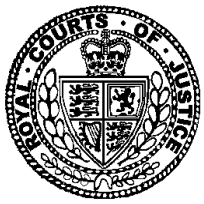

Nuetral citation: [2023] EWHC 3164 (Fam)
Case No: FD23P00406

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Before :

HHJ MORADIFAR
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

In the matter of;

Re M (A Child) (1980 Hague Convention : Abduction: Article 13(b): Mental Health)

- -
- -

Miss Emma Spruce (instructed by Family Law Solicitor) on behalf of the father
Ms Naomi Wiseman (instructed by Moore Barlow LLP) on behalf of the mother

Hearing dates: 30 November and 1 December 2023

- -

Judgment

HHJ MORADIFAR:

Introduction

1. M has just turned five years old and is the subject of a dispute between his parents about whether he should be summarily returned to Australia where he previously lived or whether he should remain living in England with his mother who states that an order for his return would place him at grave risk of harm or otherwise an intolerable situation. The mother relies on a number of allegations of domestic abuse and social considerations that would cause her mental health to significantly deteriorate. Additionally, she raises concerns that a return would be highly disruptive for M and the support he is receiving for his additional needs.

The law

2. The 1980 Convention on the Civil Aspects of International Child Abduction (the 'Convention') regulates and provides the framework within which cases such the present case are to be approached by the courts of its member state. Art. 1 of the convention sets out that its objectives are;

> " …
>
> a) *to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and*
> b) *to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.*"

After setting out the defenitions and the parameters of the Convention, Art. 13, provides for a defence to summary return of the subject child in the following terms;

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

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

3. In England and Wales, the approach to the Art. 13(b) defence has been the subject of guidance from the appellate courts from which the following broad principles may be deduced:

Re E (Children) (Abduction: Custody Appeal) [2011] 2 FLR 758;

a. These are summary proceedings and it is rarely appropriate to hear evidence of or in rebuttal of allegations. The court must be mindful of this when assessing the evidence.
b. The person, institution or other body opposing the child's return has the burden of proving that the defence is established.
c. The risk must be so serious that it can be characterised as *'grave'*. A low risk of a serious event such as death or serious injury may be characterised as grave but a higher degree of risk may be required when assessing a lower degree of harm. (see also *"The more serious or significant the character of the risk, the lower the level of risk which might 'properly qualify as "grave" and*

vice versa" per Moylan LJ Re S (A Child) (Abduction: Article 13(b) Mental Health) [2023] EWCA Civ 208)

d. Harm may be physical or psychological, or
e. Otherwise, place the child in an intolerable situation meaning *"a situation which this particular child in these particular circumstances should not be expected to tolerate"*. The subjective anxieties of an individual can establish an Art.13(b) defence (Per Lord Wilson *Re S (A Child)* [2012] UKSC 10, [2012] 2 FLR 442).
f. Art. 13(b) concerns the future and how the situation would be for the child upon his/her return.

Further,

g. When assessing if an Art 13(b) defence is established, the court must consider all of the relevant matters that include the available protective measures (*Re W* [2018] EWCA Civ 664) and
h. The efficacy of the protective measurers which include but are not limited to the enforceability of any undertakings offered.

4. I have also been referred to a number of authorities that I have considered and include;

Re H (Children) (Children: Abduction Grave Risk) [2003] EWCA Civ 355, [2003] 2 FLR 141
Re C (Children) (Abduction: Article 13(b)) [2018] EWCA Civ 2834, [2019] 1
M v G [2020] EWHC 1450 (Fam), [2020] 2 FLR 1295
Re K & S [2023] EWHC 1883

Background

5. The parents were born and raised in the UK and now hold dual British and Australian nationality. They have known each other since school. In 2013, father relocated to Australia where he continues to reside. On or about May 2017, the mother visited Australia and soon after, the parties commenced their relationship. Later that year they began living together. About a year later, M was born. Sadly, the parents' relationship ended shortly after M's birth but remained living under the same roof until 2021 when father moved out of the property.

6. Whilst noting that there is a vast factual dispute between the parties about the mother's circumstances in Australia, it appears that the parents were able to agree the arrangements for M's care with the father seeing him regularly. It is also clear that with the agreement of the parties, M visited the UK on at least three occasions and returned to Australia at the end of those visits. It is asserted by the father that there was a standing agreement between the parents that the visits would not be for longer than six weeks.
7. In the autumn of 2022, the parents agreed that M could travel with the mother to the UK for another visit. The father's expectation was that pursuant to the previous arrangements, the visits would be for no longer that six weeks and that he would be informed of the travel arrangements before M left Australia. On or about the 7 November 2022 the father discovered that M had travelled to the UK without providing the father with the flight details. The father expected M to return by 19 December 2022. M did not return as expected. The parents spent the next four months in correspondence and by August 2023, the father issued his application for M's return to Australia. The proceedings have since continued with the court giving permission for the parties to instruct a Consultant Psychiatrist to assess the mother.

Analysis

8. I have considered the evidence that is within the bundle that crucially includes three statements from each of the parents with extensive exhibits that are in a separate bundle as well a psychiatric report by Dr Wilkins dated 16 October 2023 who was jointly instructed by the parents to undertake an assessment of the mother.
9. Dr Wilkins is a Consultant Adult and Forensic Psychiatrist with considerable experience and a highly regarded expert. He assessed the mother in his clinic on 4 October 2023. In his report he summarises his findings as follows:

"…

- *At present,* [mother] *suffers from symptoms of PTSD.*
- [The mother]*'s mental health is especially vulnerable to factors relating to her relationship with … the father in this case.*
- [Mother] *would benefit from more assertive treatment of her mental health problems.*
- *These treatments are available to her in the U.K but should be available to her in Australia provided she has access to these services.*

- *Overall,* [the mother]*'s mental health problems will be significantly affected by her personal circumstances.*"

10. He was the only witness to give oral testimony during which his conclusions remained unaltered although he made some important observations. Dr Wilkins' conclusions were reached in the premise that the mother's version of events was accurate, thus drawing a causal link between the mother's presentation and the father's alleged behaviour. Having now read the father's most recent statement, he observed that the veracity of the mother's account may be more questionable, but that in his opinion the mother's anxieties were genuinely held. He explained that the mother may have a predisposition to psychological and psychiatric issues that may stem from events predating her relationship with the father and other events such as the dog attack.
11. Dr Wilkins identified that the mother's predisposition to social isolation and lack of support as the key concern with issues of access to medication as secondary to the same. He opined that the mother has coped better in the UK because of the support around her and accepted that this is particularly important given M's additional needs. He stated that if the mother was his patient, he would advise her not to return to Australia. He further observed that it is difficult to distinguish between natural distress and mental health issues. Nevertheless, a return to Australia will cause the mother to suffer a deterioration in her mental health. Dr Wilkins' strong recommendation was for the mother to access therapy and support. He predicted that it would take months to address her social isolation.
12. Dr Wilkins further observed that his recommendations tested the mother's motivation to act upon the same. Dr Wilkins found it *"telling"* that she had not. The support that she has recently sought to access could be tailored to prepare her for a move to Australia. He anticipated that such a preparation could take about two months. He noted that there is evidence of the mother living independently and coping in Australia. He further observed that there was no evidence that during her more anxious and depressive periods, the mother's care of M had ever been compromised or raised safeguarding issues.
13. The summary nature of these proceedings precludes the court from embarking on a fact finding exercise. The mother's evidence raises serious concerns about the father's behaviour and the impact of this on the mother should she return to Australia. Whilst

the mother does not raise issues of physical abuse, her allegations of coercive and controlling behaviour are indeed serious and the psychological impact of such behaviour cannot be underestimated. In the context of a mother with predisposition to social isolation, depression and anxiety, it is a significant factor that must be weighed into the balance.

14. M's developmental delay is also a significant factor. Whilst I accept that the father may have needed time to digest the opinions and concerns about M, particularly when he has not cared for him for a significant period, his unwise responses would serve to affirm the mother's views of the father and the nature of his behaviour towards her. The father's apparent minimisation of his behaviour and possible lack of insight in its impact on the mother is another concerning feature. I have little doubt that this would further add to her anxieties about returning to Australia. Furthermore, the father's lack of financial support for the mother and M whilst in the UK and lack of direct contact with M, would serve to crystalise the mother's concerns about the father.
15. However, these must be assessed in the context of all of the evidence. In doing so, it is important to note that the allegations of domestic abuse have never been raised prior to the mother settling in the UK. Indeed, after separation, the parents spent a significant period living under the same roof when they jointly cared for M. After the father left the home, the parents appeared to have had an amicable arrangement for sharing the care of M and spending time with him which is reflected in the tone of some of the text messages that have been adduced before me. The parents seemed to have well established ground rules about financial matters and travel with M. Until the mother's departure the father provided the mother with financial support, and as observed by Dr Wilkins, the mother led an independent life.
16. The circumstances of mother removing M from Australia is concerning. Whilst this may well be a response by the mother to her circumstances and her views about the father, it has the hallmarks of a calculated and misleading act in which the father was given no opportunity to contribute to the discussions about relocation. Indeed, the text message in which the mother informs the father that they have left for England makes a request of the father to collect her car and signs off with a promise of seeing him in six weeks. It took the mother several weeks after the end of the six week period before she informed the father of her intention to retain M in the UK. The impact of her decision on M has not been independently assessed, but in my judgment this was a

significant change for M particularly in the context of his identified and anticipated needs.

17. There are no evidential certainties about how the mother will react to M going back to Australia. She has expressed a clear view that she will not go back with M if the court orders his return. Thus, she argues that in the context of the concerns that I have summarised, creates an intolerable situation for M. Having considered the totality of the evidence, I share Dr Wilkins' views in this regard and would be very surprised if the M does not return with M. In the event that she does not, there is no evidence that the father cannot provide a good standard of care for him. Indeed, the evidence suggests that he did with the mother's agreement when M lived in Australia.
18. I have little doubt that the mother will react adversely to any order for M's return and that this would serve as a trigger to the likely deterioration in her mental health. The protective measures that are offered by the father will provide significant support for the mother should she return to Australia. The nature of the support is in part financial and in other parts regulates the behaviour and the relationship of the parties. I share the mother's concerns about the father's reluctance to offer assurances concerning family proceedings in the Australian courts, but I do not find any evidence that this is with a maline intention. I envisage that he is keeping his options open as a response to fluid and unpredictable circumstances. Latterly the father has offered further sums to allow the mother to bring a family member or friend with her to help with the transition back to Australia. This is an entirely sensible and reasonable offer that adds further weight to the protective measures for the mother and M.
19. In the course of submissions, counsel have referred me to a number of authorities that I have listed earlier in this judgment. Unsurprisingly, some have been given a particular focus given the apparent similarities in the facts with the instant case. The first is *Re S (A Child) (Abduction: Article 13(b) Mental Health)* [2023] EWCA Civ 208 which concerned a mother with mental health difficulties that were likely to significantly deteriorate if she was to return to Australia. Moylan LJ's judgment is characteristically instructive on the applicable law and the correct approach which I have summarised earlier in this judgment. Whilst there are factual similarities in that case and in the instant case, in my judgment it cannot be said that the outcome of this case should be the same as *Re S.* The mother in the latter case had otherwise been robust in her mental health and the deterioration in the same was closely connected with the father's behaviour and a return to Australia. Furthermore, the severity of the

mother's mental health was sadly such that when she was decompensating and her mental health deteriorating, her capacity to care for the child was seriously compromised. Finally, one of the important factors that the court considered was the separation of the subject child from his sibling, contributing to the court concluding that the protective measures could not ameliorate the impact of an order for return.

20. The second case is *M v G* [2020] EWHC 1450 (Fam), [2020] 2 FLR 1295 which was a first instance decision by Theis J. There are clear factual similarities with the instance case. Notwithstanding the serious psychological and mental health concerns that were identified by the expert, the court ordered the return of the child to Australia. Although this may be a very helpful example of the approach of the court, it is crucial to note that the assessment of the anxieties of an individual is subjective (*Re S (A Child)* [2012] UKSC 10 above) and each case must be decided on its individual facts.

Conclusion

21. I have no doubt that any order requiring M to be returned to Australia would cause the mother great anxiety and distress. I am equally certain that these will serve as a trigger to a deterioration in her mental health. However, I do not find that the severity of her condition and her predispositions are such that they would constitute a grave risk or create an intolerable situation for M. Furthermore, the collective nature and impact of the protective measures will provide the mother with sufficient safeguards and support to travel back with M and to establish herself in Australia. The additional funds for a friend or family member to travel with the mother would provide a degree of assistance for the mother in the early days of return to Australia and ameliorate some of the concerns about social isolation whereby she can further address this issue in the medium term. Therefore, having regard to all of the evidence, I do not find that the requirements of Art. 13(b) defence are satisfied and I order that M should be returned to Australia.

22. The remaining issue is the timing of M's return. Ms Wiseman submits that if a delay is intended to psychologically prepare the mother for traveling back to Australia, such a need is illustrative of the serious impact that this move would have on the mother and serves to illustrate that the Art. 13(b) defence is established. Miss Spruce on behalf of the father sees some merit in this given Dr Wilkins' evidence but expresses a strong preference on behalf of her client that M should be returned before Christmas. In this context, I further note that the new term in the proposed school that

M will attend in Australia begins at the end of January 2024. On balance, given M's identified needs, it is important he is prepared for such a move and to have the opportunity to settle back in Australia before starting his new school. It is also important for him to complete the autumn term in his current school, to enjoy the festivities and celebrations that come at the end of this term and to have time to adjust to the changes that are before him. This also offers the mother an opportunity to better prepare herself and seek assistance in this regard should she decide to return with M. Therefore, I order that he must return to Australia by no later than 23.59 hours on 10 January 2024.