Case No: FD14P000925

Neutral Citation Number: [2014] EWHC 3799 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2014

Before :

MRS JUSTICE PAUFFLEY

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Between :

	C	**Applicant**
	- and -	
	S	**Respondent**

(Child Abduction: Hague Convention: Article 13)

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- -

Richard Jones for the Applicant, father
Christopher Miller for the Respondent, mother

Hearing date: 4 November 2014

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Judgment **Mrs Justice Pauffley:**

Introduction

1. This is an application by a father for the summary return to Australia of his son, L, who was born 14 years ago, in 2000.

2. On the basis of the papers, it had seemed as though the mother's opposition would have had a very broad base – a possible argument about parental responsibility and the implications of the father not holding it here; an assertion that the father consented to the removal; a

claim that by the time the mother decided to retain the child here he was no longer habitually resident in Australia; a contention that a return would place the child in an intolerable situation and there would be an associated grave risk of psychological harm; and finally, a child's objections' 'defence' based upon the content of L's interview with Bob McGavin of the Cafcass High Court team as well as L's letter written to me after interview.

3.The mother's case was modified at the outset of the hearing so that the only two issues pursued on her behalf were Article 13B 'intolerability / grave risk of psychological harm' and 'child's objections.'

4.I am indebted to Counsel, on both sides, for the economical, erudite and considered way in which they have presented their respective cases. Though I was provided with bundles of authorities which extended to many hundreds of pages, it was unnecessary to go further than those extracts related within the Skeleton arguments. The law in this area, although constantly developing, does benefit from a number of well-established principles.

Essential background

5.The background may be shortly summarised. The father was born in the UK but is now habitually resident in Australia. The mother is a UK national.

6.The parents began their relationship in 1997 and separated in 2003. They did not marry. After the separation, L lived with his mother in England and had regular contact with his father.

7.In about 2007, the father moved to live in Australia having met the person who was to become his future wife on a trip there in 2005. The father and his wife have two daughters of their marriage.

8.Meanwhile, the mother became involved with and subsequently married H. Together they have two children, a boy who is nine and a girl almost four. In late 2008, the mother, L, her husband H and their first born child moved to Australia. H had secured employment there.

9.L started school locally. He had staying contact with his father as well his new family every third weekend.

10.In the early summer of 2011, the mother, her husband and the children came to England so that he could fulfil a work assignment. According to the father, the expectation was that they would return within 3 months. They did not go back to Australia until the spring of

2012. The mother claims there was "no talk of (the trip) being for a limited time such as three months." Her husband had "announced that he would like to return to Australia." She did not want to go but her husband "was very forceful and (she) really had no choice but to accompany him back to Australia."

11. Unbeknown to the father, the mother and her husband separated in December 2013. She remained, together with the children in the former matrimonial home, a rented property.

12. Since her departure from Australia in early June 2014, there have been divorce proceedings between the mother and H in the courts there. Although there had been some indication that H might apply "for a recovery order" in relation to his children, I was told he has accepted that they will live in England, he will agree to the equivalent of a Child Arrangements Order in favour of the mother and there will be no application for their summary return.

Circumstances of departure from Australia

13. Tracking back a little in time, in May 2014, the maternal grandmother who lives in England visited the mother in Australia. According to the mother, at the end of her visit, the maternal grandmother asked if the mother would like to take a holiday in England "to have a break." The mother accepted the offer. Tickets were purchased on 22 May. They travelled here with the children on 2 June.

14. The mother asserts she "did have a conversation via telephone and email with the (father) and explained to him that because of the situation with (her) husband and the break up of (their) marriage, (she) made the decision to travel to the UK." It might be said that the email correspondence between the parents from 4 – 29 June, usefully analysed on page 3 of Mr Jones' Skeleton, suggests otherwise.

15. On 25 June, the father wrote that he and his wife were "still devastated and shocked that (the mother) left Australia … without even a phone call." On 29 June, in an email, he said "you should still have consulted with me as (L's) parent before leaving the country as I would not have given you my permission …"

The Hague Convention – the framework

16. Pursuant to Article 3 of the Convention on the Civil Aspects of International Child Abduction, *"(t)he removal or the retention of a child is to be considered wrongful where – a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or*

retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

17. Article 12 provides that *"(w)here a child has been wrongfully removed or retained in terms of Article 3 and .... a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith*."

18. Article 13 describes exceptions to the mandatory return provision created by Article 12. As relevant here, "… *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 – 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.*"

Article 13B principles

19. As was made clear by the Supreme Court in *Re E (Children) (Abduction: Custody Appeal) [2011]UKSC 27* there is no requirement to narrowly construe Article 13B. "*By its very terms, it is of restricted application. The words …are quite plain and need no further elaboration or 'gloss*.'" A number of principles may be drawn from the judgment –

- The standard of proof is the ordinary balance of probabilities. The burden of proof rests upon the person opposing the child's return. It is for that person to produce evidence to substantiate the defence raised.

- 'Grave' qualifies the 'risk' of harm rather than the 'harm' itself but there is a link between the two concepts. The risk to the child must have reached a such level of seriousness as to be characterised as 'grave.' A relatively low risk of death or serious injury might properly be qualified as 'grave' whereas a higher level of risk might be required for other less serious forms of harm.

- The situation faced by the child on return depends crucially upon the protective measures which could be implemented so as to avoid the risk that the child will be harmed or otherwise face an intolerable situation.

- Inherent in the Convention is the assumption that the best interests of children as a primary consideration are met by a return to the country of their habitual residence following a

wrongful removal. That assumption is capable of being rebutted only in circumstances where an exception is made out.

20. In relation to 'intolerability' Lady Hale in *Re D (Abduction: Rights of Custody*) *[2007] 1FLR 961* said, "*Intolerable is a strong word but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate*.'"

21. Also relevant to the facts of this case is the principle articulated in *C v C (Minor) (Abduction: Rights of Custody) [1989] 1 WLR 654* namely that an abducting parent is not entitled to rely upon harm to the child arising out of her refusal to return with the child, as permitting her so to do would "*drive a coach and four through the Convention. In such a situation any risk of harm to the child arises not from the order for return but from the refusal of the abductor to accompany him.*"

22. It is also right to observe that it has been held that if an order for return was demonstrated to result in children being left homeless and destitute without recourse to state benefits, a court would be likely to find that Article 13B had been established: see *Re M (Abduction: Undertakings) [1995] 1FLR 1021.*

The mother's case in relation to a return

23. The mother's Defence, particularly as it relates to Article 13B, is founded upon an envisaged separation between herself and L if a return order were to be made. Neither she nor his siblings would be going back to Australia.

24. In her statement of 8 October, the mother refers to the circumstances between herself and her husband, H. She states that unbeknown to her, he had surrendered the lease upon the former matrimonial home, disposed of the contents and on 11 June had sent an email telling her she had nowhere to go back to. The mother maintains that her husband's actions "*in surrendering the home and refusing to pay any maintenance or contribute to the family financially made (her) realise (she) could not go back to Australia*."

25. Moreover, the mother's understanding – from internet research – was that her ability to enter Australia on her existing visa had terminated as a result of her separation.

26. On 4 November, in preparation for this hearing, the mother emailed the Cancellations' Officer in the Department of Immigration and Border Protection. She referred to their telephone conversation that morning and asked for confirmation that she and L "*are no longer eligible to enter Australia on (her) ex husband's e457 visa.*" The mother confirms that L was not adopted by her ex husband and ends by saying the matter "*is extremely*

urgent" as (she has) to attend at the Royal Courts of Justice in a few hours."

27. The reply from Mr Gareth Joseph, the Cancellations Officer, included the following – that the circumstances which permitted the grant of a dependent 457 visa no longer exist. The message goes on, "*The Department however has no information before it at this stage that suggests (L) is no longer a dependent of (H). It would be advisable that you seek for yourself a separate class of visa should you desire to enter Australia as I cannot guarantee you clearance at our borders on the current 457 visa you hold. You can request voluntary cancellation of your visa by confirming your request to the Department* …."

28. Within his Skeleton Argument, Mr Miller states that the mother is "*not confident that she and her children would be permitted to re-enter Australia*." He emphasises the visa situation and the mother's fear that she might be deported if she entered the country on a visa without alerting port officials to her change of circumstances.

29. It is the mother's case that L's return would inevitably mean a change of residence because, in addition to the immigration difficulties, she cannot see how she would meet the family's needs in Australia. She has no job, no entitlement to state benefits, no home and no means of supporting herself.

30. The mother's case is that a change of residence would have the following consequences for L, sufficient to satisfy the Article 13B exception. Specifically that L's separation from his mother would be against his strongly held wishes; that separation from his maternal half siblings would be similarly damaging; that living in the same house as his step mother would be problematic because he has an extremely difficult relationship with her; and that he would have to move to a new school against his very clear wishes.

31. It is also said, on the mother's behalf, that L feels marginalised and belittled within his father's home. As to that, although there is trenchant denial in relation to the general claim, it would appear there is some recognition from the father's statement that, on occasion, L has been teased playfully. With the benefit of hindsight, the father accepts that was wholly inappropriate.

32. Thus, on any fair reading, the mother's case is structured such that if L had to return to Australia then he would be going back alone and to his father's home.

33. When L saw Mr McGavin on 20 October, L said his mother had assured him, in the event he is returned, she will go with him. In evidence, Mr McGavin added that L had imparted that piece of information "*somewhat unexpectedly*" and that it had been "*unsolicited*." Unsurprisingly and altogether appropriately, Mr McGavin had conducted

his interview on that basis.

34. The mother's response to that information is comprised within Mr Miller's Skeleton Argument supplemented by his oral submissions. The mother maintains she has tried to reassure L he will not have to live in his father's household if he is returned. However, she asserts "*this was simply an attempt to allay his fears and not something which she is able to achieve in reality*." Mr Miller submits the mother would encounter greater difficulty in returning than "*mere logistics*" as had been suggested by Mr Jones. There is an inability to return on her part, says Mr Miller, by virtue of the immigration and financial circumstances. He referred to her as finding herself in "*an intolerable situation.*"

Discussion – grave risk of harm and intolerability

35. In the unusual circumstances of this case, it is necessary to consider Article 13B considerations both on the basis that the mother will return with L and, alternatively, that she does not.

a) If the mother returns

36. It is difficult, but not impossible to assess what is most likely to happen. I predict that if return is ordered, the mother will honour the assurances given to L, thus defeating those arguments deployed on her behalf to substantiate the Article 13B exception.

37. In terms of the practical impediments to return, so heavily relied upon by the mother, there are a number of very obvious counter arguments. Her own and L's passports each have visas entitling them to live in Australia until March 2016. If the holiday to England in early June had ended in the mother's and children's return to Australia, it is fair to assume they would have re-entered on those visas. By her own actions in contacting the Immigration Department the mother has sought to erect barriers to return. But, in the different circumstances which now apply, the mother could apply for visitors' or other visas. Australia is, of course, a Commonwealth country; it makes no sense at all to suggest there will be insuperable immigration problems. There is also the potential for assistance from the Australian Network Judge, should it be needed, so as to establish whether, in the event of a return order, immigration problems might be avoided and if so how.

38. In relation to financial and accommodation difficulties, I observe that the two fathers of the mother's three children have maintenance obligations. L's father has been a consistent contributor paying $600 per month under a private arrangement and more when needed. Recently, as the email correspondence suggests, the mother's indication is that she does not want L's father to continue to pay. On 26 June she wrote ….

"*financially things are being put in place as I speak. Please forget paying any maintenance as we do not need it.*"

39. Since the mother's return to the UK she has been in receipt of income support and other benefits. She has taken a voluntary position at one of the children's schools. But she has also received financial and other support from the maternal grandmother and her partner as emerges from the email correspondence. They have provided clothes, food, new school uniforms and shoes. The mother describes herself as "*lucky in the fact that they consider it is a privilege to do so and they are in a position to be able to do it* …"

40. In the event that H, who is in employment, did not contribute voluntarily to the mother's and his children's financial needs, then I must assume that the Australian courts would require him to make adequate provision.

41. All in all, I reject the assertion that perforce the mother would be returning to a situation of homelessness and destitution. I do not accept her claims which amount to an impossibility of return. Clearly she has a very strong, persistent and enduring wish to remain here but that is not the same as an inability to go back. The assurances she gave to L in advance of his meeting with Mr McGavin are, in my assessment, very likely to represent the reality. In any event, it should be part of the way in which she exercises parental responsibility for L that (a) she fulfils her promises to him and (b) accompanies him on return.

42. It is singularly unattractive, I would observe, to run a particular case in front of the court whilst at the same time seeking to reassure a child, privately, that something entirely different will eventuate.

43. Had the mother's position been that she was refusing to return then the considerations arising from *C v C (supra)* would have been relevant. As it is, if a return order is made and she complies with her assurances to L, as I believe she will, there are a number of practical measures to be tackled straightaway.

b) If the mother does not return

44. Because of the ambiguity as to the mother's position it becomes necessary to consider Article 13B on the basis that L returns to Australia and lives within his father's home. It is abundantly clear that neither the mother nor L want that to happen. L was under the mistaken impression when he spoke to Mr McGavin that the court would be dealing with custody. Notwithstanding Mr McGavin's detailed explanation about the workings of the Hague Convention, in his letter to me L continued in his mistaken belief that the court hearing is because his "*father would like (him) to live with him*." L went on to say he has never lived with his father, likes living with his mother and younger siblings and

does not want to go back to Australia. L added that he "*hated going to London (a reference to the possibility of meeting with me) … it really did make (him) feel so sick and hot*." Interestingly, and relevantly, there was no mention of hatred in relation to anything associated with his father or, indeed, Australia.

45. There are several noteworthy positives in relation to the potential of L living with his father. The obvious first is that prior to 2 June, the father and L had an ongoing relationship marked by staying contact every third weekend. According to the father, broadly accepted by the mother, throughout L's life there has been regular staying contact. This father has always been committed to and involved in his son's life. The father's evidence is that prior to 2 June he and his wife had "an affectionate, loving, comfortable relationship with L."

46. Second, and very importantly, in his discussions with Mr McGavin L spoke well of his father and said he enjoyed the time they spent together. L mentioned that he did not get enough one-to-one time and that his step mother would get jealous if L and his father spent time together. L would have welcomed time alone with his Dad. In his oral evidence, Mr McGavin added that what L had said to him about the father / son relationship "*had a very nice feel to it.*"

47. Thirdly, and significantly, such problems as there have been are now out in the open. They have been articulated and, to an extent, there has already been some acknowledgment and apology. The father accepts it was inappropriate for his wife to have referred to L as looking "*like a nerd*" and says she apologises. However, to my mind, much would depend on the context in which the remark was made before a conclusion could be drawn as to its essential quality.

48. Mr McGavin was probably correct to assume, as he said in evidence, that if L had been asked about going back without his mother "*it would have been a strong and confident 'No'*" and that a return alone would represent "*a big issue for L.*" But the question I am required to answer is whether the mother has established that, if returned, L would be at grave risk of psychological harm or otherwise placed in an intolerable position.

49. I cannot conclude either that he would be at such risk or that his position would be intolerable. If his mother failed to accompany him, reneging upon her assurances, doubtless there would be an impact upon L. He would be entitled to feel resentful and betrayed. But considering the factual background as to how L's relationship with his father has been promoted throughout his life and the positives noted by Mr McGavin, it is really quite impossible to conclude that a return into the father's household would fulfil the criteria for the establishment of an Article 13B exception.

'Child's objections'

50. The final matter for decision is as to whether the mother has substantiated her case in relation to 'child's objections.'

51. It is well established that there are three stages in any consideration of this exception arising out of a decision of the Court of Appeal in *Re M (Abduction: Child's Objections) [2007] 2 FLR 72.* The first question is whether the child objects to a return. The second is as to whether the child has attained an age and degree of maturity at which it is appropriate to take his views into account. And the third involves the court in considering whether to exercise its discretion to direct or refuse a return.

52. In *Re K (Abduction: Case Management) [2010] EWCA Civ 1546* it was held that there is a clear distinction between the child's objections and the child's wishes and feelings. "*The child who has suffered an abduction will very often have developed wishes and feelings to remain in the bubble of respite that the abducting parent will have created, however fragile the bubble may be, but the expression of those wishes and feelings cannot be said to amount to an objection unless there is a strength, conviction and a rationality that satisfies the proper interpretation of the Article*."

53. Asked about how he would feel about going back to Australia, L told Mr McGavin he "*wouldn't really like to*" adding that he is in a new school, is making new friends and has made "*new beginnings*." On the scaling exercise, "*How L would feel if the judge decided he has to go back*," with 0 representing 'would not mind' and 10 representing 'would hate to go back', L chose 8 saying in explanation that he "*did not think he would enjoy to go back; starting school over again; meeting people over again; restarting his life over again.*" He did not want "*to leave people all over again*."

54. As for the positives of returning, L mentioned that he would get to see old friends. He told Mr McGavin about his daily message contact with three friends in Australia, mates from school.

55. Mr Miller submits that, on any view, L is objecting to a return and that the exception is clearly met even on the basis that his mother will return with him. In cross examination, he suggested to Mr McGavin that only a 10 on the scaling exercise would have constituted an objection in his eyes. Mr McGavin – an immensely experienced member of the Cafcass High Court team – disagreed with that proposition. Significantly, he added this – that what L had said "*did lack strength. It could have been put more powerfully. He could have been far more emphatic – i.e. 'I <u>really</u> don't want to go*.'"

56. Mr McGavin told L at the end of the interview that although he would faithfully report his wishes to the court, he "*was not able to assure him that they amount to an 'objection' in Hague Convention terms*." In evidence, Mr McGavin added that he is always interested to see what a child's reaction is to news of that kind. Sometimes there is a

dramatic response. L did not say anything or otherwise react. Mr McGavin ended that section of his report, I should add, by saying it would be for the court to determine whether L's wishes amount to a preference or an objection.

57. I am in no doubt. L has expressed wishes and feelings but they fall a long way short of an objection in Convention terms. Neither from the contents of L's letter nor from the interview with Mr McGavin could I conclude there was a strength, conviction and a rationality which could be said to amount to an objection.

58. I should add, for the avoidance of doubt, that had I been persuaded in relation to the first of the gateway questions, I would have gone on to find that L has attained an age and degree of maturity at which it is appropriate to take account of his views. Clearly, he is an articulate, intelligent young person who was well able to present his thoughts in a mature and balanced way.

59. The last matter for comment in relation to 'child's objections' relates to the way in which I would have exercised my discretion had I been satisfied in relation to the two gateway questions. Pursuant to Lady Hale's guidance in *Re M (Abduction: Zimbabwe) [2007] UKHL 55, "(O)nce the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically (his) own" or the product of influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to … welfare, as well as general Convention considerations …. The older the child, the greater the weight that (his) objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances.*"

60. In this instance, had there been an established 'objection,' I should nonetheless have exercised my discretion so as to make an order for summary return. My reasons would have been these. Inevitably, L will have absorbed his mother's strong desire to remain here and make a new life in this country. As to that, as emerges from the written evidence and L's letter to me, my sense is that the mother is robustly supported by the maternal grandmother and her partner. L says, "*My nanny and granddad have really helped us so much and we really needed them*." L has been influenced, quite obviously, by the attitudes and feelings within the maternal family home.

61. It is also relevant that the mother's actions in bringing and retaining L here amount to flagrant abduction. There can be no real question about the father's complete lack of knowledge as to what was about to happen at the beginning of June. On any fair reading of his own and his wife's statements, when they last saw L (between 22 and 26 May) they had no reason to believe they would not see him again in a few weeks time.

62. The mother came here for a supposed holiday which turned into a plan to remain within

days of their arrival. The mother told the father on 22 June she had "*not made this decision in haste*." The emails between her and the father can lead to only one conclusion as to the mother's motivation. She had decided what she wanted for herself and what was in L's welfare interests and was determined to secure her objectives irrespective of the father's reaction. The father's emails tell their own story of shock, distress, even incredulity in relation to the events of June.

63. The underlying assumption of the Hague Convention is that the best interests of children will be served by a swift return to the country of habitual residence. It must be the case that the courts of Australia are better placed than those here to decide welfare issues in relation to L. I remind myself that the Convention is there, not only to secure the prompt return of abducted children but also to deter abduction in the first place. The message, said Lady Hale in *Re M (supra),* "*should go out that there are no safe havens among the Contracting States*."

64. Had it been necessary to exercise my discretion, it would also have been a factor of relevance in favour of return, that this has been a case of relatively 'hot pursuit.' The father signed the forms for the Australian Central Authority on 9 September, less than three months after he discovered the mother's intentions.

65. I have no doubt that it will be extremely inconvenient for the mother to rearrange her life in the way that an order for summary return will require. But I am in no doubt about her failure to establish an exception to mandatory return. Had I been required to exercise my discretion then I reiterate I should have done so not to permit L to remain here but so as to ensure his return.

66. That is my judgment.