepared to offer undertakings to the court as to financial provision and accommodation for mother and child. He will also undertake not to institute criminal proceedings, to pay for direct flights, and not to harass, pester, intimidate, threaten or use violence against the mother or her property. The offer to provide separate accommodation for the mother and child came on the day before the hearing and following receipt of the psychiatric report .

The law

Habitual residence

7.

In Re B (A Child)(Custody Rights: Habitual Residence) [\[2016\] EWHC 2174 \(Fam\)](#), [\[2016\] 4 W.L.R. 156](#) , paragraph 17 Mr Justice Hayden summarized the leading authorities to date on habitual residence:-

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* , 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 emphasized that the factual inquiry must be centered throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (A v A , In re L).

iii)

In common with the other rules of jurisdiction in [Council Regulation \(EC\) No 2201/2003](#) ("Brussels IIA") 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); In re B , para 42, applying [Mercredi v Chaffe \(Case C-497/10PPU\) EU:C:2010:829; \[2012\] Fam 22](#) , 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).

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). 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 lose a pre-existing habitual residence at the same time as gaining a new one (In re B).

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 ([article 9](#) of Brussels IIA envisages within three 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 JSC referred (para 45) to 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 an 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 an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former" (In re B supra).

8.

In the case of Re M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention) [2020 EWCA Civ 1105](#) Moylan LJ endorsed this summary but suggested that bullet point (viii) should be omitted as it might distract the court from the essential task of analysing the situation of the child.

Article 13b

9.

The law with respect to Article 13b has been set out in numerous cases, most recently in Re IG (Child Abduction: Habitual Residence: Article 13b) [\[2021\] EWCA Civ 1123](#) where Baker LJ stated at paragraphs 46 to 48;

' 46. The leading authorities remain the decisions of the Supreme Court in Re E (Children) (Abduction: Custody Appeal) [\[2011\] UKSC 27](#) , [\[2012\] 1 AC 144](#) and Re S (A Child) (Abduction: Rights of Custody) [\[2012\] UKSC 10](#) , [\[2012\] 2 AC 257](#) . The principles set out in those decisions have been considered by this Court in a number of authorities, notably Re P (A Child) (Abduction: Consideration of Evidence) [\[2017\] EWCA 1677](#), [\[2018\] 4 WLR 16](#) and Re C (Children) (Abduction: Article 13(b)) [\[2018\] EWCA Civ 2834](#) , [\[2019\] 1 FLR 1045](#) . Since the hearing of the present appeal, this Court has handed down judgments in another appeal involving Article 13(b), Re A (A Child) Article 13(b) [\[2021\] EWCA Civ 939](#) in which Moylan LJ carried out a further analysis of the case law. I do not intend to add to the extensive jurisprudence on this topic in this judgment, but merely seek to identify the principles derived from the case law which are relevant to the present appeal.

"47. The relevant principles are, in summary, as follows.

(1) The terms of Article 13(b) are by their very nature restricted in their scope. The defence has a high threshold, demonstrated by the use of the words "grave" and "intolerable".

(2) The focus is on the child. The issue is the risk to the child in the event of his or her return.

(3) The separation of the child from the abducting parent can establish the required grave risk.

(4) When the allegations on which the abducting parent relies to establish grave risk are disputed, the court should first establish whether, if they are true, there would be a grave risk that the child would

be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then establish how the child can be protected from the risk.

(5) In assessing these matters, the court must be mindful of the limitations involved in the summary nature of the Hague process. It will rarely be appropriate to hear oral evidence of the allegations made under Article 13(b) and so neither the allegations nor their rebuttal are usually tested in cross-examination.

(6) That does not mean, however, that no evaluative assessment of the allegations should be undertaken by the court. The court must examine in concrete terms the situation in which the child would be on return. In analysing whether the allegations are of sufficient detail and substance to give rise to the grave risk, the judge will have to consider whether the evidence enables him or her confidently to discount the possibility that they do.

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

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

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

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

"48 In his judgment in the recent case of *Re A*, Moylan LJ (at paragraph 97) gave this warning about the failure to follow the approach set out above in paragraph (4):

"if the court does not follow the approach referred to above, it would create the inevitable prospect of the court's evaluation falling between two stools. The court's "process of reasoning", to adopt the expression used by Lord Wilson in *Re S*, at [22], would not include either (a) considering the risks to the child or children if the allegations were true; nor (b) confidently discounting the possibility that the allegations gave rise to an Article 13(b) risk. The court would, rather, by adopting something of a middle course, be likely to be distracted from considering the second element of the *Re E* approach, namely "how the child can be protected against the risk" which the allegations, if true, would potentially establish."

The evidence of Dr. Ratnam

10.

Dr. Ratnam prepared a report dated 16th December and gave oral evidence to the court. She concluded that the mother had suffered from recurrent depression, and remains depressed at the current time. She also fulfils criteria for generalised anxiety, with symptoms of palpitations and

feelings of fearfulness. The mother had experienced episodes of emotional dysregulation and self harm in the relationship with the father. During the summer 2021 she had experienced severe depression and some suicidal ideation. Since that point the mother's condition has improved so that she is now more stable and her level of depression was moderate. Whilst treatment with anti-depressants and anxiolytics will aid the resolution of her symptoms it is unlikely that full resolution will be achieved whilst there are ongoing stresses, as her depression is affected by psycho-social factors.

11.

In her opinion, set out in her report and oral evidence, Dr. Ratnam considered that a return to France would impact adversely on the mother's mental health. Adequate treatment is available in France (and the mother is motivated to seek treatment) but other factors are also important in recovery from mental illness. Although she was not able to say exactly how the mother would fare if a return was ordered, she was clear that her situation would not be ameliorated and it could deteriorate. She noted that in France the mother did not have access to the significant support from her parents in the way that she does here, and her career prospects would be limited, at least for a while. The mother's work is very important to her, for her sense of self and independence. Dr. Ratnam further said that the relationship with the father was triggering for the mother and that exposure to him would be likely to lead to the sort of difficulties she had earlier, especially if she was to live with him.

12.

In her oral evidence, Dr. Ratnam noted that the episode in July 2021 where the mother had had suicidal ideation had been a serious one, where the mother was very emotionally dysregulated. She self-harmed and ran into the woods with the intention of harming herself further (her statement suggests suicide) and at that point her depression would have been characterised as severe. Whilst the mother has made a significant recovery since then, these symptoms can reoccur very quickly.

13.

Although being in separate accommodation as now offered by the father would significantly reduce the level of stress upon the mother, financial dependence upon the father would be difficult. Further legal proceedings in France, especially without security of accommodation or a job, or the support from her own side of the family that have assisted her so much here would be very difficult.

The mother's case

14.

Ms Renton on behalf of the mother submits first that the child was not habitually resident in France on the date of his removal. The mother is British by birth and has lived here almost all of her life. She spent time in France in 2019 but was still going back and forth to work. She spent the most part of her pregnancy and gave birth here. She went to France in order to allow the father to spend time with the baby, but she always planned to return to England to resume work. The baby and mother were registered with a GP here. The mother never claimed benefits in France.

15.

The mother went over to France in December 2020. She booked return flights for 7th January but they were cancelled because of the resurgence of Covid. On 5th January the mother was very depressed and anxious, feeling she was trapped in Paris, and sought out some support groups to assist her. The relationship between the parties in January was very poor and there were a lot of arguments.

16.

The mother then booked return flights to the UK on 1st April, intending to return on 18th but in fact returned on 22nd April. She said she did not wish to return at all but felt pressurised to do so. She flew back to London on 19th May.

17.

Ms Renton submits that all these matters demonstrate that the child had not attained the necessary degree of integration into a social and family environment to become habitually resident in France. He was of an age where he was totally dependent on his mother. Her roots in this country were very deep, and between December 2020 and May 2021 in France she was in a situation of distress, instability and uncertainty. If it had not been for Covid they would have only remained for a few weeks at the longest. The child had to have immunisations in France because appointments here could not be attended. The child was registered with a GP and had his eight week check in England in December 2020.

18.

Ms Renton submits that either the child was habitually resident in England on 19th May 2021, or he had no habitual residence at all at that point.

19.

Turning to the mother's case pursuant to Article 13b, Ms Renton submits that the mother has been subjected to seriously abusive and controlling behaviour at the hands of the father which has affected her mental health. She is suffering from depression, which will be exacerbated by an order for return to France. She points to the detail in the mother's statement about her treatment at the hands of the father.

20.

Ms Renton further relies upon the report and oral evidence of Dr. Ratnam, Consultant Psychiatrist as to the mother's mental health and prognosis. ~~She submits that~~ these matters taken together will place the child at grave risk of harm and/or place him in an intolerable position if a return order is made.

The father's case

21.

On behalf of the father, Mr Jarman submits that the child was clearly habitually resident in France as at 19th May. The situation had undoubtedly been affected by Covid, but the situation was that the child and mother were living in France for five months between December 2020 and May 2021. Indeed the mother moved to France for the first time in February 2019 and a declaration was obtained to confirm they were living together and cohabiting. After the child was born the mother arranged for his and her belongings to be transported to France, and the child was registered with healthcare services there. She opened a bank account, and obtained a French residency card allowing her to stay permanently there. It was in France that the mother had a home with the father, for in England her accommodation was tied to her work with a family. In France, the parties were living together as a family and caring for the child.

22.

As to Article 13b, Mr Jarman submits that the mother's mental health problems are not of a sufficient degree or intensity as to give rise to a grave risk or intolerable situation for the child. The defence is not there to protect children from what may be called the ordinary 'rough and tumble', discomfort and distress or other vicissitudes of life. Dr. Ratnam is not able to say that the mother's mental health will deteriorate to a serious level; all she could say was that her current state was unlikely to be

ameliorated. The mother has insight and is able to seek assistance from professionals virtually, and also her parents, even if she is in a different country.

23.

The protective measures offered by the father, in particular the offer to provide the mother with independent accommodation and funding, and the undertakings not to remove the child from her care pending French proceedings and not to harass pester or intimidate her would be sufficient to ameliorate the risk. The mother would receive assistance from the father in caring for the child, which would in turn enable her to go to work.

Discussion and conclusions

Habitual Residence

24.

Habitual residence is never easy to determine in a case where at least one of the parties and the child have spent time moving from one country to another. Here, there is little doubt that since the parties' relationship developed, the mother has spent time in both England and France. Her job enabled her to spend blocks of time in each country.

25.

Although I acknowledge that this was a situation affected by Covid, I have come to the conclusion that this young child was habitually resident in France at the time of his removal. Looked at from his perspective he was living in a home with his mother and his father, the latter of whom had very significant roots and family there. That was his day to day life. Belongings were transferred at the start of the stay and the mother obtained a residency card (albeit the timing was affected by the exit of the UK from the EU). The child may have been registered with healthcare services in England but he was also registered in France - the consequence of the length of his stay there. The relationship was certainly unhappy so far as the mother was concerned and she would no doubt have left earlier if she could have done, but it seems to me that the child had attained the necessary degree of integration into a social and family environment. I do not think it could be said of this child that he was either habitually resident in England at the date of the removal, or that he had no habitual residence at all.

Article 13b

26.

The mother's statement in these proceedings is very detailed and sets out numerous examples of what she says is the father's abusive and aggressive treatment of her. Most of the instances, taken by themselves would not be particularly serious, but what is being alleged is a clear pattern of abusive behaviour. The mother gives a range of examples of the father losing his temper with her and berating her for the most trivial of reasons. She gave an account of his pushing her aggressively and shouting 'fuck you'. She also said that there were occasions when he shouted at her for keeping him awake (by breastfeeding with the light on, watching Netflix, or listening to music in the middle of the morning) and then when he berated her for failing to wake him up. Once he was angry her for not buying him croissants when she went to the shop. On another occasion he was angry with her and would not let her pass him in the home to get to the kitchen. At other times he has woken her up to shout at her.

27.

She said that he pestered her frequently for sex. On occasion he was physically controlling, for example by holding onto her, or pinning her to the back of the door for a moment. The mother said that she was in such a state of distress and anxiety that on occasions she did such things as smashed a cup, turned over a coffee table and bit the father to get him to release her. She had become so distressed by her situation in January of this year she had sought professional help and had engaged in a support group for victims of domestic abuse.

28.

In July of this year the mother set out an account of an argument between herself and the father which she said arose because he taunted her that he would take the baby back to France the following day. This argument appears to have taken place in front of the child. Her father tried to intervene but the mother became so distressed (because she said she misunderstood what her father was saying) that she deliberately hit her head against the door (causing injury) and then ran off into the woods with the intention of causing herself harm (her statement is not explicit but clearly suggests she was thinking of committing suicide). Fortunately she thought of the effect on the child if she did that, and rang her cousin. Then her father came to look for her. The police arrived at the home and arrested the father.

29.

Dr. Ratnam noted that this episode included suicidal ideation and demonstrated the mother was suffering from severe depression. Although the mother's propensity to depression is long standing, her psycho-social circumstances are a feature of the recurrent episodes. The relationship with the father is triggering for her, and within that she has behaved in an emotionally dysregulated way.

30.

When considering the Article 13b exception, it is important to focus on the concrete situation of the child if a return is ordered.

31.

Being cared for by a depressed parent is not that unusual. Many children grow up and are cared for perfectly well in such circumstances. In this case, however, the mother was so distressed and dysregulated that she inflicted physical injury upon herself in a bad moment in July 2021, and also thought of committing suicide. She pulled back from this with the assistance of her cousin, and also her father came to look for her. On other occasions when she said she was being verbally abused by the father she has become extremely distressed and has torn up her books, broken small items of furniture, and turned over a coffee table. She has insight and has sought appropriate assistance and treatment but the incidents have still happened. Her mental health has improved since July 2021, but it is in the context of her being well supported and away from the father.

32.

This is a very young child, not yet 18 months old. He is strongly dependent upon his primary carer, his mother. She has been able to offer him a good standard of care to date, most recently with the assistance of her parents, but as Dr. Ratnam states, depression can impact upon emotional interactions with a child, which can impact on the child's emotional well-being. Also, the effects upon a child of seeing their own parent in a desperate dysregulated state (such as in July 2021) could be psychologically harmful. The risk to him of his mother becoming suicidal are obvious.

33.

In my judgment that whilst the more general effect of the mother's depression upon the emotional interactions with the child are more likely to fall within the category of the day to day 'rough and

tumble' if taken alone, the effect upon the child of the mother suffering not only depression but also the sorts of emotional dysregulation she has been known to display in the past is different and much more intense. I do not consider witnessing the mother becoming so dysregulated that she is capable of harming herself and considering suicide is something this young child should be expected to tolerate or cope with. The same applies to the mother breaking items, turning over furniture, or become uncontrollably distressed and crying.

34.

Whilst the risk of this happening can be ameliorated by the mother having her own accommodation away from the father and continuing to engage with health services and supportive groups, a return to France would still place significant stressors in her way. She would not be able to do the job there that she does here without speaking French, so that for a while at least she would not be financially independent. Her parents would be some way away. These are not normal times and travel between England and France is not straightforward. There would be litigation in France which would be very stressful without any family support. Even though living separately and the undertakings offered (which include the father abiding by contact arrangements and refraining from harassing, pestering or intimidating the mother, threatening or using violence against her) should limit the risk of 'triggering' interactions between the parents, there would have to be some making of arrangements and handing over of the child. There may have to be negotiations about finances. The mother's case is that the father lacks understanding and empathy for her; indeed she believes that his behaviour has been cruel and provocative. As one example of a lack of understanding, Ms Renton points out that it was only on the morning of the hearing that the father was prepared to undertake to provide the mother with separate accommodation. Until then, his case was that she could return to the family home.

35.

In my judgment, even taking into account the protective measures that are now offered by undertakings, the grave risk that a return order would expose the child to psychological harm or an intolerable situation still persists. On the expert evidence before me, this mother is vulnerable to further episodes of emotional dysregulation, particularly so if she has to return to France whilst there is further litigation about the child. There is properly no suggestion that the child could or should be separated from her. In all the circumstances the threshold for the exercise of my discretion is met. On the evidence as put before me, I have concluded that I should decline to make the return order sought. Accordingly, I will dismiss the father's application.