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MB v TB (Art 13 Alleged Risk of Oppressive Litigation) (2019)

[2019] EWHC 1019 (Fam)

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Barristers
Paul Hepher
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Court
Family Division

Practice Areas
International Children Law

In Hague Convention proceedings Mr Justice MacDonald ordered the summary return of a child to the State of Israel, rejecting the mother's "grave harm" defence which relied on her assertions both as to the alienation of the child from her by the father and on what she described as his "relentless and oppressive" use of the legal system in Israel.

Background

The case concerned an 8 year old girl, L, whose parents had separated when she was 18 months old. L lived with her mother in Israel and had contact with her father. There was a substantial litigation history in that country in respect of the arrangements for L and financial issues: between 2013 and 2017 the mother had made 24 applications and the father 36. Following mediation in 2017 they agreed to close all the cases against each other, save for the Enforcement Services file in respect of maintenance.

In November 2018 the mother removed L to England, having made significant preparations and having misled L about the trip, describing it as a holiday. The mother accepted that she had done this because she did not want to incur the potential delays of making an application for permission to remove her. Ironically the mother's actions almost inevitably led to the father issuing applications in Israel to protect his interests as well as the Hague proceedings.

These proceedings

The mother relied on the 13(b) exception, namely that return would put L at grave risk of exposure to physical or psychological harm or otherwise place her in an intolerable situation, based on the following two factors:

a) The father's use of litigation allegedly to obstruct her care of L, in the context of substantial disparities between the parents' financial positions;

b) The father's actions which she claimed were alienating L from her with the risk that L might no longer

wish to live with her.

In respect of the first factor she alleged that the psychologist who reported in 2016 on behalf of the Rabbinical Court in respect of L had been influenced behind the scenes by the father and that her own lawyer had been bribed or influenced to give her unhelpful advice.

The mother also sought to rely in these proceedings on critical comments made about the father in two reported judgments of Hayden J in proceedings between the father and a previous wife in respect of their child and comments made in the Court of Appeal in relation to financial remedies proceedings between the father and that wife.

MacDonald J considered that to apply these highly fact specific judgments about the breakdown of a previous relationship and a dispute about a different child would risk "acting on assumption and prejudice and not on evidence." (para 12)

The mother had originally pleaded but did not pursue a child's objections defence. The Cafcass officer, Ms Demery, found no evidence that L had been influenced by either parent or that she had suffered any harm or upset by reason of the father's conduct toward her. She was a resilient child who loved both her parents. Her findings were congruent with the 2016 psychological report. Ms Demery commented that, "L has been left confused as to why she has been taken away from Israel and that she misses her father, home, school, friends and wider family. L is conscious that her mother wants her to remain in London, whilst her preference is to be back home."

The decision
In Re E (Children)(Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 AC 144 the Supreme Court made it clear that the court is not expected to conduct a fact-finding in respect of a grave harm defence; instead the court should assume the risk of harm at its highest on the evidence available to the court and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm are identified. At para 37 of the instant case MacDonald J comments that "The court does not simply assume, without more, the maximum level of risk contended for by the abducting parent. Rather, the court examines the information available to it and, having considered that information, arrives at a reasoned and reasonable assumption as to the maximum level of risk having regard to the available evidence."

There was no evidence for the mother's assertion that L was being alienated from her; the 2016 psychological report and the recent Cafcass report provided evidence to the contrary.

On the basis of an expert report about the Israeli legal system and in accordance with the principle of international comity, the court was satisfied that the Israeli courts would take the necessary steps to ensure that L was not subjected, by reason of litigation about her, to the grave risk of harm asserted by the mother.

The evidence showed that despite the high level of litigation between 2013 and 2017, L had not suffered harm and her mother's ability to care for her had not been impeded. On the contrary she is a happy, well-balanced and confident child despite the prolonged litigation. There was no evidence that the mother had any psychological or psychiatric disorder or predisposition that would lead to her suffering such anxiety that her care for L would suffer if L was returned.

Accordingly the mother's defence was not made out, there was no need for the court to consider the availability of protective measures, and the return order was made along with a plea to the parents "to prioritise her best interests by co-operating in respect of her welfare".

Permission