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**Neutral Citation Number: [2024] EWHC 1282 (Fam)**

Case No: FD24P00700

**IN THE HIGH COURT OF JUSTICE**

**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

24 May 2024

Before:

**JOHN MCKENDRICK KC**

(Sitting as a Deputy Judge of the High Court)

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**Between:**

**A FATHER**

**Applicant**

**- and -**

**A MOTHER**

**Respondent**

**Re N (A Child) (Ukraine: Art. 13 (b)) (No. 2)**

**Ms Katy Chokowry** instructed by Williscroft and Co appeared for the applicant

**Mr Mani Basi** instructed by Russel Cooke for the respondent

**Hearing Date: 20 MAY 2024**

**APPROVED JUDGMENT**

This judgment was handed down remotely at 14:00 on 24.05.24 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

The Deputy Judge:

Introduction

1. By way of an application dated 8 February 2024 and made pursuant to the Child Abduction and Custody Act 1985 (incorporating, by Schedule 1, the 1980 Hague Convention on the Civil Aspects of International Child Abduction, hereafter the "Hague Convention") the applicant seeks the summary return of his son to Ukraine. I shall refer to his son, born in August 2012 as N. The respondent to the application is N's mother. I handed down judgment on this application on 17 April 2024 with neutral citation [2024] EWHC 871 (Fam).
2. At this hearing, the applicant has once again been represented by Ms Katy Chokowry, counsel, and the respondent by Mr Mani Basi, counsel. I am again grateful for their assistance. I read the updating witness statements from both parties as provided for in my earlier order and heard submissions from counsel. After briefly retiring to consider the written evidence and submissions, I announced my conclusion to reject the respondent's Article 13 (b) defence and that I would make a return order for N to return to Ukraine.

### The Updated Evidence

#### *The Father*

3. The father has filed a short updating witness statement in response to the earlier judgment. He welcomed the opportunity to file evidence of alternative living locations in Ukraine. He carefully went about identifying three locations which he considered were distant from the current conflict and in respect of which there has been little or no hostilities in recent times. One of these, I shall refer to as T Town. T Town is in western Ukraine around 150 km from Kyiv. It is close enough to X Town that N will be able to visit and see friends and family somewhere safe. In respect of T Town the father exhibits a letter from the town's 'Executive Committee' stating the town has not seen any combat action. It is noted there are no facilities or infrastructure that is likely to be the subject of Russian aggression. The father's friend's letter dated 23 April 2024, is exhibited to the statement. It notes the father and N are welcome to live there. She notes it is a two bedroom house with all amenities. The father exhibits letters from others friends in other towns which sets out the arrangements they are able to make for the father and N to reside with them.

4. The father has also made arrangements for N to continue at his school in X Town by way of distance learning. He set out that alternatively N could be registered and educated in a school in one of the three towns he has identified as safe. He noted the Ukraine school summer holidays run from 1 June to 31 August 2024. He suggested N would be able to see his friends and family in Ukraine, but away from X Town during this period. There was talk of a football camp.
5. As for his own situation, he exhibited a letter from his employers who authorised him to work remotely away from X Town until 31 December 2024.
6. His evidence states that there are on-going family proceedings before the Ukraine courts in the X Town area. There will be a hearing on 24 May 2024. This is an interim hearing. I was told the father represents himself and the mother has instructed lawyers to represent her. He offered two further undertakings:

“I will move to the area deemed most suitable and safest for N’s return to Ukraine.

I will not remove N from the area the court determines is safe for him to return unless and until the Ukrainian courts determine otherwise.”

#### *The Mother*

7. The mother responded to the father’s witness statement. She gave evidence that moving N to one of the three locations identified would be damaging to N, as he has no connections with these places and would be isolated, knowing only his father. She noted that when N was spoken to by the Cafcass officer he wanted to be at his school and with his friends in X Town. She also gave written evidence that he has integrated more in the north of England and would miss his English friends. She raised a concern about the quality of the education in these other parts of Ukraine. She stated the teachers at his English school told her at a recent parents’ evening that N was doing well. She stated things had moved on since the Cafcass report. She raised concerns about the father calling N and putting pressure on him. Some text messages were exhibited.

8. She stated western Ukraine was safer but there was still danger and risk throughout the country. She exhibited a news report that shows on a date in May 2024 the area of X Town was the subject of shelling by the Russian armed forces and that as result some people were injured and over a thousand families were left without electricity.
9. She raised a concern that the father would be conscripted and made reference to the need to conscript more men into the Ukrainian armed forces. She raised doubts about the efficacy of the father's undertakings.

### Ukraine

10. The earlier judgment set out the approaches to the issue of the safety of Ukraine taken by various judges. One further judgment has been published which is the decision of Keehan J in *Re A (Article 13b Ukraine)* [2023] EWHC 3524 (Fam). In that case Keehan J ordered the return to Ukraine of a young child and rejected the mother's Article 13 (b) defence based upon serious allegations of domestic abuse by the father. The court accepted undertakings would amount to sufficient protective measures. Keehan J stated at paragraph 12:

“The protective measures in place and the order of this court will be lodged with the Ukrainian court prior to her and A's return. It's appropriate and in the child's best interests for the summary return of her to Ukraine. I acknowledge the war exists, but I am satisfied that where they live is not affected by the war to a degree that it would limit the ordering of return.”

### Submissions

11. Mr Basi maintained his submissions that N faces either a grave risk of harm or would face an intolerable situation because: (i) of being returned to a war zone with the risk of injury or death notwithstanding the father's evidence in respect of residence options other than X Town; (ii) he faces emotional or psychological harm because of the war and in particular because of fears his father might be conscripted into the army to fight; (iii) he would suffer because of the separation from his mother and would be living in

an unfamiliar part of Ukraine. He also submitted any undertakings should be formally registered in Ukraine pursuant to the 1996 Hague Convention prior to a return.

12. Ms Chokowry submitted the mother had failed to establish on the evidence that a return of N to the alternative locations in Ukraine in May 2024 would involve a grave risk of harm or would otherwise be intolerable. She invited me to make a return order forthwith. Ms Chokowry reminds me that: *“Ukraine is a signatory to the 1996 Hague Convention and these undertakings are therefore directly recognised and enforceable pursuant to the 1996 HC. In addition, the court is in a position to make protective orders considered urgent to regulate the situation on return until such time as the Ukrainian courts hear the matter: Art 11.”*

### Analysis

13. I can state my reasons for making a return order to Ukraine shortly.
14. As is apparent from the earlier judgment I had concerns about N’s safety in X Town caused by the proximity of the C Facility. Since that judgment the Russian armed forces appear to have shelled and destroyed electricity infrastructure in or near X Town. I am however satisfied that the three alternative locations identified by the father do not carry the same low risks of grave harm to N’s physical safety. Of the three towns proposed by the father, the mother favoured T Town and the father readily agreed to locate there. T Town is in the West of Ukraine. There is no evidence that T Town has a facility similar to the C Facility that caused me concern for N’s safety in my earlier judgment. Unlike X Town, T Town has not been repeatedly attacked and there have been no civilian fatalities. The town’s Executive Committee states that it is not part of the ongoing combat. The mother’s evidence points to no open source information about the risks to civilians of the war in T Town or the other locations identified. I am therefore satisfied that if N returns to Ukraine and resides in T Town (or such similar town) he is not at risk of grave harm or intolerability brought about by the physical risks to him of the on-going war. I am of course aware that the judge in the X Town area family court may take a different view as to the safety of X Town and the risks to N. I have little doubt a judge in X Town will have a greater appreciation of the risks in that town than a judge sitting in London. That judge will have the benefit of carrying out a full welfare analysis of N’s situation and the comparative risks to his physical safety and his

emotional, psychological and educational welfare in the fullest sense, which a judge considering a return order does not have. It is after all the purpose of the 1980 Hague Convention that the courts of country where the child is habitually resident carry out the investigation and determination of a child's welfare. It is proper for N that a Ukrainian judge in a Ukrainian court should determine his arrangements after hearing from his father and mother.

15. The mother's case under Article 13 (b) is also based upon the psychological harm of a return to a part of Ukraine in respect of which N is not familiar, with the risks of separation from her. She is not currently prepared to return to Ukraine and a family friend will return N to Ukraine if the return order is made. I do not accept that this case reaches the Article 13 (b) threshold of grave harm or intolerability. Whilst Cafcass reported on 8 March 2024 and it is now 20 May 2024, the evidence seen overall is still clear that N wishes to return to Ukraine. For the purposes of this hearing I have re-read the helpful report and I accept there are references by N to wishing to return to X Town specifically. However, there are also several references to wishing to return to Ukraine generally and wishing to leave England. I also note that N will be with his father, who he stated he wishes to be with and in respect of whom he says he is closer than his mother. He will be with his dog. I have little doubt that for the period of the long Ukrainian summer holiday, he will be able to see his friends from X Town. He may well play in a summer football camp. He may begin distance learning at the school he studied so hard to gain admission to last year. Overall, he will be back in his country, with his people, speaking his preferred language. I very much hope arrangements will be made for contact between N and his mother. Her presence in his life is essential.

16. I have taken into account the pressures of the war and the worry that N may harbour of the Russian advance across Ukraine and the possibility of his father's conscription. On the evidence before me, these issues are theoretical, possible, future risks. But they are also risks that N *feels* whether he is in Ukraine or England. I have little doubt his caring parents and his wider family would make appropriate arrangements to protect him. I consider there are greater dangers physically separating him from his Ukrainian identity, his father, his dog and his friends. That is entirely consistent with the detailed Cafcass report. The fact of a little more integration into England over the last six weeks does not fundamentally alter the balance and I note the mother has produced no

evidence of N's wishes and feelings which alter or change what he told the Cafcass officer. It would be more psychologically harmful to keep N from Ukraine. I emphasise that I have re-considered the evidence and analysis which underpins paragraphs 51 to 57 of my earlier judgment and have considered all the strands of the mother's case on psychological harm together but I have come to the clear conclusion that the least psychologically harmful course for N is his return to Ukraine. Therefore the mother's Article 13 (b) defence is not made out on the evidence.

17. After having announced my decision at the hearing and prior to completing these written reasons to explain the return order, I have received an agreed return order which I have approved. I have accepted the following undertakings and noted that these will be offered to the Ukrainian court by the father at the hearing on 24 May 2024. In those circumstances I do not consider it is necessary that the undertakings are registered in the way Mr Basi submitted take place. The father's undertakings are:

“To move to T Town by no later than 2 clear days prior to N's return to Ukraine in accordance with this order and to remain living there pending further or other order of the X District Court made in the proceedings concerning N.

Not to institute or voluntarily support any proceedings, whether criminal or civil, for the punishment of the respondent arising out of the removal of the child to England and Wales on 20 December 2023 and the subsequent retention of the child in England and Wales since 21 December 2023 to date;

Not to intimidate, harass, or pester, use or threaten to use violence against the respondent, on a without admissions basis, pending the first *inter partes* hearing in the X District Court currently seized of welfare issues relating to the child;

To facilitate contact as may be agreed between the respondent and himself or ordered by the X District Court. “

18. In respect of these measures the parties have agreed:

“The father has agreed to lodge the undertakings given herein in the Ukrainian proceedings in the X District Court which is allocated to Judge 'K' at the hearing currently listed on 24 May 2024.

The undertakings given and orders made constitute binding and enforceable obligations in this jurisdiction and it is intended that the said undertakings

should also constitute binding and enforceable obligations in Ukraine pursuant to the 1996 Hague Convention

The undertakings and orders constitute ‘measures’ for the purpose of article 23 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.”

19. This provides for a suitably robust and efficacious series of protective measures to protect N until such time as the X Town family court can consider and determine matters. Should there be any issue, for the avoidance of doubt, I prefer Ms Chokowry’s legal analysis at paragraphs 22 to 28 of her position statement, submitting that this court need not delay N’s return to Ukraine to ensure the undertakings are formally registered first. That is inconsistent with court’s obligation to forthwith make a return order and the recognition of such measures by operation of law. In any event should there be any doubt, those undertakings will be offered to the Ukrainian judge at the hearing on 24 May 2024.

20. I have sought to ensure that these undertakings do not usurp or impact on the functions of the courts in Ukraine. I have been mindful throughout of the necessary comity which exists between England and Wales and Ukraine. I have accepted the father has conscientiously recognised the risks of X Town and he has carefully and diligently sought to ensure N can be safely located until the Ukrainian court are able to carry out a full welfare analysis which will consider the risks to N of the C Facility in particular. My earlier judgment has already been translated into Ukrainian and this judgment and the order will also be translated to assist the Ukrainian courts.

### Decision

21. I therefore make a return order. N will be returned to Ukraine no later than 3 June 2024. This will give him time to finish his school half term in England and have a holiday with his mother. He can then return to Ukraine to his father’s care and enjoy the long Ukrainian school summer. I end this judgment by acknowledging the impact of the war



on the lives of N, his mother and his father and hope they can peacefully adjust to their new realities.