



Neutral Citation Number: [2023] EWHC 602 (Fam)

Case No: FD22P00732

**IN THE HIGH COURT OF JUSTICE**

**FAMILY DIVISION**

**In the matter of Z and X (Children: Article 13(b): Return to Kyiv)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 17 March 2023

**Before :**

**Dexter Dias KC**  
**(sitting as a Deputy High Court Judge)**

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**Between :**

**NW**

**Applicant**

**- and -**

**SW**

**Respondent**

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**MR BRIAN JUBB** (instructed by **MSB Solicitors**) for the **Applicant**  
**MS MARTHA GRAY** (instructed by **Blackfords LLP**) for the **Respondent**

Hearing dates: 16 and 17 March 2023  
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## **Approved Judgment**

**DEXTER DIAS KC**

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.

**Dexter Dias KC :**

*(sitting as a Deputy High Court Judge)*

1. This is the judgment of the court.
2. This is my decision on an application by a father for permission to withdraw his application under the Hague Convention 1980 on the Civil Aspects of International Child Abduction. He issued proceedings for the summary return of his two children from this country to Ukraine, and specifically to Kyiv, where he remains. Although his wife and children left Ukraine at the start of the Russian invasion of their homeland, he was unable to leave the country due to the requirements of the nation's martial law, whereby men between 18 and 60 were obliged to remain as part of the resistance to the Russian invasion that began almost exactly a year ago.
3. It has been absolutely essential to anonymise parties to protect their Art. 8 rights under the European Convention on Human Rights ("ECHR") and those of their children. While acknowledging the vital importance of the open justice principle and the "public watchdog" function of the press (*Thoma v Luxembourg* [2001] ECHR 240 at §5), I judge that privacy and private life imperatives here significantly outweigh the Art. 10 ECHR freedom of expression rights of the press and public. The father (NW) is represented by Mr Jubb of counsel. The mother (SW) is represented by Ms Gray of counsel. I am very grateful to counsel for their assistance. I will call the children Z and X.
4. I publish this judgment as part of the Transparency in the Family Court initiative. The President of the Family Division has encouraged the "greater publication of judgments" as a constituent element in fostering openness and public confidence ("Transparency: what does it mean?" at §8).<sup>1</sup>

**A. Background**

5. The parties are both Ukrainian nationals. They married in 2006 and have a teenaged daughter and a son a few years younger. No one disputes but that the father has rights of custody under the Ukrainian Family Code. The four of them lived in the Kyiv area and had a comfortable life. On Thursday 24 February 2022, everything changed. From several compass points simultaneously, Russian military forces invaded Ukrainian sovereign territory.
6. From the north, there was a drive towards the capital Kyiv. The mother and children fled towards the Slovakian border to the east. The father, however,

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<sup>1</sup> <https://www.judiciary.uk/wp-content/uploads/2021/10/Confidence-and-Confidentiality-Transparency-in-the-Family-Courts-final.pdf> (accessed 16 March 2023).

stayed in Kyiv, not wishing to abandon his parents. The Ukrainian government declared martial law on the day of the invasion.

7. On 3 March, the mother and the children crossed the border into Slovakia. They stayed in a monastery for a month. The mother learned of the UK's "Homes for Ukraine" scheme and applied. Her application was successful and she arrived on these shores with the children on 4 April 2022. A family in the south of England provided accommodation and the children began to attend a local school, where they have settled well and have made progress. On 22 September, the mother issued divorce proceedings in Ukraine. On 27 October, the father applied under the Hague Convention 1980 for the summary return of the children to Ukraine.
8. I take the procedural history shortly. The first hearing before this court was on 24 November 2022. At the second hearing on 1 December, the matter was set down for final hearing for yesterday's date, 16 March 2023. The mother opposed return on a number of grounds: habitual residence, acquiescence, Art. 13(b), child objections. A CAFCASS report was ordered and Ms Baker of the bespoke CAFCASS High Court Team met with the children and elicited their wishes and feelings. While very naturally being conflicted, they do not wish to return to Ukraine. Yet they love their father and he is unquestionably a very important part of their life.
9. This is how the matter came before me yesterday. In the meantime, the situation on the ground was evolving. The father reassessed the changing circumstances following the issuing of proceedings and sought permission yesterday to withdraw his application. He has been living in Kyiv. He knows very well what is happening around him. I informed parties that the court would give its outline assessment of the prevailing factual and risk situation. Further, because of the public interest in the question of the war in Ukraine and possible returns of children to that country, the court would deliver a judgment focussed exclusively on the Art. 13(b) question. I received no further submissions about the other grounds of resistance (Convention exceptions). Although the mother abandoned the habitual residence point, disputes remained about whether the father agreed that the children could leave Ukrainian territory permanently. There is the question of whether, once in the United Kingdom, he acquiesced, and questions surrounding the objections of the children. There are also issues around refugee status and refoulement. I make no findings whatsoever about any of them.
10. Instead, this judgment assesses as best it can the prevailing risk levels in Kyiv as of today. In terms of material, I had a trial bundle extending to 176 pages and helpful skeleton arguments from counsel. I was also provided with a number of authorities and links to relevant material.

## **B. Law**

11. The law is settled and uncontroversial between parties. I can reduce it to its essentials for the purposes of this decision.

***General approach to Art. 13(b)***

12. Art. 13(b) provides:

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

13. This provision has been subject to “extensive judicial analysis” (*Re IG (Child Abduction: Habitual Residence: Article 13b)* [2021] EWCA Civ 1123 at [45]). The Art. 13(b) exception has historically presented trial courts with conceptual and implementation problems. In *Re IG* the Court of Appeal recognised these difficulties and provided guidance. In particular, Baker LJ set out the structured approach first instance courts were encouraged to adopt. He reduced the vital principles to a set of ten propositions at [47]. Of especial relevance to this case are the following:

- (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.

14. Baker LJ underscored what Moylan LJ had said in the (then) recent case of *Re A (A Child) (Article 13(b))* [2021] EWCA Civ 939. Moylan LJ said at [97]:

“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.”

### *Q v R*

15. Both parties cited the case of *Q v R* [2022] EWHC 2961 (Fam). This was a judgment at first instance of Williams J on 21 September 2022. Q applied for the return of her son E from the UK to Ukraine. Mother and child arrived from the Ukraine in April 2022 on one of the visa schemes put in place in this country after the Russian invasion of Ukraine. The mother wished for E to return to Ukraine, but this was resisted by R, the father. Q's proposal was to locate the child at Town B in the west of Ukraine. This is a significant distance from hostilities. Williams J did not find the Art. 13(b) exception established and ordered summary return. His reasoning included:

56. It seems clear that Town B itself has not been involved in any sort of hostilities; the nearest that hostilities have come is Ivano-Frankivsk, more than 100 miles away. That is not to say that it has not been impacted by the conflict because it seems the region has received hundreds of thousands of displaced people from other parts of the Ukraine.
58. Life it seems in Town B goes on not quite as normal, but with minimal or limited disruption. Thus, E's return to that environment would seem not to expose him to any immediate or direct risk of exposure to armed conflict; the risk of exposure would come with a significant escalation in the extent of the war. Town B, it should be noted, is in the far west of the Ukraine: to the north lies Poland; to the south lies Hungary; to the southeast lies Romania; to the west lies Slovakia. Thus, it is in a well-protected part of the country geographically.
59. Barring some remarkable turn of events, it is difficult to foresee how Town B would become subject to active conflict, save by a prolonged incursion into the rest of Ukraine, ultimately reaching the far west of the country close to those borders with European Union and NATO

members. It seems to me, therefore, that that risk is very low indeed, although cannot be entirely discounted. If that were to happen though, there would be a period of time preceding it which would give warning to those in that part of the country the opportunity to leave, given that the Hungarian border is close by, and the mother is a Hungarian citizen who is entitled to enter that country.

60. In terms of missile attacks, of course, in an unpredictable situation one cannot identify a clear absence of risk. However, Town B has, I am told, no military installations, it is not a central transport hub, and that is supported by the absence of any attempt to target it since the invasion began some six months-odd ago. Thus, that risk, it seems to me, is at a low level, although cannot be ruled out, but sufficiently low that the risk of exposure in Town B to any of the consequences of the hostilities are capable of being addressed by the mother taking protective steps.

16. In the case before me, counsel were unable to identify any other reported decision of this court ordering the summary return of children to Ukraine post-invasion.

### C. Risk levels around Kyiv

17. There is a mass of information available about the risk levels in Ukraine generally and Kyiv in particular. It is important to focus upon those sources that are likely to be the most reliable and authoritative. Naturally, these are not findings of fact, nor conclusions of official inquiries. They contain hearsay, opinion and interpretation as well as factual reportage. The court must do the best it can. In respect of the capital, I now list the accounts of the most recent developments.

18. **26 January 2023.** The *Financial Times* reported:

#### **Kyiv rocked by explosions as Russian barrage targets cities across Ukraine**

Explosions rocked Kyiv and several other cities on Thursday as Russia conducted its latest barrage of missile strikes nearly one year into its full-scale invasion of Ukraine. Vitaliy Klitschko, Kyiv's mayor, said in a post on Telegram that one person was killed and two wounded by a missile hitting a non-residential building in Kyiv's southern Holosiyivsky district. Klitschko said explosions had also occurred in Dniprovsky, east of central Kyiv. Serhiy Popko, head of Kyiv's military administration, said in a Telegram post that "about 20 missiles of various types were detected in Kyiv's airspace."<sup>2</sup>

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<sup>2</sup> <https://www.ft.com/content/715854a4-eebe-4249-8c39-d0e9229c100a> (accessed 16 March 2023).

19. **10 February 2023.** The *Guardian* reported:

**“Large-scale missile attacks ‘reconnaissance’ for future offensive**

Russia launched a large-scale missile attack in Ukraine on Friday, striking several cities including the capital, Kyiv ... Air raid sirens sounded in Kyiv and other cities around breakfast time on Friday. There were five booms in the Ukrainian capital, as air defence batteries shot down enemy missiles. A trail of white vapour could be seen above tower blocks and the railway station area ... In a short video report Friday Volodymyr Zelenskiy said Russia had targeted civilians and civilian architecture. “Unfortunately there are victims,” he said.”<sup>3</sup>

20. **23 February 2023.** The US Department of State provides travel advice. It has four Travel Advisory Levels: 1. Exercise normal precautions (blue); 2. Exercise increased precaution (yellow); 3. Reconsider Travel (orange); 4. Do not travel (red). Ukraine is red. Level 4. The State Department also provides security alerts. One of the most recent is dated 23 February 2023 and from the US Embassy in Kyiv:

“Event: The Department of State continues to caution U.S. citizens of an ongoing heightened threat of missile attacks across Ukraine, including Kyiv and Kyiv Oblast.”<sup>4</sup>

21. **9 March 2023.** The identified threats proved all too real. On 10 March, the BBC reported further missile strikes against Kyiv on 9 March (confirmed by Reuters).<sup>5</sup> The mayor of Kyiv Vitaliy Klitschko said that two people were wounded in the capital and 40 per cent of the heating was “knocked out”.
22. **16 March 2023.** The latest available Foreign, Commonwealth and Development Office Advisory states:

**“The FCDO advises against all travel to Ukraine.**

The Russian invasion of Ukraine is ongoing, with attacks against a number of major cities, including Kyiv. Several towns and cities in southern and eastern Ukraine are temporarily under Russian control. There is a real risk to life.”<sup>6</sup>

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<sup>3</sup> <https://www.theguardian.com/world/2023/feb/10/wave-of-russian-missile-attacks-on-ukraine-reconnaissance-for-future-offensive> (accessed 16 March 2023).

<sup>4</sup> <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Ukraine.html#/> (accessed 16 March 2023).

<sup>5</sup> <https://www.bbc.co.uk/news/world-europe-60506682> (accessed 15 March 2023).  
<https://www.reuters.com/world/europe/russia-strikes-many-ukrainian-regions-cutting-off-power-2023-03-09/> (both accessed 15 March 2023).

<sup>6</sup> <https://www.gov.uk/foreign-travel-advice/ukraine> (accessed 15 March 2023).

## D. Discussion

23. Ms Gray argues that *Q v R* is distinguishable on the facts. I am not convinced that one needs to approach the question forensically in that way. That decision was at first instance by an equivalent tier court, although an experienced full-time judge. It is persuasive, but not binding. What I take from the judgment of Williams J is that these decisions are intensely fact-specific. Indeed, he states at [19]:

“The authorities indicate a need to focus upon the circumstances of **this** child returning to **that** country, and the risks which arise on their return and thereafter.” (original emphasis)

24. I would add: “to **that specific part** of **that** country”. To my mind such qualification is necessary because it would be wrong in principle to adopt an indiscriminate blanket policy, a fallacy warned against in *Q v R*. The mother’s core position is that while the war continues in Ukraine, it is not safe to return the children to that country (B71-73). While there may be circumstances in which that is true, I do not have sufficient evidence to conclude that presently. A more nuanced and granular approach is necessary. The real question is to ask what risk the children will face in the part of the country they will return to and whether that will imperil them unacceptably.
25. The court can best determine this issue by systematically going through the *Re IG* propositions insofar as they are material to the particular facts of the case. I thus examine propositions 4-7 in turn.
26. **Proposition 4.** I must proceed on the basis that the mother’s “allegations” about the situation at Kyiv are “true” and then assess risk. There is no dispute between parties but that the situation in the Ukrainian capital is serious. Further, the father has accepted that it has “deteriorated” more recently. There is, I judge, plainly a grave risk that the children would be exposed to physical harm if they returned to Kyiv. Ms Gray mentioned at the end of her oral submissions that there would likely be a risk of psychological harm if returning children to a city where there were regular missile strikes. I can entirely foresee this to be true when civilian buildings and infrastructures are being targeted by a hostile enemy. A moment’s thought at what the living reality of life in Kyiv might look like for the two children indicates that this submission has great force. However, I indicated that if this basis were being relied upon, or if it was the exclusive basis for resistance, then I would need further evidence. That, however, was unnecessary as I found that the physical harm element was unquestionably established by the mother on the uniform and consistent evidence.
27. **Proposition 5.** This is about oral evidence. I do not need to consider it as the application was made on the papers.
28. **Proposition 6.** The court must consider whether the allegations are of “sufficient detail and substance to give rise to the grave risk”. I find that they undoubtedly are. There is a wealth of convincing and independent evidence from multiple sources all pointing in precisely the same direction. Taken



together, the Advisories from two governments and several reputable news outlets, paint the unmistakable picture of grave risk in Kyiv presently. I must consider whether the evidence enables me to “confidently discount the possibility [of grave risk]”. It does not. The grave risk remains.

29. **Proposition 7.** Next, the court must consider whether the risk can be “ameliorated” or sufficiently mitigated to enable the children to return to Kyiv safely. It should be noted that there is here a fundamental factual distinction between this case and *Q v R*, as Ms Gray correctly points out. There, Williams J was able to order a return to Ukraine because the location the child would return to was 100 miles away from hostilities. That case was decided in September 2022. The situation on the ground is not the same. As indicated, the father agrees that the situation has “deteriorated” in Kyiv; there is “increased risk” and that there have been recent attacks “on civilian targets”. Now, he says, there is “more risk than was previously the case”. In his statement, drafted at the beginning of this year, before the spate of missile attacks, he proposed as a protective measure that the children could live with him in the family home in what he said is “a safe area” in Kyiv, where there have been “little [few] military movements” (B150/§18a.). He no longer believes this would be sufficiently protective. Given the overall picture, he is without doubt absolutely correct. The difficulty of protective measures in this specific case is that the source of the grave risk is entirely independent of the applicant and beyond his control. He can do nothing to influence the military strategy of Vladimir Putin or the Russian state. Plainly, Kyiv as capital is an ongoing target with obvious military, strategic and symbolic significance. The BBC map produced by Ms Gray shows how close areas of Russian control are to the north and east of the capital.
30. My conclusion is that the Art. 13(b) exception has been established by the mother. There would be grave risk of physical harm to the children if they returned to Kyiv. I find no protective measures or package of protective measures that would ameliorate or mitigate that obvious grave risk of return to the capital. Once such an exception is established, the court has a discretion whether to order summary return. The proper approach to the exercise of the consequent discretion can be seen in *Re M (Abduction: Zimbabwe)* [2007] UKHL 55, where the House of Lords confirmed that discretion is at large. However, I remind myself what Lady Hale said in *Re D (a child)* [2006] UKHL 51 at [55]:
- “it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate.”
31. Therefore, I would not exercise my discretion to order the summary return of the children. Presently Kyiv is unsafe for them.

### **E. Disposal**

32. It is important to emphasise that nothing in this judgment creates or reflects any general or blanket policy this court has towards the situation in Ukraine.

33. Instead, this is an acutely fact-specific risk assessment about the safety of two children amid a troubling, complex and ever-evolving international conflict involving two sovereign states on the other side of the continent. At the same time, this case shows how responsible parents can put aside personal conflicts in the context of gross international ones in the best interests of their children. The father deserves a great deal of credit for putting his children first, despite his desperation to see them again after so long. The mother wishes to record that she welcomes his child-focussed approach.
34. Therefore, I grant the applicant father permission to withdraw his application under the Hague Convention 1980. I wish him and all the family well.
35. That is my judgment.