

Neutral Citation Number: [2023] EWHC 2129 (Fam)

IN THE HIGH COURT OF JUSTICE  
FAMILY DIVISION

Case No: FD23P00109

IN THE MATTER OF THE CHILD ABDUCTION & CUSTODY ACT 1985  
(INCORPORATING THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF  
INTERNATIONAL CHILD ABDUCTION 1980)

AND IN THE MATTER OF  
**D (A GIRL) (DOB: 2011)**  
and  
**E (A GIRL) (DOB: 2012)**

Date: 27 July 2023

BETWEEN:

**P**

**Applicant Father**

**-and-**

**O**

**Respondent Mother**

**APPROVED NOTE OF JUDGMENT**

*(SB refers to the Set Aside bundle; TB to the Trial bundle)*

**Dexter Dias KC :**  
*(sitting as a Deputy High Court Judge)*

1. This is the judgment of the court.
2. This is an application to set aside the return order of this court under the Hague Convention 1980, granted on 30 June 2023. This judgment should be read in conjunction with the 30 June judgment, which is also published to the National Archives with a Neutral Citation Number of [2023] EWHC 2128 (Fam).

3. The parties to the application are as follows: O is the applicant in the set aside application, and respondent in the Hague proceedings. She is the mother (“M”) of the two subject children. She is represented by Mr Crosthwaite of counsel. The respondent in the set aside is P, who is applicant in the Hague proceedings. He is the children’s father (“F”) and is represented by Ms Baker of counsel. The court is grateful to both counsel for their outstanding assistance.
4. The two subject children are sisters. D is 12 years old. Her sister E is aged 10.
5. I subdivide the judgment into four sections to assist parties and the public follow the court’s line of reasoning:

- I. INTRODUCTION
- II. LEGAL PRINCIPLES
- III. DISCUSSION
- IV. CONCLUSION AND DISPOSAL

## **§I. INTRODUCTION**

6. On 9 December 2022, the two subject children were brought to England from their home in the Republic of Ireland, where they had lived their entire life. They were brought by M without the knowledge or consent of their father. They have remained in this country ever since. F sought their return to the Republic. The trial was heard on 24 and 25 May. Having received evidence from the CAFCASS officer Mr. Lill, and submissions from counsel, the court rejected M’s two claimed Hague exceptions: (1) child’s objections (Article 13); (2) grave risk of harm/intolerability (Article 13(b)).
7. To assist parties, the court’s decision was communicated to parties on 30 May. Judgment was formally handed down on the first available date, which was 30 June 2023. The court ordered the children’s return to the Republic under the Hague Convention 1980. However, on the advice of Mr Lill, it delayed the return until the end of the summer term at the children’s school, where the children have progressed well. This was a purely welfare-based decision. Return to the jurisdiction of the Republic was ordered to take place before 23.59 hours on 28 July 2023.
8. In the intervening period, and by an application dated 10 July 2023, M applies to set aside the return order pursuant to FPR 2010, r 12.52A and PD12F, para 4.1A. She argues that there have been several important and fundamental changes of circumstance. The respondent F disputes those assertions. This judgment rules upon her application. I emphasise that I deliver the judgment *ex tempore* as on F’s case, time is very short and the children should be returned to the Republic of Ireland tomorrow, in accordance with the court’s previous order. Indeed, even on M’s case, while she seeks the set aside, she asks that should her application fail, the return should be delayed for seven days. Thus, time is of essence. The court gives its decision today, very soon after the close of submissions, to assist all parties.

## **§II. LEGAL PRINCIPLES**

9. The court must view all this in the context of these being summary proceedings. An agreed bundle of authorities consisting of five cases was put before the court. The Court of Appeal decisions in the bundle set out the law. It is settled and uncontroversial (see *Re W* [2018] EWCA Civ 1904; *Re B* [2020] EWCA Civ 1057; *Re A* [2021] EWCA Civ 9). My judgment in *ST v QR* [2022] EWHC 2133 (Fam) was included by parties as the fifth authority.
10. In short, as stated by Moylan LJ in *Re B* at [89], the first question is whether to permit any reconsideration. That depends on a fundamental change of circumstances. That is a question of fact that the court has to determine. The applicant must prove the fact on a balance of probabilities. If this is done, the court must proceed to determine the extent of any further evidence; whether to set aside the existing order; and if the order is set aside, the court then redetermines the substantive application.
11. For sake of completeness, I add that Ms Baker provided the court with a further authority: *In re E* [2019] EWCA Civ 1447.
12. The question on factual change can be further subdivided into four sub-questions:
  1. What is the change of facts or circumstances?
  2. Is that change fundamental?
  3. Does it undermine the basis of the court's decision?
  4. Should the court permit reconsideration of its decision?

### **§III. DISCUSSION**

13. This is not an appeal. It is not an application to argue that the previous judgment was wrong. The procedural course to make good such an argument would be to seek permission to appeal. There has been no appeal pursued of the substantive judgment in this case. Instead, this is an application to set aside the previous court order, arguing that the factual basis has been overtaken by changing circumstances. The change in circumstances must be fundamental and the law is that the bar is set high (*Re A* at [48]-[49]). It is set deliberately high to avoid further bites of the forensic cherry and not undermine the policy and object of the Hague Convention 1980.
14. The Hague jurisdiction is a summary jurisdiction. There cannot be extensive delay, nor protracted litigation. The condition precedent of a fundamental change must be strictly proved by the person relying on it. That is M. Naturally, some circumstances in any case may change over time. Life rarely remains static. It is only a fundamental shift that counts, that is, a change of such order and magnitude that the previous basis on which the judgment rests is swept away. Has that happened here? Everything turns on it.
15. I now subdivide the court's analysis by considering the four prime issues:
  1. Accommodation with M's father;
  2. Social or public housing;
  3. M's mental health;
  4. Separation of siblings & child's objections.

16. Each time I ask whether there has been a fundamental change of circumstances. If any matter relied upon by M reaches that threshold, or any combination of them do, then I proceed to consider whether the change undermines the court's decision, whether a rehearing should be ordered, and what further evidence is required. No one suggests that I should reconsider the substantive application today.

**Issue 1: Accommodation with M's father**

17. The core submission is that for the children to become homeless or street homeless is intolerable for Art. 13(1)(b) purposes, and that is a fundamental change. Further, there are no protective measures that F offers and no others suggested to mitigate that risk.
18. The evidence from M's father is found in a statement dated 10 July 2023 at SB193. In it, he states at [3]-[4]:

“3. I currently live in a three-bedroom house with my wife and my step-children, Child A who is 24 years old and Child B who is 34 years old. They have their respective bedrooms in the house. At the time of writing my first letter, Child B was potentially moving out with her boyfriend and I was hoping to offer M a place to stay. The plan was that M would stay in Child B's room with her two younger children and D and E would stay in the sitting room where they would share a sofa bed.

“4. Approximately three weeks ago, Child B changed her mind and told me that she will no longer be moving out of the house. I sent M a further letter on or around 23rd June 2023 explaining this which I understand she has exhibited to her most recent statement. I unfortunately can no longer offer M a place to stay with her four children because there is simply no space in the house. I thought that she would have an available bedroom but now that this is no longer the case, it is too impractical for M and four children to stay with me for an uncertain period of time.”

19. In his statement for the trial, M's father stated in a letter put before the court (TB196):

“To whom this concerns,

In relation to the above address, I live in a 3 bedroom house with my wife and two kids. We have no spare rooms in the house. We have a large sitting room with a fold out bed that M and the kids can stay in for the short term, a few weeks. We have no other space available for anyone to stay any longer.”

20. Thus, in his trial evidence (by letter), he never mentioned that the accommodation offer was contingent on his step-daughter moving out. The living room is still available. Therefore, the circumstances have not changed from the letter M's father previously provided to the court. It appears that his new stance is a convenient gloss that is now added, following the notification of the court's decision on 30 May (he states the letter to M was 23 June). I have no doubt it is designed to present a further purported obstacle to return.

21. In her third statement to the court dated 10 July 2023, M states “I have since fallen out with my father and we are not on speaking terms any longer.” However, in his statement dated exactly the same date, M’s father mentions nothing about the relationship having broken down. M provides no explanation for why the relationship has suddenly collapsed. I find this very unpersuasive evidence. It has all the hallmarks of something highly contrived. Families find a way and make do, especially in the short term. The suggestion that if she and the children appeared on M’s father’s doorstep, he would turn his daughter and his four grandchildren away so they became destitute is so unlikely that the court can discount it. Indeed, he states at [8]:

“I would really like to help M and I do not want her and the children to be in an unsafe environment upon a return to Ireland which is why I originally offered that they could stay with me for a few weeks.”

22. Therefore, it is clear that he would really like to help M and he plainly is in the same position as he was in respect of the living room. What is interesting is that he concludes that paragraph by stating:

“I do not think it is appropriate or safe to force M and her children to share a sofa bed or sleep on the floor. For these reasons, I am no longer able to offer M a place to stay in Ireland.”

23. One has to compare the inconvenience of using the living room against the unsafety of the children living on the street. It is obvious that he would permit M and the children to stay with him on return.

24. Ms Baker adds graphically in her skeleton [7c]:

“There are still 5 generations of M’s family living in [the home town]. M does not seek to adduce any evidence to suggest that one or all of those relatives would rather see her and the children on the streets than in their homes.”

25. But as Mr Crosthwaite correctly states, one cannot assume that because they are family, they will be able to assist. Yet the reality is that M has lived all her life previously in Ireland; the children were born, brought up and schooled there; she has a very extensive family network there. It seems difficult to believe that there would be no other family solutions. But I do not need to decide this. This is because I am not satisfied that my previous conclusion on staying with M’s father has been displaced by fundamental factual change. I am satisfied that M could stay with her father. Or put another way: M has not proved that a fundamental change of circumstances has occurred.

26. As Baroness Hale notably said in *Re E (Children) (FC)* [2011] UKSC 27 at [34]: “every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up.” For the six months prior to the trial, M lived with her partner, Mr. Y, and four children in his sister’s house along with his sister’s husband and their two sons, aged 12 and 18. This means there were five adults, three children and two toddlers occupying a four-bedroom property. I reviewed these arrangements in my previous judgment.

27. I was and remain completely satisfied that the two subject children's basic needs will be met as set out in the HCCH's Guide to Good Practice: Part VI Article 13(b). I have already found that living with M's father has not been established as an Art. 13(b) exception. Thus, I find that there is no fundamental change of circumstances in respect of the possibility of staying at his house until matters come before the Irish court.
28. Consequently, on Issue 1, I find that no fundamental change of circumstances has been proved.

**Issue 2: Social and public housing**

29. M has produced evidence that she cannot apply for a council tenancy in [County Council A] for 12 months. This can be found in the letter from the [County Council] dated 29 June 2023 (SB115):

“This is to confirm that M gave up her tenancy on 08/03/2023.

“She cannot reapply for Social Housing with [County Council] for 12 months.”

30. M argues therefore that she and the children will be homeless and destitute. Yet one must add the response from [County Council] when asked by M's solicitors.
- “Q. Would M be able to return to the same property?  
A. There is no automatic right to return to the property, M would be required to make a new application for social housing. This application would be required to be assessed on its merits to determine if it qualifies for social housing supports.”
31. It seems to me that M's argument confuses two things: first, the fact that there cannot be an application for permanent council tenancy for 12 months; second, the provision of emergency accommodation. A number of immediate and obvious points arise.
32. **First**, the context is that she has made herself ineligible due to her wilful termination of her previous tenancy, a step she deliberately concealed from both F and the court until late in the day. This is relevant in weighing the credibility of her claims.
33. **Second**, the court set a strict timetable for evidence to be filed, which for M was by 10 July 2023. She filed no evidence from the Irish authorities that they are unable to provide her with emergency accommodation. Then during the course of the hearing itself, Mr Crosthwaite sought to adduce evidence from M that she had spoken to the [County Council] about emergency housing and the content of what she was told. It was contained in a solicitor's letter. But there has been no application from M to adduce the solicitor's letter. Mr Crosthwaite then sought to refer to the letter during the course of his submissions without any application.
34. The court was concerned about this procedural stance. It was not in conformity with proper or fair procedure. The way in which it was adduced would give F no opportunity whatsoever to respond. That produces a serious degree of unfairness to F.

But to adjourn the case again for him to meet this evidence would necessitate yet another delay in these summary proceedings. On balance, and in the interests of the children to have the best evidence before the court, I admitted the letter even though it was not in the bundle, nor filed in accordance with the court's strict and clear timetable. The letter from Lyons Davidson, Solicitors on behalf of M, was sent to F's solicitors Goodman Ray and dated 21 July 2023:

“Following receipt of your client's statement, our client contacted the number provided and spoke to a [name removed] and we enclose a copy of an email our client sent to the Homeless Unit at 14:28 on 19<sup>th</sup> July 2023 in which she explained that she had been speaking to [name removed] who advised her that she would receive no help with any emergency hostel accommodation or any emergency accommodation whatsoever notwithstanding our client advised that she has been ordered to return the children pursuant to a High Court Order. Our client was advised that the English court 'do not dictate their policies' and that she would receive no help as she would have effectively made herself homeless twice over by, firstly leaving her house in Ireland, and then leaving the council property in this jurisdiction.”

35. Thus, the evidence amounts to simply what M claims she was told. It is hearsay, or double hearsay, and from M, who has been unreliable throughout these proceedings. The fact is that there is no independent evidence from the [County Council] to support what she says about emergency housing. Further, in fairness to F, I permitted the adduction of two attendance notes from his solicitors when they spoke directly to [County Council A]. They state:

**20 July 2023:**

“KG [F's solicitor] engaged in call to [County Council] emergency accommodation department. On hold for 5 minutes.

“Through to department. KG asking for clarification as to how long an application takes from initial telephone call to telephone assessment to being determined as eligible or not. [County Council] confirming that they will usually call individuals back in an hour or two after the initial enquiry call and failing that it will be before 5pm on the same day. As applicants are deemed homeless, it is a very quick turnaround so anyone who phones up will be seen as a matter of urgency.”

**21 July 2023**

“KG engaged in call to [County Council] emergency accommodation department on [number removed]. On hold for 3 minutes.

“Through to [name removed]. KG asking what the call back times are for today. [name removed] confirming that they are not particularly busy today and that call back times for telephone assessments are likely to be within the hour. [name removed] confirming that once the telephone assessment is

complete, they will notify the individual before COB as to whether or not they are eligible for emergency accommodation.”

36. That accords tolerably closely with the situation in this jurisdiction in respect of urgent assessment of emergency homeless situations. Therefore, when Mr Crosthwaite was asked whether there is a possibility that M would be able to obtain emergency accommodation, he accepted that, as he put it, “legally, there is”. He added that she would have to go to the council offices and make the application herself.
37. I add that one must be cautious about transposing the situation in this jurisdiction to the Republic. In the UK you may be ineligible for a council tenancy on permanent basis, but you may be granted emergency or social housing or other temporary accommodation in cases of high need.
38. **Third**, there is no evidence that in the Republic of Ireland similar basic safeguards do not exist. The Republic is a much respected and humane Western democracy with a strong social welfare tradition. The solicitors’ attendance notes indicate that emergency homeless safeguarding systems exist. This is unsurprising.
39. **Fourth**, the letter from the homelessness charity “Threshold” does not say that M will not or cannot receive any emergency accommodation support. The person contacted at Threshold simply says, “You may not” (be eligible).
40. **Fifth**, it is absurd to imagine that the [County Council] authorities will not blink an eye and condemn a mother and four children aged 12, 10, 2 and 1 to sleep on the street. That would be a fundamental breach of core safeguarding obligations.
41. **Sixth**, there is no evidence from the Irish authorities that M would be ineligible for housing benefit support in form of HAP and RAS payments. There is simply the unsupported claim of M who has manipulated the facts and previously deceived F and the court.
42. **Seventh**, if there were any delay in benefit payments (asserted by M, but not evidenced by the authorities in Republic of Ireland), there is, as Ms Baker points out, the extensive network of M’s family. The idea that they would refuse to assist M and the children at all is hard to believe, but one must be cautious about speculating.
43. The court does not accept the evidence that M and the children would not be able to stay with M’s father. It does not accept the evidence that they would be destitute and living on streets. It does not accept that the Irish authorities have no power to provide temporary or emergency housing to M and the four children. Indeed, the attendance notes suggest that there are emergency powers to relieve homelessness in cases of need. But as Mr Crosthwaite rightly submitted, this should not become “a forensic analysis of the entire housing situation in Republic of Ireland”. These are summary proceedings.
44. Therefore, on Issue 2, the court finds no fundamental change of circumstances in respect of social or public accommodation.

### **Issue 3: M's mental health**

45. M has been prescribed anti-depressants, a prescription of 50mg of sertraline. The letter from the GP's office dated 5 July 2023 sets this out (SB188). Again, a number of points arise.
46. **First**, the prescription is undoubtedly based on M's self-reporting to the GP. Mr Crosthwaite is correct that many psychological and psychiatric assessments are based on the same. But in many such cases, there is other independent evidence, such as self-harm or reports of others. Here the GP was simply told by M what she said she felt.
47. **Second**, the letter contains no diagnosis.
48. **Third**, there is nothing about the nature and extent of her condition, whatever it may be.
49. **Fourth**, there is no independent medical evidence that she could not cope with a return to Ireland.
50. **Fifth**, there has been no application for a psychiatric report.
51. **Sixth**, there is no evidence that the medication would be insufficient to reduce her anxiety and depression or make it manageable.
52. **Seventh**, there is no evidence from any professional that M's mental health is likely to deteriorate significantly or materially on return, sufficient to begin to found an Art. 13(1)(b) exception.
53. **Eighth**, in significant measure, the claimed deterioration on return is based on what she fears about the housing situation. In her statement she says:

“I feel like my mental state is worsening by the day as I am terrified at the prospect of getting off the ferry in Ireland with my children in an unfamiliar location with nowhere to go and no money. The thought of this brings tears to my eyes.”
54. As is evident in the GP's letter at [SB188] her deterioration rests in part on her lack of accommodation:

“The deterioration in her mental state has been triggered by the order that she has to return to Ireland and leave her partner and new home here. As I am sure you are aware, M has no accommodation to return to.”
55. I have reached a different conclusion about the continuing availability of accommodation. The court is not satisfied that the accommodation situation is dire like M says and told the GP.
56. Thus, the extent of her mental health deterioration on return critically rests on her assertions. The court has every reason to remain profoundly sceptical about her claims due to her history of deceit and manipulation in this case and these

proceedings. In any event, her claimed deterioration significantly rests on being homeless or street destitute as she says in her statement. As explained previously, this is unlikely. She has exaggerated the problems and plainly enlisted her father to help her create the spectre of destitution, just as she enlisted her two daughters in the abduction deception.

#### **Issue 4: separation of siblings and child's objections**

57. M had the opportunity at trial to argue that there would be sibling separation. She did not. At trial she stated that she intended to take all her children, including the two youngest, back to Ireland even if she and the children would stay temporarily at her father's house. The court has found that she can still do that – or she has not proved that there has been a fundamental change of circumstances about that finding in the original judgment.
58. But this volte face about her youngest children, strikes the court as being yet another strategic manipulation by M to delay the inevitable. Who are the children that she proposes to leave behind? Her son G, who was born in 2020; and H born in 2022.
59. The court does not believe for a moment that she would leave a child aged 1 and another aged 2 in a different country, separated by the Irish Sea (see original judgment at [65] “My youngest son H who would accompany us in the event of the making of a return order is still only a baby and very dependent on me to meet his needs.”). This is undoubtedly why M's case at trial was that she would take all four children back, including the two youngest, the boys. This is a paradigm example of a party seeking to take advantage of a capricious and unconvincing change of mind in *Re W* terms. The justification for the change of heart is the housing situation. Yet M intended to bring the two boys to Ireland when they were going to stay with her father. M and her children can still stay with their grandfather in [Town B]. The court is perfectly satisfied that the two youngest children will not be left behind by M.
60. That being so, there is no fundamental change of circumstances in respect of sibling separation and thus no change in respect of child's objections.
61. I add as a matter of completeness, although I do not understand it to be a claimed change of circumstances, that there is no evidence from authorities that the children cannot resume schooling within the Irish educational system. M has deliberately disrupted the children's schooling in Ireland by her abduction, but there is no reason to suppose they cannot return to Irish education.

#### **§IV. CONCLUSION AND DISPOSAL**

62. Mr Crosthwaite is correct: the court must look at matters holistically. When doing so, the court concludes that there is nothing approaching a fundamental change of circumstances. I have examined these four issues individually. But, and critically, I have examined them together and globally, to see whether each of them makes a contribution towards fundamentality.
63. The court rejects M's unproved claims and self-serving assertions. Such evidence as she has otherwise produced comes nowhere close to reaching the threshold of

fundamentality. Each of the four claims is weak and poorly evidenced. As said in *Re B* at [91], the number of cases which merit any application being set aside are likely to be few. This most certainly is not one of them. It comes nowhere near to it. Thus, the condition precedent to proceed through the carefully calibrated process and trigger the court's discretion has not been established.

64. What is the true position here? M has acted in a deeply deceitful and manipulative fashion throughout this case, starting with her inexcusable plot to abduct the children by deception, while enlisting them both in the dishonesty. She has tried everything to ensure that the abducted children remain in the UK in serious breach of their father's rights of custody. She is plainly enlisting her own father now to provide obviously unreliable evidence to support her and thereby frustrate the court's decision in an attempt to manufacture a false change of circumstances. The court must be astute to guard against this (see *Re B* at [91]).
65. The Hague Convention 1980 is one of the greatest and most effective conventions in international law. It was devised by a community of nations to counter and correct precisely the kind of behaviour M has so flagrantly demonstrated. This application is dismissed.
66. Time has run out. I will hear submissions about when return to the jurisdiction of the Republic of Ireland will be affected.
67. That is my judgment.

## **Update**

68. The mother applied for permission to appeal. The application was refused by the judge and deemed Totally Without Merit, but he granted a short stay to enable application to the Court of Appeal. On Monday 31 July 2023, Lord Justice Peter Jackson in the Court of Appeal upheld the decision of Dexter Dias KC, and refused both permission to appeal and an application for a further stay. The mother returned to the Republic of Ireland with the children.