# F v M (ABDUCTION: GRAVE RISK OF HARM) [2008] EWHC 1467 (Fam)

Family Division

Ryder J

6 February 2008

*Abduction – Intolerability defence – Grave risk – Allegation of unfairness in French proceedings – Whether valid defence – Whether evidence of domestic violence established grave risk*

The French father and the British mother lived in France with the two children. After the couple's relationship broke down, the mother began a relationship with another man, with whom she had a baby, her third child. The mother sought French orders providing for the two older children to reside with her on the basis of joint custody with the father; she was allowing the father unsupervised overnight contact. French social services had already been involved with the mother, and an investigation was ordered into the children's upbringing. In the interim the court confirmed joint parental responsibility and made orders that the children should reside with the mother, and have contact with the father, pending completion of a welfare report. The welfare report raised significant concerns about the mother's lifestyle, and her ability to parent the children, describing the mother as 'a very disturbed personality'; the French court chose to make a form of supervision order for a year. Shortly afterwards the mother wrongfully removed the children to England. In her absence the French court made a residence order in the father's favour, with no provision for contact with the mother. The father applied for the summary return of the children under the Hague Convention. The mother raised a defence under Art 13(b), claiming that there was a grave risk of harm based on domestic violence, and that a return to France would put her into an intolerable position because the French courts and welfare advisers were against her, would not acknowledge or consider her detailed allegations against the father, and were prejudiced against the man with whom she was living to such an extent that there was a risk that they would remove the baby, the third child, into State care. The father disputed the mother's account of domestic abuse, which she had not specifically detailed in the French proceedings, but offered non-molestation, non-prosecution and harassment undertakings in any event. The children were now 5 and 2; the 5-year old was said by the mother and by her school to be very opposed to a return to France. The mother made an informal application for the 5-year-old to be interviewed by Cafcass.

**Held** – ordering the summary return of the children –

(1) It would have added nothing to have subjected the 5-year-old child to an interview with Cafcass; the court had before it two clear views and took them into account as objections (see para [10]).

(2) Even taken at face value the mother's evidence of domestic violence fell short of the clear and compelling evidence required to establish grave risk of harm; the father was, in any event, offering appropriate undertakings (see para [17]).

(3) It was near impossible to assert without a specific and detailed case that the legal process in a country that had signed BIIR was such that, of itself, it produced intolerability; the actual circumstances of intolerability must be pleaded. Comity and respect for the policy of the Hague Convention obliged the English court to determine that the French courts were just as capable as the English court of fairly investigating and adjudicating on the competing claims of the parties, unless there was the most persuasive compelling evidence to the contrary. The mother's evidence did not satisfy the threshold in that regard. There had been no apparent representational or linguistic difficulties before the abduction, and the French welfare report had been detailed and even handed, as had the French judgments (see paras [18], [19]).

**Statutory provisions considered**

Child Abduction and Custody Act 1985

Hague Convention on the Civil Aspects of International Child Abduction 1980, Arts 12, 13(b)

Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1, Art 11(4)

**Cases referred to in judgment**

*C (Abduction: Grave Risk of Psychological Harm), Re* [1999] 1 FLR 1145, CA

*D (A Child) (Abduction:Rights of Custody), Re* [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961, [2007] 1 All ER 783, HL

*H (Abduction: Acquiescence), Re* [1998] AC 72, [1997] 2 WLR 563, [1997] 1 FLR 872, [1997] 2 All ER 225, HL

*M (Abduction: Intolerable Situation), Re* [2000] 1 FLR 930, FD

*M (Abduction: Zimbabwe), Re* [2007] UKHL 55, [2007] 3 WLR 975, [2008] 1 FLR 251, [2008] 1 All ER 1157, HL

*S (A Minor) (Abduction: Custody Rights), Re* [1993] Fam 242, [1993] 2 WLR 775, sub nom *S v S (Child Abduction) (Child's Views)* [1992] 2 FLR 492, [1993] 2 All ER 683, CA

*TB v JB (Abduction, Grave Risk of Harm)* [2001] 2 FLR 515, CA

*W (Abduction: Domestic Violence), Re* [2005] 1 FLR 727, [2004] EWCA Civ 1366, CA

*Edward Devereux* for the plaintiff
*Nicola Martin* for the defendant

**RYDER J:**

**[1]** This is the final hearing of the application made on 14 December 2007 by a plaintiff father, PF, who was born on 17 May 1971 and is now aged 36, pursuant to the Child Abduction and Custody Act 1985, which incorporates the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention). The application is for the summary return of the parties' two children, N, who was born on 29 May 2002 and is now aged 5, and M, who was born on 22 March 2005 and is now aged 2, to the Republic of France where they were (and are) habitually resident.

**[2]** The defendant mother is EM, who was born on 22 September 1981 and is now aged 26. She has a further child, A, who was born on 22 March 2007 and is now aged 10 months, who is not subject to these proceedings and is a consequence of a relationship with a Mr KJ. The defendant concedes that she wrongfully removed the two children who are the subject of these proceedings on 12 November 2007 when she relocated from France to the jurisdiction of England and Wales. She defends the proceedings by seeking to rely on the exception under Art 13(b) of the Hague Convention.

**[3]** Father submits that the children should be summarily returned to France pursuant to Art 12 of the Hague Convention on the basis that the mother is not able to meet the very high threshold required to make out an exception to return under Art 13(b). Although the father has an alternative case relating to recognition and enforcement of the existing French proceedings under Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility,

repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1 (BIIR), he does not seek to pursue that remedy today because of the procedural requirements which would need to be satisfied. It is clear in any event and it is common ground that the French court is already seised of the case, and welfare-based orders have been made in that jurisdiction.

*The brief background to the application*

**[4]** The father is a French national and has, until recently, lived at 9 R L'E, France, with his mother. He is now cohabiting with a new partner. The mother is a UK national. The parties began a relationship in late 1999 and they began living together in or about January 2000. The children are the only children of the relationship between the parties, and that relationship broke down in or around early May of 2006. After the breakdown of the parties' relationship and by an application dated 6 March 2007, the mother sought various orders in France, settling the arrangements for the children.

**[5]** Prior to March 2007, there had been some involvement between the mother and French social services. On 21 March 2007, an order was made in the French proceedings for there to be investigation into the children's upbringing by the ADSEAM agency in Avranches. Thereafter, in the Tribunal de Grande Instance d'Avranches in France on 24 May 2007, the court confirmed joint parental responsibility for the children and it made orders that the children should reside with their mother and have contact with their father, pending a further hearing and completion of a welfare report. The matter was also listed for a further hearing. In a subsequent judgment of that tribunal the residence order is described as temporary, that is pending further hearing before that court.

**[6]** On 1 October 2007, the welfare report was completed and, on 22 October 2007, the parties returned to court. The French court made a form of supervision order for one year. On a date unknown to this court, the parties accept that they were notified of a further hearing which took place on 22 November 2007, when the mother did not attend, having by that time wrongfully removed the children to England. On that occasion, the French court made a residence order in favour of the father but made no provision for contact with the mother. That order remains in force and the mother has taken no steps to appeal or vary it. I am told that mother was unrepresented at that hearing but that her advocate appeared briefly to explain that he had no instructions.

**[7]** Within the welfare report, significant welfare concerns were raised about the mother's ability to parent the children, and her lifestyle. The report concluded that she was 'a very disturbed personality.' It is perhaps not surprising that the French court made the order which it did, having regard to the content of that report and mother's absence with the children.

*The history of these proceedings*

**[8]** These proceedings were first issued on a without-notice basis on 14 December 2007. On that occasion, a location order and various disclosure orders were made. There were then various hearings which were used to trace the whereabouts of the mother and the children. On 12 January 2008, the mother and the children were located in Wrexham. The mother was thereafter

personally served on 14 January 2008 and, on 17 January 2008, case management directions were made leading up to this final hearing.

**[9]** For the avoidance of doubt, this hearing was set up on the basis that disputed issues of fact would be for whichever court dealt with the welfare question and not this court. Accordingly, no provision was made for the hearing of oral evidence. Likewise, no application was made for the interview of the children by a Cafcass practitioner; whether or not that would have been appropriate having regard to their young ages need not concern me. The suggestion that I must have regard to any objections they raise and hear them is readily accepted by me, and I propose to do that by taking as read the children's objections as reported by mother and the school. After I had announced the decision of the court, mother instructed her counsel to make an informal application that the elder child be seen by the Cafcass unit at the Principal Registry of the Family Division. This was on the basis that N had said she would not return to France, she would run away and, in any event, the mother believes there is no equivalent to Cafcass in France.

**[10]** I have considered these questions de bene esse and as if raised within the proceedings and I have decided it would add nothing to subject N to an interview. I have her clear views as a 5-year old and I take them into account. As it happens, I believe mother is wrong about the French welfare reporters' ability to speak with children and, indeed, the normal practice of the French judiciary, but the normal provision for the interview of children in the European jurisdictions is often more advanced than our own and I decline to accede to mother's request on that basis.

*The father's case*

**[11]** The specific twin objects of the Hague Convention are:

> '(a) to secure the prompt return of children wrongfully removed to or retained in any contracting state; and
> (b) to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states.'

The locus classicus of the object and purpose of the Hague Convention is the speech of Lord Browne-Wilkinson in *Re H (Abduction: Acquiescence)* [1998] AC 72, [1997] 2 WLR 563, [1997] 1 FLR 872 at 81, 567 and 875F, which Ward LJ called 'the most authoritative statement of the purpose of the Hague Convention' in *Re C (Abduction: Grave Risk of Psychological Harm*) [1999] 1 FLR 1145, at 1152 E–F:

> 'The object of the Convention is to protect children from the harmful effects of their wrongful removal from the country of their habitual residence to another country or their wrongful retention in some country other than that of their habitual residence. This is to be achieved by establishing a procedure to ensure the prompt return of the child to the state of his habitual residence.'

There is, further, an important deterrent aspect to the Hague Convention:

> 'The Convention is there not only to secure the prompt return of abducted children but also to deter abduction, in the first place. The message should go out to potential abductors that there are no safe havens amongst contracting states [per Baroness Hale of Richmond at para. [42] of *Re M (Abduction: Zimbabwe)* [2007] UKHL 55, [2007] 3 WLR 975, [2008] 1 FLR 251].'

Indeed, it is well established across all jurisdictions that the 'limitations on the duty to return must be restrictively applied if the object of the Hague Convention is not to be defeated' (per Baroness Hale of Richmond in *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619, [2006] 1 WLR 989, [2007] 1 FLR 961, at para [51] and Balcombe LJ speaking generally about the policy of the Hague Convention in *Re S (A Minor) (Abduction: Custody Rights),* [1993] 2 WLR 775, sub nom *S v S (Child Abduction) (Child's Views)* [1992] 2 FLR 492, at 783, 501 B–D).

**[12]** As to the Art 13(b) exception, the father says, by reference to *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145, in the judgment of Ward LJ at 1154 A that:

> 'There is therefore an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial and 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.'

In *TB v JB (Abduction: Grave Risk of Harm)* [2001] 2 FLR 515, at para [110], Laws LJ concluded that Art 13(b) 'is there to relax the obligation to return under Art 12 in a very exceptional case.'

**[13]** Before BIIR, or in a case outside the ambit of this regulation, if the court was (or is) satisfied that the child would be given adequate protection by the courts of the Requesting State and/or the left-behind parent had provided sufficient protective undertakings, the abducting parent would usually not be able to rely on the Art 13(b) exception, especially in the cases where domestic violence has been raised (see, for example, *Re M (Abduction: Intolerable Situation)* [2000] 1 FLR 930, and *TB v JB* above). After BIIR, in a case bound by that regulation, the court is positively required to return the child 'if it is established that adequate arrangements have been made to secure the protection of the child after his or her return' (see Art 11(4) thereof).

**[14]** As to the facts, the father disputes the contents of the mother's affidavit, in particular as to domestic abuse. He says that any such dispute as to welfare concerns should be resolved in the French court by a detailed investigation, which has already been ongoing. He also says that it is noteworthy that mother did not raise much of the specific detail of her concerns in her statement to the welfare reporter in the French proceedings, where it can be seen that only general cross-allegations are recorded. Further, the father says that he will withdraw his criminal complaint; that he will not pursue or assist in criminal or civil complaints in relation to the children's abduction; that he will provide weekly contact and financial support for the

return. He will also co-operate with any French proceedings and provide non-molestation and harassment undertakings.

**[15]** The mother's case under Art 13(b) has two limbs: (1) grave risk of psychological or physical harm arising out of the alleged domestic abuse; and (2) intolerability arising (it is said) out of her position vis-à-vis the French legal process. She accepts she must discharge the burden of establishing the Art 13(b) exception and says that, in that regard, she will not be able to obtain representation; that the courts and welfare advisers in France are against her; that she has not been able to get them to acknowledge or consider her detailed allegations; and that she is at risk, having regard to their view of her present cohabitee, of losing her third child into State care. Further, she says that there are witnesses of fact who would support her in the allegations she makes, some of which are contained in the bundle of papers which I have read and considered.

**[16]** Let me deal first of all with her factual case, reminding myself that this is not an appropriate venue for the determination of disputed facts. If I take her allegations set out at paras [6] to [21], inclusive, of her affidavit of 25 January 2008 at face value and ignore the father's adverse commentary upon the same – namely that they are developed only to support her abduction – I must nevertheless assess whether they are, in themselves, capable of establishing the high threshold required. I acknowledge what Wall LJ said in *Re W (Abduction: Domestic Violence)* [2004] EWCA Civ 1366, [2005] 1 FLR 727, at para [49]:

> 'The second proposition with which I find myself unable to agree is the judge's suggestion that an Article 13(b) defence, which in itself demands a high threshold as the law now stands, has no realistic chance of ever being established unless there has been violence or other specific abuse to the child himself/herself. In my judgment, this proposition is not an accurate statement of the law. The court in a Hague Convention case is entitled to recognise the interrelationship and important interdependence between a mother and child who have lived in an abusive situation over a period of time. In my experience, it is well recognised both in the domestic and international jurisdictions that, in the context of domestic violence, the position of the child is vitally affected by the position of a child's mother. If the effect on the mother of the father's conduct is severe, it is, in my judgment, no hindrance to the success of Article 13(b) defence that no specific abuse has been perpetrated by the father on the child.'

I have regard to that dicta in relation both to the allegations which mother makes as to father's violence upon her and also the effect of his behaviour upon the children. I would add that this court takes domestic violence allegations very seriously indeed. However, it is only if I am able to find that the potential effect of the alleged abuse is such that the grave risk of harm can be established that I should move to investigate that by psychological report.

**[17]** I regret that, on the first limb of her defence, I am forced to adopt the submission urged on me by the father. The threshold to make out an Art 13(b) exception is a very high one. The evidence the mother produces falls short of the clear and compelling evidence which would be expected to make out the

exception to the obligation to return. Not to return immediately would frustrate the policy of the Hague Convention. The father, in any event, offers undertakings as to non-molestation and non-prosecution of the mother. In my judgment, this serves to neutralise much of the mother's asserted Art 13(b) factual circumstances. The father is entitled to (and does) rely, in addition, on Art 11(4) of BIIR. The exception which the mother seeks to rely on is centred on the children's, not the parties', interests. Until she abducted the children, the mother allowed the father unsupervised overnight contact; indeed her original application before the French court was for residence with her and joint custody with the father.

**[18]** So far as the second limb of her argument is concerned, it is near impossible to assert without a specific and detailed case that a Brussels' signatory's legal process is such that it, of itself, produces intolerability; in other words the actual circumstances of intolerability must be pleaded. The mother's affidavit evidence does not develop a case which is sufficient to satisfy the threshold in that regard.

**[19]** The French judiciary have responded to the mother's application; indeed her case was upheld by them, at least until she unlawfully removed the children. There were no apparent representational or linguistic difficulties until she chose to leave the jurisdiction and failed to appear before the French judge last November. The welfare report to which I have alluded is detailed and even handed in its condemnation, as are the French court's judgments. There is simply nothing sufficient to permit this court to interfere with the French process. Comity and respect for the policy of the Hague Convention obliges this court, unless there is the most persuasive compelling evidence to the contrary, to determine that the French courts are just as capable of fairly investigating and adjudicating on the competing claims of the parties. The mother's assertions as to the question of fairness of any proceedings in France cannot therefore be an Art 13(b) defence.

**[20]** In all the circumstances, I hold that the Art 13(b) exception is not established and accordingly there must be an order for the return of both of the children to the jurisdiction of the Republic of France.

*Order accordingly.*

Solicitors: *Dawson Cornwell* for the plaintiff
*Allington Hughes* for the defendant

PHILIPPA JOHNSON
*Law Reporter*