

Child abduction in times of corona

By **Nadia Rusinova**

Currently large increases in COVID-19 cases and deaths continue to be reported from the EU/EEA countries and the UK. In addition, in recent weeks, the European all-cause mortality monitoring system showed increases above the expected rate in Belgium, France, Italy, Malta, Spain, Switzerland and the United Kingdom.

It is not unreasonable to predict that COVID-19 will be used increasingly as a justification in law for issuing non-return order by the Court in international child abduction proceedings, return being seen as a “grave risk” for the child and raised as an assertion under Article 13(b) of the Hague Convention.

What would be the correct response to these challenging circumstances, when the best interest of the child in child abduction proceedings calls for restoration of *status quo ante* under the Hague convention on the Civil Aspects of International Child Abduction (hereinafter: the Convention)? This post will focus on the recent judgment [2020] EWHC 834 (Fam), issued on 31 March 2020 by the High Court of England and Wales (Family Division) seen in the light of the ECtHR case law on the child abduction, providing brief analysis and suggesting answer to the question if the return of the child to the state of its habitual residence in the outbreak of COVID-19 can constitute grave risk for the child under Article 13(b) of the Convention, and how the practitioners and the Court should approach these assertions in the present pandemic situation.

The facts of *Re PT [2020] EWHC 834 (Fam)*

PT (the abducted child) and both of her parents are all Spanish nationals. PT was born in 2008 and had lived all of her life in Spain, until she was brought to England by her mother, HH, in February 2020. She is the only child of the parents’ relationship. They separated in 2009. Following the parents’ separation, legal proceedings were brought in Spain by the mother concerning PT’s welfare. A judgment was issued in these proceedings by the Spanish Courts on 25 May 2012, providing for the mother to have custody and for parental responsibility for the child to be shared by both parties. The order provided for the father to have contact with PT on alternate weekends from after school on Friday until Sunday

evening. In addition, she was to spend half of each school holiday with each parent. The order also required that the parents should inform each other of any change in address thirty days in advance.

On or about 13 February 2020, the mother travelled to England with PT. The mother's partner (with whom she is expecting a child the following month) lives in the South East of England, and they have moved in with him. The evidence on behalf of the father is that the child was removed from Spain by the mother without his knowledge or consent.

The father asked the mother to return PT to Spain, but she refused to do so. The father travelled to the UK and met with the mother and PT at a shopping centre. However, the mother again refused to permit the child to return to Spain. She did however permit PT (and S) to spend a night with the father at his hotel in England.

The case first came before the Court on 10 March 2020 on a "without notice" basis. At that hearing the mother attended in person, and indicated that she would be seeking to defend the application on the basis of (1) the father's consent and / or acquiescence and (2) Article 13(b) of the Hague convention - claiming existence of a grave risk that a return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

On that occasion PT was, as directed by the judge, present in the Court vicinity to be interviewed by the CAFCASS (Children and Family Court Advisory and Support Service) Officer. She told CAFCASS that she had not wanted to come to England, and that she wanted to be with her father, although she did not want to be separated from her mother either. PT's clear wish was that she wanted to return to Spain with her father rather than stay in England.

The judgment

The Court is entirely satisfied on the evidence that PT is habitually resident in Spain as she had lived there all of her life until she was recently brought to the UK. In this case the Court ruled that PT has been wrongfully removed from Spain within the terms of Article 3 of the Convention and that none of the Article 13 defences have been made out. Therefore, return order for the summary return of PT to Spain has been made.

Comments

First of all, in such cases the Court should unavoidably take the challenge to identify the risks for the child in case of return in the context of the pandemic situation. Indeed, in the present case the formulation is rather simplified. Therefore and due to the lack of case law on this issue, and in order to be able to answer the question if the return of the child would pose a grave risk, we should take a look also at the recently published Guide to Good Practice on Article 13(1)(b) (hereinafter: the Guide) by the Hague Conference On Private International Law (HCCH) and the concept of “grave risk” in child abduction proceedings in general, as set by the ECtHR in its case law.

In general, the grave risk exception in child abduction cases is based on “the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation”, as stated in the § 29 of the Explanatory report to the Hague Convention. The general assumption that a prompt return is in the best interests of the child can therefore be rebutted in the individual case where an exception is established. It is important to note that the exception provided for in Article 13(b) concerns only situations which go beyond what a child might reasonably be expected to bear (Ushakov v. Russia § 97, X v. Latvia § 116, Maumousseau and Washington v. France §§ 69 and 73, K.J. v. Poland §§ 64 and 67)

In § 46-48 of the discussed judgment the Court points final argument relates to the risk of physical harm that is presented by the current coronavirus pandemic in the following way:

“...This risk presents itself in two ways:

(1) The pandemic is more advanced in Spain than in the UK. As at the date of the preparation of this judgment (29 March) the official death toll stood at 1,228 in the UK and 6,528 in Spain. It could therefore be argued that PT would be at greater risk of contracting the virus in Spain than in the UK.

(2) The increased risk of infection that is posed by international travel at this time.”

Did the Court explore all possible harm that the return order can bring, and since it is recognized that the risk is present, what specific kind of risk the return of the

child would constitute in the context of the pandemic situation – physical or psychological danger, or being placed in an intolerable situation?

The way the Court approached this issue is a very basic attempt to identify the risks that a return order in the outbreak of COVID-19 can bring to the child. As the Guide points in § 31, although separate, the three types of risk are often employed together, and Courts have not always clearly distinguished among them in their decisions. It is clear that the return could bring physical danger of contamination with COVID-19 together with all possible complications, despite the fact that child is not in the at-risk groups as are the elderly or other chronically ill people. But we should not underestimate the psychological aspect of the pandemic situation. As the coronavirus pandemic rapidly sweeps across the world, the World Health Organisation has already, a month earlier, stated that it is inducing a considerable degree of fear, worry, and concern in the population. It is therefore out-of-the-question that for a relatively mature child (in this case of 12 years old), whether the ability to watch, read or listen to news about COVID-19 can make the child feel anxious or distressed and therefore can, and most likely will, bring also psychological harm to it. In this sense the potential psychological harm is inevitable and whilst the physical harm can or cannot happen, and indeed the contamination cannot be foreseen, in any case with the return order (especially to a state with significant risk of increasing community transmission of COVID-19) the psychological integrity of the child will be put at immediate risk.

In order to explore how this risk can be adequately assessed in child abduction proceedings in the context of the COVID-19, we should look at § 62 of the Guide, where HCCH explicitly discusses risks associated with the child's health, stating that *"In cases involving assertions associated with the child's health, the grave risk analysis must focus on the availability of treatment in the State of habitual residence, and not on a comparison between the relative quality of care in each State"*. How is this applicable to the pandemic situation, if at all? It seems like the only adequate response in these fast-changing unprecedented circumstances would be that the Court should indeed not compare the situations in both states, but still having in mind the nature of the COVID-19, to try to foresee the developments, relying on the general and country-specific health organizations reports, accessible nowadays online in a relatively easy way.

As a first step the Court should consider whether the assertions are of such a

nature, with sufficient detail and substance that they could constitute a grave risk, as overly broad or general assertions are unlikely to be sufficient. In this situation, without precedent in the history of the Convention's application, holding that *"Although the course of the pandemic is clearly more advanced in Spain than in the UK, I do not have any evidence from which I can draw a conclusion that either country is any more or less safe than the other... I am simply not in a possession to make any findings as to the relative likelihood of contracting the virus in each country. On the material before me, all that I can conclude is that there is a genuine risk that PT could contract the virus whether she remains in England or returns to Spain."* does not fulfil the obligation of the Court to assess the risk in full, in all its possible implications. The Court is obliged to conduct the step-by-step analysis, prescribed by and explained in the Guide, and to examine the types of risk for the child, assessing it separately and in the context of their deep interrelation in these specific circumstances.

Secondly, the wording of Article 13(b) also indicates that the exception is "forward-looking" in that it focuses on the circumstances of the child upon return and on whether those circumstances would expose the child to a grave risk. Therefore, ECtHR is clear that in any case (regardless the context and for sure not only in cases with history of domestic violence), where such assertions have been raised, the Courts should satisfy themselves that adequate safeguards and tangible measures are available in the country of return (*Andersena v. Latvia* §118, *Blaga v. Romania* §71).

In addition, as the Guide points in § 53, Article 13(b) analysis should be always be highly factually specific. Each Court determination as to the application or non-application of the exception is therefore unique, based on the particular circumstances of the case. A careful step-by-step analysis of an asserted grave risk is therefore always required, in accordance with the legal framework of the Hague convention, including the exception as explained in the Guide. When we discuss this issue, not only the Convention, but also Article 11(4) of Brussels IIa applies in answering the question of, what in the case of COVID-19 are "adequate safeguards". This is, without a doubt, a question difficult to answer to with certainty, as the case law of the ECtHR and the Guides do not contain any directions or good practices on the behaviour of the domestic authorities in times of pandemic.

In the present case the judge estimated as "tangible safeguards" the following

“number of undertakings”, offered by the father, effective until the matter could be brought before the Spanish Court, and intended to support PT’s return to Spain. They include: (1) *Lodging the final order in Spain;* (2) *Not pursuing any criminal charges against the mother for her wrongful removal of PT from Spain to England;* (3) *Seeking to mediate with the mother on PT’s return in relation to the mother’s access;* (4) *Agreeing to unrestricted indirect contact between PT and her maternal family (especially with the mother and S);*(5) *Agreeing to direct contact for PT with her mother in Spain and England, to the extent that is possible or appropriate from a public health perspective given the current global pandemic;*(6) *Meeting with the mother only at neutral and/or public places when picking or dropping PT off;*(7) *To pay PT’s maintenance and school fees pending any further determination about maintenance by the Spanish Courts;* and (8) *To pay all the travelling costs (flights) for PT of travelling to and from England for the purposes of contact with the mother.”*

It looks like the Court is indeed satisfied with the undertakings, but unfortunately, these examples are far from adequate protective measures when we consider the grave risk induced by return in the current pandemic situation. None are directed to prevention of the grave risk as raised by the mother, and none are related to the child’s health. Better examples remain to be seen from the upcoming case law of the Courts, but in the current situation, a strong focus should remain on comprehensive testing and surveillance strategies (including contact tracing), community measures (including physical distancing), strengthening of healthcare systems and informing the public and health community. Therefore, following the Guide, such measures should at the minimum include rapid risk assessment upon arrival at the state of habitual residence, application of different types of available COVID-19 Rapid Tests, ensuring social distance and exploring online education possibilities, providing guarantees that the child will be isolated and distanced from potentially infected people (through evidence for appropriate living conditions upon return), etc. Strong focus should also be put on the possibilities for mental support for the child, bearing in mind the extremely stressful situation, related not only the COVID-19 but also to additional factors such as the separation from the other parent and the mental consequences from the forced social isolation which, as pointed above, would inevitably affect the mental wellbeing of the child.

The next question is who should prove the risk, and its gravity in this specific

situation? Following the ECtHR case law, the burden of proof traditionally lies with the party opposing the child's return (*Ushakov v. Russia*, § 97). In this case the abducting parent indeed shall prove the grave risk, but it is true that the COVID-19 situation itself and the wide-spread precautions and information contribute a lot to proving this risk. Yet, what in the current pandemic circumstances is still to be proved by the abducting parent?

According to § 49 of the Guide, even if a Court *ex officio* gathers information or evidence (in accordance with domestic procedures), or if the person or body which has lodged the return application is not actively involved in the proceedings, the Court must be satisfied that the burden of proof to establish the exception has been met by the party objecting to return. However, in these specific circumstances, the national and international situation is developing at such speed that any evidence that could be gathered would be likely to be immediately outdated. Something very convenient for the abducting parent, it would be almost enough if the Court *ex officio* conducts check on the actual COVID-19 information regarding the state of habitual residence of the child, ensuring it is current when issuing the return or non-return order. However, this does not relieve the opposing party from the procedural obligation to present evidence as accurately as possible, and it remains important that arrangements regarding the "tangible safeguards", discussed above, are offered and supported by evidence by the party which claims the return order.

There is a further discretionary ground in the Convention which permits a refusal of a return in certain circumstances where the child objects. According to Article 12 UNCRC, the child has the right to express its views freely, these views to be given due weight in accordance with age and maturity, and the Court should carefully examine them together with the other evidence (and not to provide stereotyped reasoning). The COVID-19 limitations raise the question should the child still be heard in this context and, if yes, how this should happen such that the risk for is minimised? Obviously, this right cannot and should not be waived in times when many procedural actions can take place online. It is worth to note that next to the existing legislation, Brussels IIa recast (Regulation 1111/2019, in force as of August 2022) pays special attention to the strengthening of the right of the child to express his or her view, reinforcing it with special provision - Article 26 in Chapter III "International child abduction", in compliance with a detailed Recital 39. No minimum age is prescribed, but also no rules who can conduct the

hearing of the child, how it must happen and where it should be conducted are set. Therefore, the hearing of the child should take place following the general conditions, and while the personal impression will indeed be reduced, and the possibilities to manipulate the child could potentially increase, the unlimited online tools to conduct the hearing eliminate the risk of contamination and offers acceptable solution for this emergency situation.

To get back to the discussed case - Re PT [2020] EWHC 834 (Fam), the Court is satisfied that the Art 13(b) defence has not been made out in this case. Many more comments could be made on the Courts assessment - the best interest of the child is not touched upon, the domestic violence is not discussed at all as an additional assertion, etc. One positive conclusion from procedural point of view is that the urgency has been taken into account, and that the Court made full use of the opportunities to conduct the proceedings online. Of course we cannot say that the return of a child during the COVID-19 pandemic constitutes a grave risk in all child abduction cases- but we can at least begin to build the good practices in this unprecedented time, when the “lockdown” will bring brand new meaning to the notion of “grave risk” under the Convention.

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