Case No: FD 15 P 00462

Neutral Citation Number: [2015] EWHC 4002 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand London

Date: Thursday, 26th November 2015

Before:

MR. JUSTICE BAKER

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IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985
AND IN THE MATTER OF W (CHILDREN) (ABDUCTION: STRIKING OUT)

Between:

	MW	**Applicant**
	- and -	
	NA	**Respondent**

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MR. MICHAEL GRATION (instructed by **Atkins Hope**) for the **Applicant/Father**
MISS VICTORIA MILLER (instructed by **Stowe Family Law**) for the **Respondent/ Mother**

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JUDGMENT MR. JUSTICE BAKER:

1. This is an application by a father under the Hague Convention and Brussels II Revised for the return to Spain of two children, M aged seven rising eight, and H who is just six. The application can be listed for a two-day hearing before a judge of the Division at the start of next term, namely 11th and 12th January, some seven weeks hence or so. It comes before me today effectively for a PTR on a range of issues, two of which remain contested and hence this short judgment.

2. The very brief background, set out only for the purposes of the issue before me today, is as follows. The children were born in 2007 and 2009 I have described and the parties were married shortly after H was born on 12th November 2009. They separated in August 2011. Thereafter there were great difficulties between them and, indeed, it is the mother's case that those difficulties extended back into the marriage itself. I note in particular that on 9th November the father was convicted in Spain of an offence of ill treatment in the family sphere and was sentenced to 6 months' imprisonment with ancillary orders as well.

3. The court found, I am told, that the father assaulted the mother in the presence of

the child. Following the separation of the parties a settlement agreement was reached in terms of child arrangements. A divorce petition filed and on 24th April 2012 divorce pronounced. The convenor agreement in respect of the child arrangements was approved by the court.

4. There were further difficulties between them and the mother made further complaints about the father's behaviour which led to a further court hearing. I am not told the details of those court hearings. If the matter proceeds to the hearing listed in this application in January no doubt it will be possible for those details to be produced if relevant.

5. On 26th June 2013 the mother wrote to the father informing him that she and the children were relocating to this country. On 6th July she and the two children duly came here and they have lived here ever since.

6. On 24th July I am told by Miss Miller on behalf the mother, that the father made an application to the Spanish court against the mother in respect of her having left Spain with the children without his consent. It is asserted by the father in his statement that the Spanish judge told him on that occasion that no order could be made or step taken without the mother's address.

7. Private investigators were instructed and it seems in June 2014 the mother's address in this country was found. In November of that year, of course now some 16 months after the mother had arrived in this country, the father contacted the school attended by the children and received confirmation from the head

teacher that the children were indeed attending the school. Thereafter the father was apparently in email contact with the school and received copies of the school reports.

8. Subsequently the father contacted a lawyer in Liverpool but it was not until September this year that the father launched his application under the Child Abduction Convention. To that application the mother, represented by Miss Miller, proposes to put forward four defences: first, that the children are settled within this jurisdiction within the meaning of Article 12; second, that the father acquiesced in their removal to or retention in this country; third, that the children object to being returned within the meaning of Article 13; fourth, the Article 13(b) defence, that to order the return would expose the children to a grave risk of harm or an otherwise grossly intolerable situation. All those issues will be determined by the judge at the hearing in January if this case proceeds.

9. Today the matter came before me for various directions and two issues remain outstanding. The first is whether or not the application should be struck out. Miss Miller seeks to persuade me that that is the course the court should now take. The second issue is the question of a psychological assessment of the mother.

10. Miss Miller relies on the decision of Connell J in ***Re G (Abduction: Striking Out Application)*** [1995] 2 FLR 410 in support of her application for the strike out of the father's application today. That is, she informs me, so far as she has been

able to discover, the only reported authority in which an application under the Hague Convention has been struck out. In that case the children were removed from America by their mother in 1992 and, after taking proceedings in America, the father started proceedings under the Hague Convention in this country in December 1993, but he did not prosecute those proceedings. It was on 11th January 1995, some 13 months after the start of the proceedings, that the application to strike them out came before Connell J. On that occasion the learned judge allowed the application observing that the children had been living in this country for two and a half years, that there had been a significant delay between the children coming to this country and the father issuing the Hague proceedings. Furthermore, those proceedings have not been conducted with the expedition that was usually appropriate.

11. Miss Miller, in a thorough and comprehensive written submission, urges the court to adopt a similar course here. She submits that in considering whether the application should be struck out consideration must be given to the order that the court is likely to make. In particular, relying as she does on Article 12.2, the settlement defence, and having regard to the approach taken by the courts to the discretion under the Hague Convention as to whether or not the return should be ordered and in particular to the principles set out by the House of Lords in ***Re M (Abduction: Zimbabwe)*** [2007] UKHL 5, it is, in Miss Miller's submission, overwhelmingly likely that the court in this case will refuse to order the return of the children on the grounds that they are settled in this jurisdiction quite apart from any of the other defences which the mother seeks to rely on.

12. Miss Miller submits that whilst a court will, of course, have regard to the underlying objectives of the Convention, it does not follow that those objectives should always be given more weight than other considerations. She submits that the further away the case is from the speedy return envisaged by the Convention the less weight of the general convention considerations must be. In making that submission she relies on observations of Baroness Hale in ***Re M*** at paragraphs 43 and 44 of her speech. Miss Miller proceeds to rely further on the strength of the defence of acquiescence by reference to father's conduct including, inter alia, the fact that he has been in touch with the school.

13. The final conclusion that Miss Miller makes is that this case is analogous to **Re G –** indeed she describes the timeframe as strikingly the same. She accepts that the father has not delayed in prosecuting the Hague application once it was started, but rather rests her case on the fact that it was not started until over two years after the children were brought to this country.

14. With respect to Miss Miller, it seems to me that the application is misconceived. It is, I find, highly significant that in the twenty years since the decision in **Re G** there has been no other reported authority in which an application under the Hague Convention has been struck out. That is not surprising given the general understanding that applications under the Hague Convention must be pursued with expedition. In my experience practitioners specialising in this field and in this court are at great pains to ensure that such proceedings are prosecuted with expedition, sometimes at the expense of other pressing cases.

15. The facts of **Re G** are quite extraordinary. It is wholly outside the experience of this court that any Hague application has taken anything like 13 months to come on, indeed 13 weeks is viewed with disfavour by this court. Accordingly, I am not surprised that there has been no other authority on striking out. The fact that there has been no authority since **Re G** illustrates to me that this is not a course which a court should generally have regard to in these circumstances.

16. The scheme of the Convention plainly allows for issues arising out of any delay in launching proceedings under the Convention to be taken into account under the settlement defence set out in Article 12. The scheme of the Convention, which stipulates a different approach depending on whether or not the children have been in the country to which they have been brought for more than twelve months, is carefully drawn so that the issue of delay can be further taken into account in the analysis which the court has to carry out on any defence of settlement raised against such an application.

17. It seems to me that the issues which Miss Miller has advanced in support of her application for a strike out of the father's application under that convention are properly matters which should be considered under the defences which the mother raises of settlement and, if appropriate, acquiescence. In my judgment, it is generally inappropriate for the courts in this country to entertain an application to strike out a summary application under the Convention, save in the exceptional circumstances typified by the decision in **Re G**. Accordingly, Miss Miller's application for a strike out of the father's application under the

Convention in this case is refused.

18. In reaching that decision I stress that I am in no way criticising or challenging the strength of the defence which will undoubtedly be run under Article 12.2. Miss Miller puts forward some cogent arguments which no doubt will be deployed properly at the hearing in January. I make no comment as to whether or not they will succeed. That is a matter for the judge who will hear that application.

19. I turn finally to the question of a psychological assessment of the mother. It is of the mother that an assessment is sought, not the children. Miss Miller submits that it will be to the benefit of the court hearing the application in January to have available a psychological report on the mother to demonstrate that her fear of the father, whether or not it is justified, is genuine.

20. This application is pursued in support of the mother's final defence to the father's application under the Convention, namely Article 13(b). The mother has at her disposal it would seem, some strong points under Article 13(b), although again in saying that I am in no way seeking to prejudge the issue should it fall for determination at the hearing in January. There is, for example, a criminal conviction and other matters, including allegation of violence perpetrated, it is said, by the father on the mother in the presence of one or more of the children.

21. To my mind, however, it is generally inappropriate for the court to embark upon seeking expert psychological evidence to support a case advanced against a summary return on applications under the Convention. I enquired whether the

mother had any history of medical treatment in respect of the father's alleged behaviour. I was told that she has had some counselling but there is no medical history of treatment for depression, anxiety or any other medical condition as a result of the father's alleged misconduct. Where there to be such evidence it would, of course, be a matter which I would expect to be adduced in these proceedings, but I do not think it appropriate in all the circumstances to approve the instruction of a psychologist to assess the mother as pleaded for by Miss Miller on her behalf, let alone to direct that such report should be paid for by the father which was Miss Miller's supplementary application.

22. Accordingly, on those two points I am against Miss Miller and her applications are refused.