[2019] EWHC 3939 (Fam)

Case No: FD18P00839

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

BEFORE:

HIS HONOUR JUDGE MARK ROGERS

(sitting as a Judge of the High Court)

BETWEEN:

E	**APPLICANT**
- and -	
Q	**RESPONDENT**

Legal Representation

Mr Michael Hosford-Tanner (Counsel) on behalf of the Applicant
Miss Jennifer Perrins (Counsel) on behalf of the Respondent

Judgment

(Approved)

19 March 2019

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His Honour Judge Mark Rogers:

1. The applications in this case relate to two young children, T, who is nearly eight, and B who is nearly four. They have as their heritage a mixed Polish and Russian family. The father, Mr E, is Russian, of Chechnyan background, but has now Polish residence. The mother, reverting to her name, Miss Q, is Polish. They were, as a couple, married in Poland and that was their main base.

2. The father, who is a professional sportsman, has from time to time moved about geographically in relation to his work. The family has, therefore, spent time over the years both in France and Chechnya as well as in Poland itself. Lately, he has been living in C country.

3. Since August of 2018, the mother and the children have been based in East London. The mother has remarried and is pregnant with the child of the new marriage. She met, or perhaps more properly was introduced to, her husband some time early in 2017. The parents are Muslims.

4. There is some confusion between them as to the exact circumstances and timing of their separation and divorce, the latter whether characterised as a civil process or a religious process. The mother says that the marriage was effectively over in 2015, whereas the father says it was 2017.

5. Normally, such a dispute, although quite stark in its terms, would not be of central importance and would not require the Court in this jurisdiction to analyse it factually in detail. But it has relevance, says Mother, because it demonstrates that the family was for a longer period than the father accepts in a phase of post separation adjustment which is measured in years not months. And, it is submitted on her behalf, the father therefore has been shown to be content to live apart from her and, more importantly, the children and simultaneously had made it clear that the mother could make her own way.

6. Miss Perrins says it is an important matter of background which goes to the credibility of the witnesses when it comes to the resolution of factual disputes and, more generally, supports her client's case overall. In fact, the definitive position in terms of the divorce can be seen from F3. It is a certified translation of an official Polish judgment which follows what is described as a session, presumably a hearing, on 27 June 2017.

7. Under the subheading, divorce, it dissolves the marriage contracted between the parties and then, secondly, awards the petitioner with parental authority over the minor children, who are named with dates of birth, and limits parental authority for the respondent, that is the father, to the right for common decisions concerning essential life matters of the child, specifically concerning choice of school, profession and method of medical treatment.

8. That paragraph 2, which I have just read, is important. The mother, at an earlier time in these proceedings, either misunderstood or ignored that second important paragraph and did not read into it the subtleties which are obviously there. She was satisfied in her own mind that she could act, so far as the children are concerned, without consultation or consent from the father.

9. Her witness statement, which is a very recent document and was added to the bundle shortly before the hearing, which begins at page C55, paints a picture of a very unhappy marriage. From C56 onwards, under the subheading, chronology, she sets out not only the key dates and neutral facts but sets out her case on domestic violence, on periods of separation and on a lack of commitment to the marriage and to contact by the father. Those are matters that he does not accept.

10. In this summary jurisdiction, it is impossible for me to resolve such areas of dispute conveniently. I am not able to resolve specific individual factual matters of that sort but, of course, in the nature of the case, particularly with the defences raised, I do have to have regard to them and, quite properly as I have been reminded, it is necessary to take the disputed allegations at their highest in terms of my approach to the overall questions that I have to resolve.

11. It seems clear from that chronology and the other evidence that the watershed for the mother came in the spring of 2017, in the chronology after the entry for 25 March which deals with a contact visit, upon the conclusion of which T's behaviour, in her view, changed significantly. She then visited London in May to stay with a friend. She says:

> **"Whilst in London, I found employment and met my current husband."**

12. In her original statement provided at the much earlier point in these proceedings at C5, dated 11 January 2019, when she was still acting as a litigant-in-person, her position was slightly different. I make allowance for the fact that the statement was not prepared or moderated by a lawyer but its internal contents are striking.

13. At C6, at paragraphs 6 and 7, she says this:

> **"I travelled to England to visit a friend in May 2017 and she introduced me to a friend of hers that was after interested in marrying me, and she also found me a job. I had been unable to find any work in Poland and was struggling financially."**

It seems that the arrangement to meet, with the ultimate goal possibly of marriage, was at a very early stage in these proceedings, or in this chronology.

14. Paragraph 7 continues:

> **"I returned to Poland and spoke to E about money, he was not paying me child maintenance he'd been ordered to pay and I explained I was struggling financially. He told me he was not interested in my problems. I explained that I'd been offered a job in England, that I would like to move there. He said that I could move where I liked and he was not interested. I said that, if he**

was not interested, I would move to England in August 2018. He said that I should do what I liked and that he didn't care."

15. That reference to 2018, although not explored in the oral testimony, seems to me of some significance given that that was the mother's stated case on paper. Whereas, in her oral evidence, it appears to have been a very much more fluid and, to some extent, last minute plan. But, if that is right, from about the mid-2017, she already had a fixed plan to relocate the following summer.

16. It is also clear from her first statement, at C8 in paragraph 13, that, under her understanding at the time, she says:

> **"I confirm that E did not have any custody rights over the children. The Polish order specifically does not provide for him to have any contact with the children. Usually the right would be included in the Polish order and it is not. The agreement made for E to see the children was a personal agreement and not a court order and, therefore, he had no rights of custody and was not exercising any custody rights."**

Then 14:

> **"Under Article 5, I confirm that E did not have any right to determine where the children should live. Those rights were purposefully excluded from the Polish order attached."**

17. Now, I am perfectly prepared to accept that those paragraphs have been given with a certain amount of assistance as to the legal technicality, but there can be no doubt that that was her approach, that effectively she was entitled to act unilaterally.

18. In the chronology back at page 58, she confirms some other key dates. In December 2017, she sets out that she had her first discussion with E about potentially *relocating* (my emphasis, then the word,) "abroad", with the children. That seems to me in clear contradiction from what she had said in her earlier statement.

19. She then relates the events of early 2018 and then, under the item, January/February 2018, she said:

> **"I had my first discussion about relocating to England with E. He was dismissive in this conversation. By then he had settled into his new life in C."**

20. The next key date on the chronology that she sets out is 27 June 2018. She says that:

> **"We agreed a contact agreement through lawyers which provided for E to have supervised contact with the children every second Saturday and Sunday from 7 July 2018 until 31 August 2018. It was agreed that I would supervise E's contact."**

21. Then, in relation to the entry of 12 August, a contact visit, she says:

> **"I had my second discussion about relocating to England with E. He was dismissive in this conversation and again told me that I could do whatever I wanted to do."**

22. There is some dispute as to the exact dates and the exact circumstances but they do not matter. The mother's clear case is that she was, in the immediate preparation for her departure, having specific discussions.

23. The mother's case is, therefore, that this was not in any sense an abduction. She says she left with the father's explicit, or as she puts it at C7, implied permission. She says he is a man who does not care for the children, is not bothered with their welfare. His default position, she says, is that he simply articulates, "you can do what you like".

24. This is, in my judgment, to be contrasted with the passage to which I referred during counsel's argument. At paragraph 71, at the conclusion of her witness statement, she says:

> **"Whilst our relationship did not work out, I know that E can be a great father to our children. I hope that through these proceedings we can work on the issues in our relationship as we need to work together as parents to our children as I know both of us only want what is best for them. I am willing to engage in therapeutic work to improve our relationship."**

I hope that I am not cynical but that has somewhat of the sound of a synthetic piece of window dressing when compared to the totality of the evidence given both on paper and orally.

25. On the other hand, the father's case is that he has been, or is being, marginalised. Although there have been, as he accepts, movements geographically during the time of the marriage, he says that he has always shown commitment. He points to the contact which has occurred. He points to the fact that he has engaged with lawyers and in discussion to build contact arrangements. He denies any domestic violence or financial dispute.

26. Reverting to the chronology, on 14 August, just two days after what the mother says was a key discussion, she and the children left Poland to come to the United Kingdom. She accepts that he did not know of her new situation or of her travel plans.

27. At C13 in the father's witness statement, he sets out the position in this way:

> **"After the agreement"**

That is the June agreement:

> **"had been made, I saw the children on a few occasions. We were able to arrange some additional time as well and the last time I saw the children was on Friday 3 August. The Respondent said that I could not see them on Saturday or Sunday but said I could come to see them on Monday 6 August."**

He accepts that there may be a mistake over the precise date but it is clearly in the key run up period.

28. He continues:

> **"I stayed in the town over that weekend. Thereafter, I was unable to make any contact with the children or the Respondent. They were not at the property when I attended to see them. I can only assume that they left that weekend. The Respondent has not actually said when she left. For the avoidance of any doubt, I confirm that at no stage did the Respondent say to me that she was moving to England with the children, either during the contact sessions or at any other time previously."**

29. 13:

> **"I was ultimately able to confirm with the children's school that they had been taken out of school and they believed they were going to England. The Respondent had not shown me the courtesy of even contacting me to let me know either before or immediately after they had travelled. The Respondent was blocking all my means of communication with her or the children. I went to the police to make a report about the children being taken but they said it was not a police matter and I needed to see a lawyer. Out of the blue, about three weeks after I had last seen the children, I received a message telling me that she was at (address). I then tried to contact the Respondent but again she blocked me."**

30. He then goes on to exhibit at SD3 and later SD4 a series of texts or WhatsApp communications during the following period, the principal contact being between the father in this case and the mother's new husband. I need not read them into this judgment in detail but those messages are there to be seen. The provision of the address is at C28, the address in East London. That message is not, unfortunately, dated.

31. However, in the subsequent exhibit, from C30 onwards, in what are dated November exchanges, there is very much more that can be read. As I say, I do not propose to put them verbatim into this judgment but there is a certain amount of toing and froing, if I can use that phrase, and, in due course, a further address arose, that of (second address). The father says he was, therefore, being drip fed, my word, not his, information in that way.

32. The reality, however, and as far as I understand it the mother accepts this as factually correct, is that for the next three months after relocation, if that is the correct word, there was no contact of any meaningful sort. At C13, the father describes, in paragraph 15, that, on 22 November, he was able to speak to the children by way of a video call but it was not until December, and then essentially as a result of chance, that he was able to re-establish face to face contact.

33. This application, in part B of the bundle and following, was made on 19 December of last year. Interestingly, and fairly contemporaneously, was the application made by the mother in Poland which is to be found in translation at F7. It is an application for a motion, in our terms, an application, for permission to remove the children from the jurisdiction.

34. At F8, in the substance of the application, it reads as follows:

> **"The applicant intends to permanently move with her children abroad. She met a man with whom she wants to cohabit and to reside permanently in Great Britain. She informed the father of the children about it, however, the respondent, probably to annoy the applicant and out of spite, informed the police in the United Kingdom, where the applicant was temporarily staying, that she abducted the children. The respondent thus exposed his own children to stress and anxiety."**

35. In closing submissions, Mr Hosford-Tanner, in my judgment with force, draws attention to the somewhat odd, some may say equivocal, language in there which did not accurately represent her position.

36. In terms of this litigation, the procedural steps took a fairly familiar course. Unfortunately, although not perhaps surprisingly, there were delays in obtaining legal aid for the mother and so this application has taken rather longer than it should.

37. Her answer, or defence, to the claim, which has been added to the bundle lately at C71, sets out that she intends to defend the application for a return on three bases under Article 13(a), consent, under 13(b), grave risk of physical or psychological harm or placing in an intolerable situation, and under Article 13, objection of the child. They are all using summary language but we all know to what they refer.

38. Curiously, and I hope I do not place undue emphasis on this, the mother, in her statement, perhaps by way of a slip, says that one of her defences is that there would be a grave risk of harm to me if I were to return because of the domestic violence suffered at the hands of the father. Of course, that is to misstate the focus of Article 13(b) which is the child or children.

39. As has rightly been pointed out and is very familiar in this situation, this is a European case so the additional factors under Brussels II Revised come into play. I hope I need not set them out in detail. Although the policy of the Convention is to adjudicate summarily and swiftly, there has been the unfortunate delay in the provision of legal aid. Also, this fixture of one and a half days was arranged probably in the knowledge that there was a significant factual dispute on the matter of consent and so, at the invitation of both parties and having some reservations but seeing the force of what was being submitted, I agreed to accept a certain amount of live oral evidence on that point.

40. The evidence was given with some difficulty. We had the dual hurdles of a video link to facilitate the father's participation and each party having his or her interpreter. In the end, it was possible, albeit it with some delays and interruptions, to make good progress. At times, the father did not focus on the specific questions and that meant interruptions in his evidence and speaking over as interpretation was given, which

always is some impediment to full comprehension. But I am quite satisfied, with the expert assistance, if I may say so, of his interpreter, that we have an entirely clear picture. It is important, therefore, for me to give briefly my impressions of the witnesses since they did give oral evidence.

41. The mother started confidently in English with her interpreter on hand simply to provide support with the odd word or phrase and, at first, she gave what on any view must be regarded as a clear enough account. However, I was struck by the fact that, as the cross-examination became for her rather more testing, she preferred to revert to Polish. Whether that was a defensive, strategic or simply precautionary matter it is difficult to say but, in the end, her evidence was a mixture of direct English with some Polish translation.

42. Notwithstanding that hybrid position, the thrust of her case was very clear indeed. She said in stark terms that she did not think the father really cared about the children and, therefore, it was no surprise to her that he simply gave a blanket consent in general and open ended terms, again and again repeating his phrase, do what you like. On detail, she was, in my judgment, less impressive. She was unable to explain the anomalies and at times contradictions, both internally and in the evidence when compared with such extraneous material as there was.

43. She also appeared to introduce significant new material into the mix in her evidence. Perhaps the most striking, but not the only example, was when she asserted that there was, in effect, a second agreement reached in the June meeting over and above that which we have in written form. Although the lawyers were present, she said that second agreement was not reduced into writing. That second agreement was, if she is right, absolutely key because it placed a direct link between the provision of child maintenance with the availability of contact. Leaving aside for a moment the rightness or wrongness of that, were that the agreed position, it seems to me extraordinary that that was not set down.

44. Furthermore, perhaps less striking but still important, were her explanations about the provision of addresses for service of certain documentation to the father and on the issue of communication after leaving Poland. She was at best vague and at worst unconvincing about those and other matters. As I have already said, she made a strong link in her own mind which she was not afraid to articulate between the issues of money and contact and that, in my judgment, was important. That situation, of course, is not unusual in the real world of the litigants whatever the lawyers may say or advise but, in this case, it seems to me important.

45. Her vitriolic criticisms of the father were, as I have already said, in surprising contrast to her softer and more generous words in her statements. In the end, however, she was not able to my satisfaction to explain why, if this father was so uninterested as she says and so readily prepared to give a blanket consent, that she acted as she did because, even on her own case, she kept back key details.

46. In my judgment, she gave the clear impression that she was worried about his reaction had she given the full picture. That is, in my judgment, plainly a contraindication of someone who is prepared to give a completely open ended consent whatever the circumstances. Unfortunately, therefore, but with no doubt in my mind, I found her an unconvincing witness and with whose evidence I have to tread cautiously.

47. The father affirmed the correctness of what he was going to say. He was challenged on this by counsel as he had said in the preamble with the interpreter that he recognised the importance of the religious oath on the Qur'an. But, as it turned out, he was in a solicitor's office and there was no Qur'an there. Miss Perrins submitted respectfully that it went simply beyond that practical point and that there must be some kind of strategic decision taken by him to give his evidence by affirmation rather than oath so that he would, in all good conscience, be able to lie or to give a less than complete account.

48. I did not allow Miss Perrins to develop that argument very far. It seemed to me that there were difficult issues of religious dogma. For example, the father began to explain how different considerations arise in relation to the gravity of the material being spoken of, he giving the example of a murder investigation as opposed to something else. There was simply no expert evidence or definitive account of the effect in the mind of a conscientious Muslim as to that and it seemed to me an area into which we could not with confidence delve. I was quite content, not only for the practical reason but because an affirmation is always regarded as equivalent to an oath, to proceed.

49. The father gave longish, rather unfocused answers on occasion. When asked for detail, he was more convincing. He denied the domestic violence and financial dispute. The mother says, well, he would do because he was bound to. He points out that there was no objective evidence put forward and the only evidence is the mother's own assertion, so it is hardly a criticism of him that he is giving an account similarly untested.

50. He was clear about contact and the arrangements which did occur. I completely accept without hesitation that he was not given a picture of the mother's pre-planning. I am also satisfied that he was not given even an outline, let alone the absolute detail. I am also satisfied, and the mother does not contradict this, that the plans, which must have been fairly well advanced in her mind, were not even mentioned during the June meeting. Indeed, the evidence was that they were focusing upon the contact which would take place on the premise that they were in Poland. Overall, the father's evidence was more persuasive and convincing.

51. In coming to my factual conclusions on the issue of consent specifically, I remind myself that the mother bears the burden of proof to show what she asserts on the simple balance of probabilities. The factors that lead me to my conclusions are as follows.

52. I will consider first of all, the assessment as between the two witnesses that I have just given and then looking at wider, and to some extent more objective considerations, the following.

53. The mother's position then was that she had the right to act unilaterally. It is a matter of logical consequence that she would not have needed to discuss the matter in depth with the father or seek his consent.

54. Next, the chronology on her own case, particularly if one goes back to the early parts of 2017, is very different indeed from that which is later asserted, and there would

have been ample opportunity, not simply to give a general expression of intent, but a much more concrete plan.

55. Next, that the meeting in June was an opportunity to regularise and discuss matters which would obviously change if there was a relocation. But there was not even the mention of a possibility of a relocation. Even those matters that she says were not covered by the written agreement she does not suggest involved that as a factor. Indeed, the contact which was agreed was completely inconsistent with what in the event happened in the middle of August. And yet it seems that she already had a plan to leave Poland and indeed to marry. In my judgment, there is no doubt that she was being secretive.

56. Next, the contact in August, whatever the precise date, was a further opportunity for a clear discussion. By then, the plans were crystal clear, I am satisfied that the travel tickets had been obtained, and yet she did not bring any of that to his attention. It is clear from the chronology that the marriage indeed was only days away and so that was a factor. And I accept the submission that, although, of course, personal relationships between adults are private and need not be broadcast across other third parties, when they, as here, have a plain implication for the children's welfare, it is not possible, in my judgment, properly to compartmentalise them as the mother says she felt she should do.

57. Next, the delay after relocation is indicative of an abduction, not a consensual move.

58. Next, as I have said and I accept Mr Hosford-Tanner's submission, that her application to the Polish court is in its vocabulary self-justificational in its tone.

59. Next, her conduct after relocation, which I accept, blocking of social media, moving house without giving details and limiting contact is indicative of trying to exclude rather than include the father whom she says she would be keen to bring back on board.

60. In all of those circumstances, as a matter of fact, taking that into account, I am quite satisfied that the mother has not proved consent. Indeed, I find, to the contrary, that there was no consent. In other words, this decision is not simply an application of the burden of proof. I do accept that Father was at times dismissive and I am prepared to accept that he may have used phrases like, "do what you like". They are likely, in my judgment and I find, to have been said in the context of divorce or their own personal adult relationships. But I am not satisfied that they amount to a direct comment on the mother's relocation plans.

61. Even if they were said in that context contrary to my view, given the secrecy and the other facts that I have found in this area, it is not possible, in my judgment in any sensible way, to characterise that as meeting the, 'clear and unequivocal' principle in this area enunciated in, for example, *Re P-J* [2009] 2 FLR 1051 and applied conscientiously daily in this Court. Therefore, I am not satisfied that there was consent.

62. I turn next, out of order, to the issue of objection. The mother says that T, and at his age he is the one, of course, with whom we are concerned in this area, is strongly opposed to a return. Miss Perrins says that that should be the start and the finish of it

and says that the intervention of the evidence from Cafcass has done nothing to clarify, indeed, has muddied the waters somewhat in this regard.

63. But, as a result of the direction of My Lord earlier in these proceedings, Miss Demery was invited, on behalf of Cafcass, to interview T in order to assist the Court. Her report, which is very recent indeed, starts at D1 in the bundle. Her terms of reference are set at paragraph 9, that she was required to report on the child's views, wishes and feelings in respect of returning to Poland, his maturity and questions of procedure to do with separate representation or meeting the judge. Her focus, of course, has been on the first two.

64. She consulted with the school, at paragraph 13, and sets out her enquiries. At paragraph 15, she established, in looking into T's intellectual functioning and maturity, what the position was and she was impressed with him. Then, in the key passages, at paragraph 18, she says this:

> **"T told me that he prefers school in London to school in Poland as, from what I understand, he was due to change schools and he wanted to be in a school where they learn English."**

65. At paragraph 23, she asked him about his father and he said he misses him, he lives in C country. He said his father is good at his sport. And then goes on to give some specific examples of time spent with Father and he also refers to paternal relatives. Paragraph 24, she asks about the arrival in London:

> **"T knew they were coming to London to live. He was pleased because he has lived all his life in Poland, he wanted to be in another country. He was unsure whether his father knew they were coming to England and he was quite guarded when he responded to this question."**

Understandably, that paragraph has been the subject of close scrutiny.

66. Paragraph 15:

> **"T said he would prefer to stay in the United Kingdom. He wants to finish his school year in London, he wants to have holidays in Poland and he will be seeing his father again in April. He was looking forward to going back to Poland as he would have another birthday celebration there."**

And then 26:

> **"T chose a sticker showing an uncertain face to express how he would feel if the Court ordered his return to Poland."**

67. In her professional judgment, at paragraph 29, she says:

> **"T is a delightful young boy with an impressive command of languages. It is easy to see why he has so many friends. Although he has indicated a wish to remain in the UK, he has much to say that was positive about aspects of his life in Poland. Whilst**

recognising it is for the Judge to evaluate whether T's expressed wish to remain in the UK amounts to an objection to a return to Poland, it is my view that it does not."

68. Then in paragraph 32, she comments on the relatively unusual feature of this case where there has, notwithstanding the removal, been face to face contact with the mother, she says surprisingly, supervising that time given her allegations of domestic abuse.

69. In her closing submissions, I had quite a debate with Miss Perrins about the approach to this. In her skeleton argument at paragraph 40 and in her oral submissions, she says that, to establish an Article 13 exception to return, the Court must be satisfied, first of all, of the gateway stage, i.e. that the child objects to a return and that the child is of an age and maturity where it is appropriate to take account of their views. Provided these two aspects of the gateway stage are met, the Court then has a discretion whether or not to order a return and this discretion is at large, meaning the Court may take into account all the circumstances relevant to the particular case.

70. Then she cites with a good deal of precision, the judgment of the Court of Appeal in *Re M & Others (Children) (Abduction: Child's Objections)* [2015] EWCA Civ 26 and refers to the familiar words of Black LJ, as she then was, of avoiding an overcomplicated approach to this question. Miss Perrins reminds me of Black LJ's words at paragraph 69 of that judgment:

> "that the gateway stage is confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in 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 his or her views."

71. Then later, Black LJ says:

> "I reiterate that an over-prescriptive or over-intellectualised approach is to be discouraged and that a straightforward and robust process is required. The Judge was asking herself, simply does the child object to being returned to his or her country of habitual residence?"

In other words, says Miss Perrins, this is very straightforward in terms of the test to be applied and the Court should avoid an over-sophisticated or intellectualised approach. And she says that, whether the evidence at its highest or taken with the nuances of the Cafcass report, it all clearly points to T having a valid objection.

72. In my judgment, with respect to her, that is to take the matter too simply. A preference for one thing over another does not amount, in my judgment, to the establishment of an objection to the other. And I am satisfied that that is not to fall into Black LJ's trap. I, of course, bear in mind T's age and maturity and the impressive nature in which he dealt with the Cafcass reporter.

73. Taking all of what I have heard and read into account and applying, I hope, a straightforward but fair approach to this test, I have no doubt at all in being entirely satisfied that he has not objected. His preference is something quite different and the

positives that he has set out in relation to Poland, even if that is not his top preference, clearly demonstrates that he is not as such objecting.

74. Even if I had been persuaded and adopted Miss Perrins' rather, as I characterise it, restrictive approach, I would nevertheless have had no hesitation in finding that any such objection on that test was simply expressing an alternative preference. And, in those circumstances, I would have had no hesitation in exercising my discretion, which as she rightly points out is at large, to order a return.

75. I turn, thirdly, to the Article 13(b) defence. Again, helpfully, she has dealt with it fully in her skeleton argument and reminds me of its exact terms, that the defence to the return is established if 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. She, of course, does not fall into the trap which the mother appears to have done of focusing only on her own situation.

76. She reminds me, as is often the case, of the hugely important Supreme Court decision in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27 and the wise words of Baroness Hale at paragraph 36 setting out the three stage approach, which she reproduces in full and I do not propose to deal with verbatim in this judgment.

77. Miss Perrins applies all of these underlying principles to the case in paragraph 38 and, in subparagraphs (a) to (e), identifies five reasons why this is made out. (c) is the fact that Sulim objects to a return, that I have dealt with and must be regarded as disposed of, but she says that in any event the other four remain in play. Again, I do not propose to recite them but they relate to various factors which are explored in some depth in the submissions.

78. In closing, she added to the list of factors, particularly reliant upon the mother's current circumstances, her relatively advanced pregnancy, the fact that her new husband is in the United Kingdom, that the proposal of return, or the application for return, would be disruptive of their family life and may in the end lead to the separation of siblings after the child is eventually born. She also points to the potential for disrupting schooling.

79. In her evidence, the mother, at C65, had dealt in the alternative with the situation where, contrary to her primary case, a return was under consideration. And, at paragraph 52 in items (a) to (m), she asks the Court to consider, she says by way of the following assurances, in other words, protective measures, the items which would give some protection in terms of the forensic processes going on, dealing with the issues of violence and intimidation, dealing with separation between the parties in terms of communication and, finally, with finances. They can be read in full for their exact terms.

80. Again, beyond what was in the evidence, Miss Perrins submits that there are other relevant factors to be considered by way of protective measures. She says that, notwithstanding those items, including mechanisms to prevent violence, intimidation and harassment and denigration, that there is little or nothing by way of protection from domestic violence. It seems to me that is a difficult proposition to make good against the exact facts of this case.

81. In what was an unhappy relationship latterly, it became clear that, at Mother's insistence, contact had to be supervised. It was, but happily it occurred, and I am satisfied without difficulty. Had there been I am sure I would have heard of it. The parents were required, therefore, to meet from time to time. Whilst I do not suppose their personal relationship was anything but difficult, there appears to have been no further problem.

82. Miss Perrins also submits that there is the unusual feature of the father's precise location and she says that that is something to be borne in mind in this context. I will return to that in terms of the last limb of this application. But, in terms of the factual position, it is true he is not in Poland, he is across the border, but the information I have been given, made good by a provision of a Google map, shows that he is very close. He is a motor vehicle drive away and is much closer than had, for example, he been in a remote part of Poland. It is to compare the difference between someone within the jurisdiction with an enormously long journey as against someone across a border with a short journey and, of course, the Court does not ignore the precise geographical boundaries and borders but must also take account of the mileage and strict physical location.

83. Further, the mother is, on her own account, regularly going back and forth between Poland and the United Kingdom. That characterised her position in the two years preceding this, and the evidence shows that she intends to return shortly, no doubt before it becomes impossible or inconvenient because of the unborn child. She is pregnant and, of course, that is a factor, but she will receive, I am quite satisfied, practical and emotional support from her new husband in relation to that.

84. This defence requires evidence to meet the test determined by the normal meaning of the words in the treaty. They are "grave" and "intolerable". Situations such as these almost always involve inconvenience, discomfiture and some disruption but it has to be recalled that what is being sought is the quick reversal of an unlawful step having been taken. The grave risk of harm or intolerability of a situation is that of the child, not the mother but I accept that often the two in practical terms are linked. Looking at the mother's particular situation in this case and as the case is presented, they are at least overlapping and Miss Perrins would say indistinguishable.

85. All that having been said and without resorting to an item by item analysis, it seems to me that this case falls far short of establishing that there is such a grave risk of harm, whether physical or emotional or that the position would simply be intolerable. It will not be easy, it will not be comfortable, but history shows that there have been resourceful decisions taken within this family and often remote relationships have had to have been preserved.

86. The return, in a case of this sort, it has to be remembered, is simply to restore the children to the place of habitual residence so that the local court can make relevant, welfare-based decisions. The mother has already invoked the jurisdiction of the Polish court. I am quite satisfied that this defence does not arise and, in any event, the protective measures are broadly agreed by the father.

87. So far as it is relevant, it seems to me that, whilst he may offer a particular amount of financial support, until otherwise varied by the Polish court, his responsibility is as defined by that order and that, in my judgment, is what he should pay. Given what has been said about the mother's situation and her intentions of travel, I agree with

the submission made that there is no obvious need for him to pay her air fare but the payment for the children is agreed in any event.

88. As to the restriction of movement in terms of his visiting a local facility, that should not be an impediment, it is a very short term matter in any event and I am not, unless specifically required to do so, going to make any stipulation one way or another. In other words, the principal position is that this does not arise. Even if it does, I am quite satisfied that any difficulties are ameliorated by the protective measures to which I have referred.

89. I turn finally to the unusual position of the question of suspending or postponing or delaying, however it is characterised, the implementation of the Return Order that I am quite satisfied should happen. Miss Perrins' final submission is that, if I have found as I have, I should nevertheless wait until the Polish court has finished its determination upon the application for relocation.

90. Perhaps not surprisingly, I asked at an early stage in these proceedings for a timescale in relation to those proceedings. She was not able to give me one. I am sure that enquiries had already been made and she promised to do her best to give me one today. Even now, it is not possible, on her instructions, to say when these proceedings would be completed. As I understand them, at the moment, they have simply been issued and no further steps have been taken.

91. She is driven, and I understand the inconvenience of this position, but she has little choice, to say arbitrarily that she would invite the Court to postpone the order for some 10 weeks with the opportunity of further argument for an extension beyond that. The basis upon which she puts her case is really a repeat of the Article 13(b) points and/or on the discretion. She says there are, however, important additional factors that make this an unusual, she would say exceptional, case, namely, that there are already in place the Polish proceedings and, secondly, that the father is not in fact in Poland at all but in C country.

92. As I have said, the Polish proceedings have been launched but, as far as I know, are not yet being progressed because of the decision taken. How long it will take to resolve, even if the matter is a relatively narrow dispute, I simply do not know. I could translate timescales from this court into Polish but that would be entirely arbitrary, but the Court is bound to reflect that any detailed welfare investigation will take some time.

93. The father, it is true, is in C country. I have already dealt with the practical logistics and geography of it. Does the fact that he is not in Poland and yet Poland is the place to which the children are to be returned, make a material difference? In purely practical terms, I am quite satisfied that there is very little, if any, difference. C country is next to Poland, the same geographical divide could be within Poland and the factors are identical. Does it, therefore, become a matter of principle or authority?

94. In that respect, I have been referred to three specific decisions, all at first instance but all of authority from distinguished Judges of the Division including a former President. I need not deal with them extensively but, since they have been the subject of argument, it is worth reciting that, in the decision *JPC v SLW and SMW (Abduction)* [2007] EWHC 1349 (Fam), the then President, Sir Mark Potter, was

persuaded to make a short term, as he put it, stay upon enforcement in a particularly unusual set of circumstances.

95. I need not go into the background facts but the third holding in the headnote says this:

> "However, if an order to return were to be put into immediate effect, the court was not satisfied in the light of the welfare concerns that the child's welfare could be properly protected in the short period prior to a hearing before the Irish Court. A stay would be imposed prior to the first Directions Hearing in Ireland, at which stage the Irish Court would consider the appropriateness of any further postponement of the child's return."

Therefore, the learned President identified that he had that power and, indeed, exercised it, but did so on a very short term welfare basis in the sure knowledge that there would be an early appointment in the local court.

96. In the next in time, *R v K (Abduction: Return Order)* [2009] EWHC 132, a decision of Ryder J, as he then was, he also was prepared to exercise a short term stay or suspension. And, again, the facts need not be dwelt upon but the second holding encapsulates his approach:

> "The circumstances of the present case made it appropriate for a limited amount of time to be permitted to the mother to settle her affairs in this jurisdiction before returning to Poland in time to participate in the first hearing before the Polish court. The circumstances did not make it appropriate for the court to consider an exceptional course of delaying the execution of its order to await the decision of the Polish court."

97. In the substance of his judgment, the learned Judge was also concerned about what he regarded as a potential floodgates argument in cases of this sort. It is not necessary, it seems to me, for me to investigate that. His, again, was a fact specific, focused delay, as he put it, to settle the mother's affairs but on the clear premise that she was leaving and would be in time for the first hearing in the Polish court. Again, short term and purposeful.

98. The most recent decision is that of My Lord, MacDonald J, *BK v NK* [2016] EWHC 2496 (Fam). It is by definition, therefore, a decision of first instance, albeit by a full judge of the Division, but it is by far the most detailed analysis of this area. As it happens, he also was dealing with an Article 13(b) defence in that particular case and had to grapple, as it happens again coincidentally, with a not dissimilar point.

99. He says at paragraph 49 of his judgment, citing an earlier decision of Macur J, as she then was, in 2009 that:

> There are no authorities on the question of whether returning a child to the country of his or her habitual residence at the request of a parent who is no longer in that country is capable of satisfying the requirements of Article 13(b). As with all cases in which Article 13(b) is invoked, the answer will depend on the facts of the case and

> the extent to which it can be said that to return the child in these circumstances would expose the child to an intolerable situation in the sense of placing the child in 'a situation which this particular child in these particular circumstances should not be expected to tolerate'."

100. On the facts of that case, he was unsatisfied that Article 13(b) was made out but he carried over that particular point into his next decision. At paragraphs 52 onwards, he sets out, with citation from all the relevant cases including the two to which I myself have just referred, the availability of the power of postponement. He does so, setting out that it is a relatively rare power.

101. He says at paragraph 53:

> "It would appear that the court, having determined to make an order for summary return in circumstances where none of the defences to the same are made out, has the power to stay or suspend the operation of that order pending steps being taken in the court of the child's habitual residence, which steps may result in the child not returning to the jurisdiction of habitual residence. It would also appear that this power is one to be exercised only in exceptional circumstances."

102. At paragraph 59, he reminds himself, relying upon the observations of Mostyn J in *B v B* [2014] EWHC1804, that even this power has to be exercised in the context of the overriding policy considerations of the Convention. As it happens, he too was hamstrung by the lack of detailed timescales in terms of the Return Order and was faced with the same difficulty, as he articulates in paragraphs 70 to 72.

103. Having then disposed of the various asserted defences, he came finally to the issue of a postponement and he sets out the factors. The precise factual situation for that father was in complete contradistinction to that in this case because the father had been deported and was not in a position to exercise meaningful contact with his child.

104. So, in that case, from paragraph 88, MacDonald J said:

> "I am satisfied on the evidence available to me that the 14-month period during which RK has been in this jurisdiction has been anything other than stable, secure and settled for him. Within this context, in circumstances where he would not be being removed from a well settled and stable life in this jurisdiction, I am not satisfied that it can be said that making a Return Order after a period of 14 months would risk for RK substantial intolerability of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence."

He is, therefore, plainly dealing with Article 13(b).

105. Then he continues at 89:

> "Is this conclusion altered by the fact that a Return Order will result in RK returning to the jurisdiction of his habitual residence in

> circumstances where the parent seeking his return is no longer in that jurisdiction? In my judgment, it is not. Whilst that situation may cause the court to question whether there is any point in exposing RK to the inevitable disruption, uncertainty and anxiety which follows a return to the jurisdiction of the court of habitual residence, the absence of the father from that jurisdiction does not in my judgment act to elevate that disruption, uncertainty and anxiety to a level capable of satisfying Article 13(b)."

106. He then goes on when considering the Return Order to say this:

> "94. I am satisfied that an exceptional circumstance exists in this case. Namely, that the parent seeking the return of the child to the jurisdiction of his habitual residence has been deported from that country with no clear indication as to whether he will be able to return.
>
> 95. In these circumstances, I am satisfied that, whilst the situation that pertains in respect of the father does not satisfy the requirements of Article 13(b) for the reasons I have already set out, the Return Order that must be made will nonetheless operate to return the child to a country where the applicant parent no longer is, and may never be."

107. In other words, as we are always reminded, decisions, even reported decisions at first instance, turn upon their own facts, but it is abundantly clear that the matter exercising the mind of My Lord, MacDonald J and which persuaded him to take what he calls an exceptional course is that the parent is not simply outside of the relevant jurisdiction but was deported with no clear indication as to whether he would be able to return. In other words, whilst this power plainly exists, I get no guidance, or indeed even assistance, from those decisions as to whether this case falls within the narrow band of cases where that power should be exercised.

108. In my judgment, therefore, the approach I take is to remind myself that the jurisdiction to postpone or suspend is plainly there but needs to be exercised in terms of the overriding policy of the Convention and where the particular factual circumstances demand. Normally, it will be to allow time to settle an individual's affairs not, in my judgment, as here, to defer indefinitely the return pending the outcome of foreign proceedings. If that were so, I am satisfied here it would in effect be a negation of all of the other findings which I have made.

109. I appreciate that Miss Perrins is hampered in her submissions by lack of a concrete timescale but there is nothing to suggest that 10 weeks is anything but arbitrary. The fact that was adopted by My Lord in *BK* does not assist me. It would inevitably, in my judgment, lead to the liberty to apply provision being invoked and to extension applications being made. It could lead, unfortunately, to a certain amount of tactical manoeuvring either to speed up or delay proceedings in Poland. It would have none of the obvious advantages which were identified in *BK* where, in that case, the father was a marginal figure, already having been deported.

110. In my judgment, this father, albeit in C country, is effectively on hand and should not be prejudiced simply by the chance of his geographical difference. In other words, I find there is no basis for a suspension in this case. As we approach Easter, the exact

moment for return must be identified to take account of practical considerations and schooling but it certainly must not be beyond the four weeks or so until the Easter break.

111. To summarise, in short, the mother's objections in fact, or as a matter of discretion or judgment, fail and the father's application for summary return is granted. He has agreed in large part to the protective measures, and I have indicated the small modifications which I would require, that will ensure that there is a vehicle for a safe and smooth transition.

112. I end this judgment, as is often the case, by saying that nothing I have said in this judgment, which is in a limited and narrow jurisdiction, should be taken in any way to influence or predict the outcome of the Polish proceedings. This mother appears to be a good mother and she is entitled to pursue her applications in Poland and it may be that custody, as the phrase is used, in the long term is not an issue in those proceedings at all. It may even, once the dust settles from these proceedings, be the subject of consensual resolution between these parties. It obviously should be. But, in order for that to happen, they must begin to cooperate and they must reopen communications.
