



Neutral Citation Number: [2021] EWCA Civ 328

Case No: B4/2020/2104

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**(FAMILY DIVISION)**

**Mr Leslie Samuels QC (sitting as a Deputy High Court Judge)**  
**FD20P00139**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 9 March 2021

Before :

**LORD JUSTICE PETER JACKSON**  
**LORD JUSTICE HADDON-CAVE**  
and  
**LADY JUSTICE ELISABETH LAING**

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Re A (Child Abduction: Article 13b)  
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Teertha Gupta QC, Maggie Jones, and Lisa Edmunds (instructed by Ben Hoare Bell LLP)  
for the Appellant  
Michael Gratton (instructed by International Family Law Group) for the Respondent

Hearing date : 25 February 2021  
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**Approved Judgment**

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Tuesday, 9 March 2021

**Lord Justice Peter Jackson:**

*Introduction*

1. This appeal from an order for the summary return of a child to the United States of America turns on the application of article 13 (b) of the 1980 Hague Convention on the Civil Aspects of International Child Abduction ('the Convention').
2. J is aged 3. His mother is British and his father American; they are in their 30s. They both come from a minority community, and in the mother's case a culturally traditional family. They married, and in 2016 the mother moved to live in Virginia, where J was born in 2017. The mother describes an abusive relationship, in which she experienced verbal, physical, sexual, emotional and financial abuse. She alleges that the father and his family controlled her life and that she found herself isolated, having no family of her own in the USA.
3. The mother visited England with J for her sister's wedding in 2018. After her return in January 2019, she describes an assault in which she and J were injured. The father was arrested and a without notice order was made by the court, excluding him from the family home. By this stage, the mother states that she was suffering from and being treated for anxiety and depression.
4. In March 2019, the parents reached a temporary custody and visitation agreement, where it was agreed they would share joint legal custody of J, that the mother would have primary physical custody, and that the father would have regular defined contact with J. It was further agreed that J and the mother "may move back to the United Kingdom in 2020".
5. In June 2019, the parents reconciled, and in September 2019 criminal charges against the father were withdrawn. However, on 13 November 2019 the mother entered a refuge and applied for a further emergency protective order which was made on that day. A hearing listed for 26 November 2019 was vacated and the mother's application was dismissed at her request. On 11 December 2019, there was a further incident in which the mother claimed to have been assaulted by the father in J's presence.
6. On 31 December 2019, the mother travelled with J to England, the father having agreed to them coming here until April 2020. On 21 February 2020 the mother applied for a domestic violence injunction against the father in the Family Court. She accused the father of harming her relationship with her family by telling them about an old relationship with a boyfriend and a termination of pregnancy, matters affecting family reputation that were, on top of their general disapproval of marriage breakdown, likely to turn them against her. As a result, the mother and J had by the time of the hearing moved into a refuge.
7. The father almost entirely denies the mother's allegations. He notes that he has no criminal record after the case against him was dismissed. At no stage has the mother accused him of breaching the protective orders she has obtained against him. She has a wide circle of friends in the USA; she has access to their joint bank account and, while working, had her own income. He strongly denies the allegation of honour-based abuse saying that they are a modern, sophisticated, middle class American

family. Although he denies the mother's allegations, he also points to a large number of domestic violence support organisations in Virginia.

8. In March 2020, the father began proceedings for J's summary return under the Convention. Unfortunately, delays were caused by the need to gather evidence about the mother's mental health following the filing of evidence from her general practitioner and Independent Domestic Violence Advisor ('IDVA'). In May 2020, the GP stated that if the mother returned to the USA it would be expected that this would have a detrimental effect on her mental health and "an increase in distress, agitation and suicidal thought and/or actions". The IDVA opined that if the mother went back to the USA she would be at "high risk of being subject to continued and worsened domestic and honour-based abuse and without the support of her friends, family and involved professionals her level of anxiety and isolation would significantly increase".
9. The father's application finally came before Mr Leslie Samuels QC, sitting as a deputy High Court Judge, on 23 and 24 November 2020. He had a report dated 13 October 2020 from Dr Sumi Ratnam, a forensic psychiatrist with significant experience of cases of this kind. After study of the mother's medical records and an assessment of the mother by video call in September, Dr Ratnam found that her account is consistent with and supported by medical records diagnosing depressive disorder and generalised anxiety disorder with panic attacks. The mother also reported some symptoms of PTSD, though this diagnosis would depend upon the court establishing that there had been domestic abuse. She said that the mother is currently depressed, anxious and fearful of a return to the USA. If there was domestic abuse as alleged and hostility from the father's family, it is likely that her mental health will deteriorate further if she returns to the USA. Though treatment should be available in the USA, other factors such as stable social circumstances and having a supportive network are not available to the mother there, as opposed to in England. The support of her family and being in a place where she feels safe is important for her mental health.
10. The Judge heard oral evidence from Dr Ratnam, in the course of which she made these statements:

"[If the] relationship was as [the mother] states – controlling, violent, emotionally abusive – then returning a woman who has had those experiences to a situation where she's potentially very scared and under threat would not be safe for her mental health."

"[There] are not concerns about [her] parenting currently, but any ongoing stresses which affect her mental illness further could result in an impact on parenting and I think the threat of her son being removed from her is a significant stress, in terms of her mental health."

"As far as I'm aware there were not concerns about parenting of her son prior to coming to England, when [she] was significantly depressed, and there have not been any concerns whilst she has been here, but I think the issue would be that if

she went back, and I think a lot of this is sort of premised on the nature of the relationship, is that one cannot predict how she would cope in that situation where she feels there's no hope, when she feels that she's stuck in a place where she feels under threat, she feels socially isolated, she feels unsupported. And whilst treatment with antidepressants would help her, they would not, in my view, they would not lead to full resolution of symptoms and the loss of hope is a really significant factor in thinking about mental health, thinking about harm to self and, ultimately, any risk of harm to a child."

"[W]hen I'm talking about hope, ... if an individual is a victim of domestic violence, the thought of being in close proximity to that person who was a perpetrator can be very frightening indeed and the thought of returning to that situation can be very frightening indeed ..., so this is very much based on if there was domestic violence to the extent that she spoke about, which impacted adversely upon her, then being in that situation she is going to feel, it's not necessarily that the reality is consistent with what her cognitions are, but in depression we think about negative cognitions and feelings of hopelessness. So being back in that situation and being faced with that situation can generate hopelessness. So it's not always the case that people are thinking practically..."

"Q. There is a distinction, is there not, between full recovery, which of course is what everyone hopes the mother will achieve in due course, and, on the other hand, trying to safeguard against a significant deterioration? They are not the same things.

A. No, they're not the same things, but the question is at what point does something become significant? For some people, you know, the severity of their depression might be moderate. Two different people. But different people cope with that depression, the moderate depression, in a different way, that their impact upon how they see themselves, how they see the world, can vary and how they cope with them. So whilst I, I would not want someone just to live with depression. I don't feel that's good enough. We need to be aiming towards recovery."

"Q. [B]earing in mind what we know about her parenting capacity in December of last year, I would suggest to you that if those [protective] measures were in place the risk of a substantial deterioration, such that her parenting capacity would be affected now. would have to be a small risk.

A. ... I would agree with that if those issues were there in safeguarding mother and that she doesn't feel still under risk from father, that father also undertakes to abide by those

measures, then you have conditions in which... I would feel more reassured about mother's mental health. If mother faces any uncertainty about those issues then those would adversely affect her mental health."

*The Judge's decision*

11. By his order of 9 December 2020, the Judge ordered that J should be returned to the USA within 14 days of the mother being notified by the father's solicitors that the court in Virginia had approved a "Consent Child Custody Order" under which the parents would have joint legal custody of J, with the mother having temporary primary care. The father provided an extensive series of undertakings to the English court and for inclusion in the "Consent Child Custody Order". These included: vacating the home for the mother and J to occupy; absencing himself from the airport; giving notice of any proceedings; no harassment; no contact by his family; no prosecution; no removal of J from the mother except for court-approved contact or in emergency; payment of child and spousal support. These provisions were enlarged by Mr Gratton during the hearing of the appeal so that the father would not (other than in an emergency) seek to remove J from the mother's care for so long as they remained in Virginia, except for agreed or court-approved contact.
12. In a notably careful reserved judgment, the Judge held that the mother's allegations were of a gravity that was capable of engaging article 13 (b), but on evaluating all of the evidence he found that she had not established that the exception applied. He did not accept that a return to the USA would destabilise her parenting to a point where J's situation would become intolerable in the light of protective measures that are available in Virginia in the form of publicly available services, supplemented by the father's undertakings.
13. The Judge directed himself accurately in relation to the legal framework, addressing the Supreme Court decisions in *Re E (Children: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 and *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 FLR 442, and a number of other prominent decisions, including *Re C (Children) (Abduction: Article 13 (b))* [2018] EWCA Civ 2834, [2019] 1 FLR 1045, *In Re P* [2017] EWCA Civ 1677, [2018] 1 FLR 892, and *Uhd v McKay* [2019] EWHC 1239 Fam. He also noted the relevant elements of the Good Practice Guide in relation to article 13 (b), published by the Hague Conference on Private International Law in 2020. No complaint is made about his thorough self-direction.
14. The Judge then gave a balanced summary of the evidence of both parents and of Dr Ratnam. He noted that the parties presented completely different accounts of their life together and that, due to the summary nature of the proceedings he could not make any meaningful evaluative assessment of the credibility or substance of the allegations.
15. After reviewing the evidence overall, the Judge arrived at these conclusions:
  - (1) The mother says that she will not feel safe if forced to return to the USA. She is currently depressed, anxious and fearful of a return. The evidence from Dr Ratnam points to a potential deterioration in her mental health should she be compelled to return. However, there have been no concerns about her parenting

either in Virginia or in the UK. She has never had thoughts of harming J and has been able to respond to him emotionally and to meet his physical needs.

- (2) The criminal and civil justice systems in Virginia have operated swiftly and effectively to protect the mother from domestic abuse and the threat of such abuse. It is a fully developed system which is accessible and has effective enforcement mechanisms.
- (3) The mother had been able to achieve a physical and emotional separation from the father on two occasions. It had been her choice to reconcile with the father. Significantly, there has been no allegation that he had broken court orders. She had been able to leave the USA on two occasions, in 2018 and 2019. This suggests that she has been able to exert some freedom in the relationship.
- (4) Although the mother asserts that the support available to her in the UK is greater than in Virginia, she had moved away from her family home into a refuge. The inference is that relations have become strained, particularly given the views expressed by some family members about her conduct. She accuses the father of causing her stress by his communications with her family. If she was in the USA, the geographical gap may give her some respite from these pressures.
- (5) The specific support the mother identifies in her evidence is professional support, which is equally available in Virginia.
- (6) The protective measures offered by the father are comprehensive and enforceable in Virginia.
- (7) There is no reason for the mother to lose hope. She would need to return to Virginia with J on a short-term basis whilst the Virginia court decided welfare issues, including any application by her for leave to return to the UK with him. Court proceedings would not be any more stressful or difficult in Virginia than they would in the UK
- (8) Although the mother's depression and anxiety is likely to continue to be a factor, with the benefit of all the protective measures in place, J's emotional or physical wellbeing will not be placed at risk. Any deterioration in the mother's mental health will be picked up and treated appropriately in Virginia and will not be such as to place J at risk of grave harm or intolerability.

16. In response to an application for permission to appeal, the Judge stated:

“97. All the points made by the mother are factors I have considered as set out above. I accept there is of course the need to consider the mother's subjective fears but in accordance with the authorities I need to look critically at that and not just accept bare assertions not supported by the evidence. I also need to consider whether the mother's fears are likely to destabilise her parenting of J to a point where his situation would become intolerable.

98. The difficulty with the reconciliations, as I think Ms Jones accepts, is that the mother does not give any evidential detail to her assertion that this was due to pressure and manipulation whether by the father and / or by his family. She had protective court orders in place, sole occupation of the family home and orders to regulate the relationship between J and his father, but she abandoned these protective measures in favour of resuming her relationship with the father. Although her evidence is very detailed in parts, it is not detailed on this issue. This is also true of her assertion of family support. Ms Jones reminded me of the evidence of the mother's brother which I have re-read. I have amended the judgment a little to reflect the detail of his evidence. However, no detail is given by the mother or her brother as to the actual support he provides or why that support would not be equally available to her in the USA. I also note from his evidence that family relations in England have become strained which I have referred to in the context of the mother having to move away from her family and into a refuge. With the professional support I accept this will be important going forward, but the father has produced evidence of agencies available in the USA and there is no evidence that the mother cannot or will not be able to access them."

*The grounds of appeal*

17. The mother asserts that, having found that her allegations were of a nature to engage article 13 (b), the Judge was wrong to grant the father's application. He failed to take sufficient account of:
  - (1) The profound effect on the mother of the father's coercive and controlling behaviour;
  - (2) The mother's isolation in the USA compared with the availability of family support in England; this will exacerbate her mental health problems and potentially mean that she cannot care for J;
  - (3) Dr Ratnam's evidence about what would be necessary to prevent a deterioration in the mother's mental health if she returned to the USA.
18. On 17 December 2020, I granted a stay and on 5 February 2021, Moylan LJ granted permission to appeal.
19. The mother has issued an application asking this court to admit further evidence in the form of (i) expert evidence from an American lawyer about the enforceability of undertakings and availability of legal aid; and (ii) updating reports from her GP and her IDVA. The first of these was refused by Moylan LJ as no report had been obtained. The second was adjourned to the hearing of the appeal, and we have read the reports in order to decide whether they should be admitted.
20. I would add that one ground of appeal asserted that the Judge had found article 13 (b) to have been established but that he had ordered a return in the exercise of his

discretion: from reading the judgment, it is clear that this is not the case. There were also grounds of appeal concerning the disadvantage that the mother claimed she would face if legal proceedings about J took place in the USA and the limited efficacy of the undertakings given by the father: these fell away with the absence of further evidence to sustain them.

*The application to admit fresh evidence*

21. The application principally relates to two letters from the mother's GP. The first, dated 19 January 2021, records that she had self-harmed with superficial cuts to her wrists and was saying that she would rather die than return. She was currently living at her parents' address and the GP felt that her care for J may be compromised if she were to live alone.
22. The second letter is dated 23 February 2021. The GP reports that the mother is suffering from severe anxiety and low mood for which she is being prescribed multiple treatments of medication and psychological support. She experiences chest pains, panic attacks, disturbed sleep and nightmares. She is having ongoing thoughts of suicide and self-harm. She reported cutting herself with a knife on 13 and 26 January. Her medications are being supplied on a weekly basis due to the risk of intentional overdose. She has been supported by the Crisis team on multiple occasions, had attended A&E on advice of her support worker, was assessed by the Psychiatry Liaison team and referred to the Treatment Team. She had made frequent calls to friends, family and the Samaritans. It is highly likely that a return to America would significantly exacerbate her symptoms as well as removing her from her current support network which is her principal protection.
23. On behalf of the father, Mr Gration opposed the admission of this evidence. Although he submitted that it showed a situation that had not been suggested by Dr Ratnam in her evidence, he argued that, if the mother wished to deploy the evidence, that should be done by way of an application to reopen the Judge's decision and not by way of appeal.
24. Mr Gupta QC and Ms Jones for the mother argued that the evidence should be admitted, though they described it as in reality the logical consequence of the Judge's decision.
25. Applying the relevant considerations laid down in *Ladd v Marshall* [1954] 1 WLR 1489, the evidence in the GP letters is credible and could not have been obtained at the trial. The remaining question is whether the information they contain would probably have an important influence on the result of the appeal.
26. In a case of this kind, the court will always be alert to ensure that litigants do not play the system, but here there is no suggestion that the mother's symptoms are not genuine. The situation portrayed in the GP letters is on the face of it markedly more severe than that previously described to the extent of being capable of influencing the outcome. I would therefore admit the evidence.

*Submissions*



27. Mr Gupta argues that the Judge did not take sufficient account of the mother's vulnerability and her justified subjective fears, grounded in the abusive nature of the relationship. A serious further deterioration in her mental health would place J in an intolerable situation. The Judge failed to respond to her assertion that she was isolated and had been pressurised and manipulated into the reconciliations. He was wrong to discount the family support she could only receive in England and to overlook the extent to which the father was responsible for creating problems between her and her family. He was also wrong to use objective reasoning to conclude that there was no reason for the mother to lose hope, or to conclude that proceedings would be no more stressful for her in the USA, when they would be likely to last for a considerable period of time.
28. In response, Mr Gration submits that the Judge was right to find that the Article 13(b) exception was not established. When the evidence that was before him is considered alongside the protective measures that are available in the USA, this was a conclusion that he was entitled to reach. The question was not whether the mother would fully recover, but whether she would deteriorate to the point that J's situation would become intolerable: Dr Ratnam considered such a possibility small. As the Judge said, he took all the mother's arguments into account. He was entitled to treat the loss of her current support network as he did. Court proceedings in relation to J's future have been issued in Virginia and await his return (he has now not seen his father for 14 months). The evidence suggests that the mother has found proceedings very stressful but the judge was entitled to reach the view that proceedings would be stressful for her in either jurisdiction.

*Analysis and conclusion*

29. Of all the categories of defended case under the Convention, those raising the exception under article 13 (b) can be the most difficult. This case is no exception. It contains unresolved issues of serious domestic abuse in a cultural context that would be likely to leave a victim with this mother's vulnerabilities particularly exposed.
30. There is, in my view, some force in the arguments that we have heard on appeal concerning the Judge's approach to what he described as the mother's choice to reconcile with the father, which cannot be regarded as a counter-indicator of an abusive relationship, and his treatment of the mother's support from her family, support that she asserted that the father was undermining. As Mr Gupta says, the mother came to the UK to be with her family, so the suggestion that a return to the USA may bring respite from family pressures, rather than loss of support, is not easy to understand. It also has to be recognised that, while the Judge relied upon the relatively short-term period until the American court is seized of the issues, the period that the mother and child may spend in Virginia awaiting a final decision, with consequent implications for the mother's subjective anxieties and her objective health, is likely to be considerably longer.
31. However, the Judge directed himself meticulously and he methodically reviewed all the evidence that was before him. There were, on examination, a number of fixed points in the analysis. The removal was wrongful in Convention terms. The mother's allegations are capable of engaging article 13 (b). The protective measures that are available in Virginia through the court system, the developed services for combating domestic abuse, and the mental health support agencies, are extensive. The Virginia

court is undoubtedly best placed to resolve the factual issues between the parents on matters that are likely to be influential for welfare decisions about J's future. Further, it was broadly accepted that a breakdown in the mother's mental health would place J in an intolerable position as she has been his primary or sole carer throughout his life. The relatively narrow, but crucial, remaining question for the Judge was therefore whether the impact of being required to return J to Virginia would cause such a deterioration in the mother's health that a breakdown was in fact likely to occur. Having heard the arguments, I consider that the decision on that question was one that the Judge was entitled to reach on the basis of the evidence before him. The matter falls squarely within the warning given in *In re J (A Child) (Custody Rights: Jurisdiction)* [2005] UKHL 40, [2006] 1 AC 80:

“12...Too ready an interference by the appellate court, particularly if it always seems to be in the direction of one result rather than the other, risks robbing the trial judge of the discretion entrusted to him by the law. In short, if trial judges are led to believe that, even if they direct themselves impeccably on the law, make findings of fact which are open to them on the evidence, and are careful, as this judge undoubtedly was, in their evaluation and weighing of the relevant factors, their decisions are liable to be overturned unless they reach a particular conclusion, they will come to believe that they do not in fact have any choice or discretion in the matter.”

32. So, if matters rested there, I would dismiss the appeal and uphold the Judge's decision. However, the appeal must be determined in the light of the further evidence concerning the mother's mental health and family support. That evidence appears to show an escalation in self-harming behaviour to the point where she cannot currently live alone with J in England, let alone elsewhere. The ramifications of her return to her parents' home are also of potential significance. These are matters that go to the heart of the fact-sensitive evaluation on the crucial issue in the case and, in the light of them, I do not consider that Judge's order, based on the evidence before him, can stand. As Mr Gratton says, there could be an application to the Judge to reopen his decision, an application that would no doubt be contested. But after careful thought, I have concluded that the better course is for us to set aside the return order and remit the father's summons under the Convention for rehearing by the Judge on an expedited basis. The weight to be given to the further evidence, and its implications for his wider conclusions, are matters for him best to determine in the light of updating information and, perhaps, the supplementary advice of Dr Ratnam. I regret the further delay, but the issues are of such importance to J and his parents that timing cannot be determinative. Accordingly, and only because of the further evidence, I would allow the appeal, set aside the return order and remit the matter to the Judge. I would invite the parties to agree directions with a view to expediting and streamlining the process.

**Lord Justice Haddon-Cave**

33. I agree.

**Lady Justice Elisabeth Laing**

34. I also agree.

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