



Neutral Citation Number: [2019] EWHC 1019 (Fam)

Case No: FD19P00059

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/04/2019

Before :

THE HONOURABLE MR JUSTICE MACDONALD

Between:

MB
- and -
TB

Applicant

Respondent

Mr Paul Hepher (instructed by **Wilson's**) for the **Applicant**
Ms Ruth Kirby (instructed by **Sears Tooth**) for the **Respondent**

Hearing dates: 11 and 12 April 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HONOURABLE MR JUSTICE MACDONALD

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

1. In this matter I am concerned with an application under the Child Abduction and Custody Act 1985 for an order pursuant to Art 12 of the Hague Convention on the Civil Aspects of International Child Abduction (hereafter the 1980 Convention) directing the summary return of L, born in July 2010 and now aged 8 years old, to the jurisdiction of the State of Israel. The application is brought by L's father, MB (hereafter 'the father'), and is opposed by her mother, TB (hereafter 'the mother').
2. The mother removed L from the jurisdiction of the State of Israel on 6 November 2018. Within this context, she makes the following admissions before this court:
 - i) At the time the mother removed L from the jurisdiction of the State of Israel, L was habitually resident in that jurisdiction for the purposes of Art 3 of the 1980 Convention.
 - ii) At the time the mother removed L from the jurisdiction of the State of Israel, the father was exercising rights of custody in respect of L for the purposes of Art 5 of the 1980 Convention.
 - iii) At the time the mother removed L from the State of Israel, the father had not given his consent to that removal.
 - iv) Less than one year has elapsed since the mother removed L from the jurisdiction of the State of Israel.
 - v) The removal of L from the jurisdiction of the State of Israel was wrongful for the purposes of Art 3 of the 1980 Convention.
3. Within the context of these admissions by the mother, and where there has been a wrongful removal of L from her state of habitual residence for the purposes of Art 3 of the 1980 Convention, this court is now required to order her return unless one of the exceptions to the making of a return order is made out.
4. In this case, the mother relies on the exception provided by Art 13(b) of the 1980 Convention, namely that to order the summary return of L to Israel would result in a grave risk of exposure to physical or psychological harm or otherwise place L in an intolerable situation. The mother makes extensive complaints regarding the conduct of the father in her second statement in these proceedings, which complaints range across the circumstances in which the parties marriage came to an end in 2012, the outcome of her divorce settlement by comparison to the father's previous wife and historic allegations of physical and emotional abuse. However, having regard to Ms Kirby's careful and full written and oral submissions on behalf of the mother, the essence of the mother's case resolves into two key situations that she submits will result for L in a grave risk of exposure to psychological harm or will otherwise place L in an intolerable situation were an order for summary return to be made.
5. First, what mother submits is, within the context of the substantial disparity in their respective financial positions, the father's relentless and oppressive use of the legal system in Israel to obstruct her care of L in that jurisdiction. In this regard, the mother relies on a chronology of the litigation in which the parties were engaged in Israel

between 2013 and 2017. Second, the mother submits that certain actions taken by the father in Israel, including a failure to address what the mother submits is inappropriate conduct towards L on the part of his new wife, that are alienating L from her mother and will ultimately lead to a risk that L will no longer wish to live in her mother's care.

6. At the outset of this hearing, the mother also relied on the child's objection exception under Art 13. Having considered the report of the CAFCASS Officer in this case, the mother now no longer pursues that exception. The mother confirmed at the hearing on 22 February 2019 that she sought to rely on L's objection to returning to Israel and Ms Demery of CAFCASS accordingly prepared a report dated 22 March 2019. However, the mother's second statement dated that 5 March 2019 does not deal substantially with any objection raised by L. Indeed, the statement expressly anticipates that L will say that she wishes to return to Israel (albeit the mother seeks to lay that view at the door of so-called parental alienation by the father). Within this context, whilst Ms Kirby now seeks to characterise the use of the exception as "a secondary defence", it is of concern that the exception was ever pursued by the mother.
7. In determining the issues in this matter I have the benefit of reading in full the trial bundle lodged in this case, which bundle includes statements from the applicant father and from the respondent mother, which statements exhibit a number of documents, including a psychological report filed and served in proceedings in Israel. In addition, I have had the benefit of the CAFCASS report of Ms Kay Demery. On 15 March 2019, Lieven J ordered a jointly instructed expert report into the operation of the Rabbinical Court in Israel. In the circumstances, I have the benefit of a report from Professor Dov Frimer, an ordained Orthodox Rabbi and attorney at law admitted to Practice in the State of Israel. Within this context, I have also had the benefit of helpful Skeleton Arguments from Mr Hepher on behalf of the father and Ms Kirby on behalf of the mother. Each counsel supplemented those written arguments with comprehensive oral submissions.
8. Finally, in determining the father's application for the summary return of L to the State of Israel, Ms Kirby also invites me to take into account a series of judgments from other courts in this jurisdiction which deal, to a greater or less extent, with the conduct of the father in the context of earlier proceedings. In particular, Ms Kirby invited me to read and to have regard to the decision of Hayden J in *MB v SB* [2014] EWHC 3719 (Fam), the decision of Hayden J in *MB v SB* [2014] EWHC 3721 (Fam) and also a decision of the Court of Appeal concerning the father.
9. It remained somewhat unclear during her submissions what exactly Ms Kirby invited me to draw from those previous decisions in the context of these proceedings, concerning as they do, in respect of the child abduction proceedings before Hayden J, a different factual situation involving a different mother and child and, in respect of the financial remedy proceedings before the Court of Appeal, a different cause of action altogether. Pressed, Ms Kirby ultimately submitted that the decisions inform the court what type of man the father is, Ms Kirby asserting that the authorities to which I have referred show the father to be a "dishonest and cruel person who will put the war before the welfare of his child". By this rather emotive submission, Ms Kirby appeared to mean that this father will use litigation as a means of oppressing the mother without regard to L's welfare. Within this context, Ms Kirby submits that I am able to, and should rely on the findings she contends are contained in the judgments to judge the

father's character in circumstances where I have not heard evidence from the mother or the father in these summary proceedings.

10. At Ms Kirby's invitation, I have read each of the judgments she presses upon the court. However, having done so, I am satisfied that that the court should be extremely cautious before importing into this case judicial observations regarding parental conduct arising within the context of a different relationship and a different factual framework.
11. It is correct that in *SB v MB* [2014] 3719 (Fam) Hayden J concluded that the father was a man who struggled to empathise emotionally with those around him, particular his *former wife*, the mother, but also [*his daughter*]" (emphasis added). However, it is equally clear that this conclusion was referable to the particular individuals involved in that litigation in the context of the breakdown of a specific relationship about which this court has no first-hand information. Likewise, it is the case that Hayden J observed that "When speaking to *the mother*, the father could, I find, be more than terse, he was dogmatic, occasionally capricious, highly opiniated and sometimes, I am afraid to say, a bully" (emphasis added). However, once again this conclusion is referable to the particular individuals involved in that litigation in the context of the breakdown of a specific relationship about which this court has no first-hand information. The same observation can be made in respect of each of the observations of Hayden J on which Ms Kirby relies in relation to his litigation conduct with his third wife. I acknowledge that Hayden J concluded in (a case concerning an argument as to costs) that the father's "dogmatic, occasionally capricious, highly opiniated" and sometimes bullying conduct characterised his approach to that litigation. However, once again, those conclusions were drawn in the context of *those* proceedings, arising out of a different relationship in the context of the breakdown of that specific relationship. The same goes for observations made by McFarlane LJ (as he then was) in the Court of Appeal and certain comments said to have been made by Moor J and Roberts J (as recited by McFarlane LJ in the Court of Appeal judgment).
12. Previous findings may, of course, be capable of standing, and often do stand as evidence in subsequent proceedings in an appropriate case. However, I am satisfied to apply the highly fact specific judgments rendered by Hayden J in the unique context of proceedings concerning of the breakdown of the father's relationship with his third wife and the resultant dispute with respect to their daughter, and by the Court of Appeal in the context of related financial remedy proceedings, to the father's relationship with *this* mother in litigation relating to *L* in the course of reaching my decision on the facts of *this* case would be to risk acting on assumption and prejudice and not on evidence. Great caution must therefore be exercised. In evaluating the father's conduct in these proceedings, insofar as it is relevant to the Art 13(b) exception, the court must have regard primarily to the evidence in *these* proceedings, including the evidence it has before it regarding the conduct of the litigation in Israel concerning *L* and generally and any other relevant evidence regarding the conduct of the father.

BACKGROUND AND EVIDENCE

13. The background to this matter is extensive and clearly set out in the extensive documentation before the court, which I have considered in its totality. For the purposes of his judgment, the following salient points require to be highlighted.

14. The father is an Israeli citizen of Russian heritage. He was born in May 1964 and is now aged 54. He holds Russian and British nationality. The mother is an Israeli citizen of Yemeni heritage. She was born in April 1984 and is now aged 34. L was born in London in July 2010. She is an Israeli citizen and a British national. The parents' relationship broke down when L was approximately 18 months old. The mother asserts that the last day the father and her were together was 23 May 2012. The mother alleges that the father thereafter stranded her in Israel for the purposes of ensuring that she could not take advantage of the jurisdiction of England and Wales in the subsequent divorce. The father denies this. The father returned to reside permanently in Israel shortly after the mother. In the circumstances, L resided in Israel from 2012 until her admitted wrongful removal on 6 November 2018.
15. On 6 October 2013 the Tel Aviv Regional Rabbinical Court endorsed a signed agreement reached by the parents in relation to custody issues, divorce and ancillary financial issues. That agreement provided for contact between the father and L for two days every week for three hours after school, alternating Sabbaths (with overnight stays) and half the religious holidays.
16. Within this context, the mother alleges that the father has engaged in a campaign to alienate L from the mother. The mother's statement contains very limited particulars, and almost no specific examples referable to particular dates. However, her allegation that the father is systematically alienating L against her appears to be based on the following assertions:
 - i) L shows "troubling signs" immediately following contact, displaying signs of extreme discomfort presenting as tantrums or withdrawal and lashing out at the mother, which conduct resumed when L had contact with her father recently in London, in addition to other concerning conduct.
 - ii) L has told the mother that her father has forbade her from saying anything negative about his new wife.
 - iii) L's relationship with her father is "extremely unhealthy" and he "tries to control her and he confuses L about how she feels about living with me".
 - iv) With respect to L "the alienation goes very deep, after years of attempts by the father to achieve it".
 - v) The father has "manipulated L into believing that I should be left with nothing (in relation to money and her living with me).
 - vi) The father "mainly uses his conversations with L to incite her against me and deepen the alienation towards me."
 - vii) The father "cut off my financial means so that he could appear to be stronger in front of the child.
17. In addition, the mother asserts that L has complained about harsh treatment at the hands of the father's new wife. In her statement, the mother states that the husband's new wife has spoken to her harshly at the dinner table and provided her with a paper plate in contradistinction to other guests. The mother also alleges that the husband's new

wife cut off “most” of L’s hair. This would however, appear to be a considerable exaggeration. The father contends that a small cut was made to remove some chewing gum, which account is corroborated by the psychologist who assessed the family at the behest of the Rabbinical Court in 2016 and saw L’s hair before and after it was cut. He did not notice that it had been cut to the extent now alleged by the mother or at all, nor did he note L demonstrating any distress in respect of this.

18. That psychologist instructed by the Rabbinical Court in 2016 was Dr Daniel Goltlieb. His report is before the court. The salient points set out in that report are as follows:
 - i) L co-operated with the examination and presented a cheerful opinionated, pleasant and energetic who appeared intelligent and well cared for, with a mild difficulty in accepting boundaries.
 - ii) L presented as very comfortable with both her parents. There was “no withdrawal whatsoever” from either of her parents. There was a good connection with both with no reservations noted. There was no danger to the child from either parent.
 - iii) L’s interaction with her father was warm and pleasant. There was a very good connection between him and L, with comfort, nearness and a desire for connection.
 - iv) There was nothing in what L said that expressed any fear, rejection or withdrawal in relation to her father’s new wife.
 - v) The father did not seek custody of L or an increase in the visitation arrangements.
 - vi) Both parents were concerned with the welfare of L and were bringing her up well, although she was subject to a poisonous and hostile atmosphere as a result of continuous legal disputes between the parents, with communication between the parents assessed as “seriously deficient”.
19. In response to the positives contained in the report (which, of course, relate to the mother as well), I note that in her statement to this court the mother asserts that “The report was of concern to me because I felt the father must have influenced it – even perhaps paying someone off to make recommendations in his favour.” Within this context, I further note that the mother seeks to ascribe the fact that the psychologist could not see that, as the mother puts it, “most” of L’s hair had been cut off not to the fact that what had happened was a small cut to remove chewing gum but rather to “serious reasons to believe that that [the psychologist] was influenced somehow behind the scenes [by] the father, which I know he is capable of”.
20. Between 2013 and 2017 it is beyond dispute that there was extensive litigation between the parties in the Israeli courts. That litigation has been the focus of the mother’s submissions during the course of this hearing. As I have noted above, the mother submits that the course of that litigation was dictated by an intention on the part of the father to use the legal system in a relentless and oppressive effort to obstruct her care of L in that jurisdiction. In respect of that litigation, the court has a chronology prepared by the father’s lawyers in Jerusalem and a chronology prepared by Ms Kirby. Each of

the parents also deals with the nature and the extent of the litigation in their respective statements.

21. I pause to note that, in the body of her statement to this court, the mother suggests, without citing any evidence, that the father bribed or otherwise influenced her lawyers. Within this context, upon being criticised for placing a recording device in L's clothing prior to contact with her father, the mother states she was advised to do this by her Israeli lawyer, in respect of which advice she further alleges that:

“It never occurred to me that my Israeli lawyer could have been influenced by the father to give me this advice, but on reflection, since the father found the device, I believe this may well have been a deliberate set up on order to portray me as an obsessive and interfering mother, which I am not...”.

22. As Ms Kirby points out, the court does not have before it the papers from proceedings in Israel. However, having regard to the totality of the evidence that is before the court, including the statement filed and served by the mother in which she appears to demonstrate a good recollection of her circumstances in Israel prior to the abduction of L on 6 November 2018, the following matters fall to be noted:

- i) There appear to have been a number of sets of proceedings initiated in Israel between 2013 and 2016 by either the father or the mother. The papers suggest the following litigation between the parties covering six broad areas:
- a) Proceedings in respect of maintenance and support. Proceedings were commenced by the mother on 8 October 2013 seeking enforcement of the financial settlement, which proceedings included an application by the mother for an order preventing the father from leaving Israel. In October 2015 the mother issued an application to the Enforcement Service to enforce the payment of maintenance by the father. On 10 January 2016 the mother lodged an appeal against the decision with respect to enforcement. On 17 December 2015 the mother issued an application to increase maintenance to cover the costs of employing a nanny. The mother lodged further applications in respect of maintenance to fund the nanny on 30 May 2016 (with respect to the salary of the nanny), 14 July 2016 (for a stay), 21 July 2016 (for an urgent hearing on the issue of maintenance) and 31 August 2016 (for an urgent order regarding payment of the nanny). On 31 August 2016 the father applied for permission to appeal orders made in respect of payments to for the nanny. On 21 September the mother issued an application to enforce payment for the nanny and to fine the father. Further applications in respect of this issue were made by the father on 22 September 2016 and by the mother on 1 December 2016. On 18 May 2017 the father made an application for an order that the mother pay certain expenses in respect of the child. On 30 July 2017 the mother applied to the court to issue a decision regarding the nanny.
- b) Proceedings in respect of visitation rights between the father and L. Proceedings were commenced by the father on 23 October 2013 to enforce the contact agreement reached between the parents in 2013. Further applications in this context were issued by the father on 23

February 2014 (including an application for transfer of custody that was withdrawn on 4 March 2015), 4 May 2014, 15 May 2014, 2 June 2014, 9 July 2014 and 11 August 2015. The mother made applications in this context on 18 May 2014 and 16 June 2014. On 14 December 2015 the father made an application to appoint a mediator. The father made a further application in respect of the visitation agreement on 9 May 2017, on 16 May 2017 and on 5 July 2017.

- c) Proceedings in respect of L leaving the jurisdiction of the State of Israel. Proceedings commenced by the mother 22 December 2013 for the annulment of the order prohibiting L from leaving Israel. The father filed a cross application on 26 December 2013. The mother filed a further application on 7 July 2014 for permission to travel to London with L. Proceedings commenced by the mother on 1 December 2015 for permission to relocate with L to England. The father filed a further application on 20 December 2015 for an order preventing L leaving Israel. The mother's application for permission to relocate was later withdrawn by the mother.
 - d) Proceedings in respect of monies said to be owed by the mother to the father. Proceedings were commenced by the father on 30 March 2014 in respect of a residue of \$1.5M left over following the purchase of an apartment, payment of rent for storage and payments for the nanny. The father issued an application on 22 September 2016 to renew this claim and on 15 May 2017 to revoke this claim.
 - e) Proceedings in respect of a mortgage on the apartment owned jointly by the mother and L. Proceedings were commenced by the mother on 29 October 2014 for permission to take a mortgage secured on her share of the apartment jointly owned with L. On 9 November 2014 an application was issued by the father requesting the court review its decision to permit the mortgage and requesting a stay. A further application was issued by the father in the context of these proceedings on 17 November 2014. The mortgage was approved on 18 January 2018 in the sum of \$300,000.
 - f) Proceedings in respect of certain chattels stored in London and Jerusalem. Proceedings were commenced by the mother on 19 November 2014 with respect to personal items stored in London and Jerusalem to which the father had access. The father issued a cross application in these proceedings on 15 December 2014. He filed a further application within these proceedings on 22 December 2015 and on 11 January 2016 followed by a further application by the mother on 8 February 2016. The father issued a further application in this context on 15 March 2016 and on 14 May 2017 seeking dismissal of the proceedings.
- ii) On 6 November 2017, following mediation between the parties by Rabbi Kharizi, the mother and father filed a joint consent with the court to close all cases between them save for the Enforcement Service file with respect to maintenance. The court duly closed all proceedings.

- iii) Following the mother's abduction of L on 6 November 2018, on 3 February 2019 the father filed further proceedings in respect of the mortgage on the apartment jointly owned by the mother and L and on 3 February 2019 the father filed an application for custody. The latter application is described by his lawyer as the most appropriate "legal technique" to defend the father's rights following the removal by the mother of L from the jurisdiction of the State of Israel.
 - iv) In total the mother issued some twenty-four applications during the litigation between the parents between 2013 and 2017 when the parents agreed to cease all litigation. The father issued some thirty-six applications during the same period.
 - v) Between the date the parents agreed to cease litigation on 6 November 2017 and the mother abducting L from the jurisdiction of Israel on 6 November 2018 neither the mother nor the father appear to assert that there was any litigation between them in the Israeli courts. Whilst the mother makes the point that she has been unable to obtain her court papers from her Israeli lawyers, she does not seek to assert in her statement that litigation continued in the period following the parents' agreement in November 2017, a year before she abducted L from Israel.
23. As I have already noted, and a year to the day on which the parents had lodged with the Israeli court notification of their joint consent to close all cases between them save for the file in relation to maintenance, on 6 November 2018 the mother abducted L to the jurisdiction of England and Wales. She accepts that this abduction was unlawful. On behalf of the mother, Ms Kirby did not seriously seek to dispute that the mother made the conscious decision not to seek permission from the Israeli courts to remove L, but instead chose to proceed notwithstanding the court order in place in Israel granting the father regular visiting rights, and in a deliberate and planned way, to remove L from the jurisdiction of her habitual residence.
24. Indeed, in her statement the mother concedes that the mortgage secured on the property jointly owned by herself and L was secured *expressly* to pay her way in England and put her in funds to resist any application by the father for L's return. She further concedes that she booked flights to London two months in advance. It is also clear that the mother sought, having left the jurisdiction of Israel, to cover her tracks with L's school, sending the school an email on 12 November 2018 that stated "L will be away from the school for the next two weeks because of my business trip abroad". It is further clear from L's statements to Ms Demery that the mother also misled Las to the purpose of their journey to London, L telling Ms Demery that she thought she was coming to London simply for a holiday.
25. At the time the mother abducted L I am satisfied that she was aware, from her application in December 2015, of the need for permission to remove L from the jurisdiction. Indeed, she makes plain in her statement that part of the motivation for abducting L was to avoid the need to go through the proceedings required to obtain permission of the court to remove L from the jurisdiction of the state of Israel:
- "I was advised it could take over a 2-3 years (*sic*) to obtain permission to leave Israel with L because of the father likely raising several appeals. Other's say that such an application with appeals could take many years

especially if there are interlocutory appeals...He is notorious for litigating furiously so I have no doubt that he would fight to the bitter end.”

26. Following the removal of L, the father made clear to the mother that he did not consent to that removal. The father attempted to negotiate an agreed return to Israel, at one point coming to believe that the mother had agreed that she would return after the Hanukah holiday. This did not however, occur and the father’s Israeli lawyers wrote to the mother on 25 December 2018, requesting the “immediate and unconditional return of L to Jerusalem”. When the mother did not return in response to this request, the father instituted these proceedings. On 11 January 2019 the father lodged his request via the Israeli central authority for the child’s return pursuant to the 1980 Hague Convention.
27. As I have noted above, by reason of the mother raising the child’s objection exception under Art 13 of the Convention, L was seen by Kay Demery from CAF/CASS in these proceedings. Ms Demery’s report is before the court. In respect of it, I note the following points:
- i) At no point during their exchange did L suggest, as the mother alleges, that she had suffered harm or upset in Israel by reason of actions on the part of her father, that her father had sought to turn her against her mother, that she was confused in her relationship with her father or that she was distressed when seeing him or was scared of him.
 - ii) Having applied the CAF/CASS tool “*Typical behaviours exhibited by a child where they have experienced alienating behaviours*”, Ms Demery could find no evidence that L had been influenced by either parent. Ms Demery noted in this context that L gave a considered description of her life in both countries and made no unfavourable comparisons between her parents, speaking of them both positively.
 - iii) L spoke freely of feeling safe when next to her mother or her father, choosing a happy and excited face to denote how she would feel if she saw her father. She identified her father as feeling the same way. She spoke about her mother as kind. She stated that she loved both her parents very much.
 - iv) L appeared guarded when Ms Demery mentioned her step-mother and said very little about her.
 - v) L demonstrated an impressive intelligence and ability to speak up and express herself. Ms Demery noted L’s positive school reports and her very positive associations with home life in Israel where she has many friends.
 - vi) Ms Demery noted that whilst L had experienced some adverse life events, including family separation, parental conflict, reported domestic abuse and most recently removal from her home and country, she had developed as a resilient child, within a protective environment which includes “steadfast parental support, contributing to good attachment and self-esteem, as well as good support from relatives which has helped L to manage the variables in her life.” Ms Demery recommended that to ensure a positive outcome and to protect L from emotional harm, that these factors need to remain in place.

- vii) Ms Demery considers 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.

28. As I have noted, having met with L and having read the court bundle, Ms Demery concluded that:

“I could find no evidence to suggest that she had been influenced by either parent. She gave a considered description of her life in both countries, and she made no unfavourable comparisons between her parents. She spoke of them both positively, as she did both countries.”

Further, in relation to the concerning behaviour raised by the mother as evidence of the father acting to alienate L from her mother, Ms Demery concluded that:

“L loves her father and the behaviours which [the Mother] describes L displaying following contact, could in part be attributable to the tension that L would feel in moving between her parents’ homes given the level of conflict between them – the two people she loves most in the world.”

29. Finally, I also note that there is a significant confluence between the information gleaned by Ms Demery and that obtained by Dr Goltlieb when she undertook her assessment in Israel in 2016. Namely that L demonstrates a strong positive relationship with both her parents with no evidence that either has sought to adversely influence L against the other.

THE LAW

30. Art 13 of the 1980 Hague Convention provides as follows with respect to the exception relied on by the mother:

“Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) 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.

The judicial or administrative authority may also refuse to order the return of the child if it finds 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 its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating

to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.”

31. The law in respect of the defence of harm or intolerability under Art 13(b) was examined and clarified by the Supreme Court in *Re E (Children)(Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144. The applicable principles may be summarised as follows:
- i) There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.
 - ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.
 - iii) The risk to the child must be ‘grave’. It is not enough for the risk to be ‘real’. It must have reached such a level of seriousness that it can be characterised as ‘grave’. Although ‘grave’ characterises the risk rather than the harm, there is in ordinary language a link between the two.
 - iv) The words ‘physical or psychological harm’ are not qualified but do gain colour from the alternative ‘or otherwise’ placed ‘in an intolerable situation’. ‘Intolerable’ is a strong word, but when applied to a child must mean ‘a situation which this particular child in these particular circumstances should not be expected to tolerate’.
 - v) Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child’s immediate future because the need for protection may persist.
 - vi) Where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child’s situation would become intolerable the court will look very critically at such an assertion and will, among other things, ask if it can be dispelled. However, in principle, such anxieties can found the defence under Art 13(b).
32. The Supreme Court made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as ground the defence under Art 13(b). Rather, 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. It follows that if, having considered

the risk of harm at its highest on the available evidence, the court considers that it does not meet the imperatives of Art 13(b), the court is not obliged to go on to consider the question of protective measures.

33. As I have noted above, the burden of proof rests upon the mother to make out her case and establish the particulars of that part of the Art 13 exception she relies upon.

DISCUSSION

34. Having had the opportunity of reading in full the bundle in these proceedings and the careful and full Skeleton Arguments prepared by Mr Hephher and Ms Kirby, and having listened carefully to their comprehensive oral submissions, I am satisfied that the mother has *not* made out the exception provided by Art 13(b) of the 1980 Hague Convention. In circumstances where L's removal was wrongful for the purposes of Art 3 of the Convention, I must order the summary return of L to the jurisdiction of the State of Israel. My reasons for so deciding are as follows.
35. In light of the case advanced by the mother, upon whom the burden lies to show that the exception under Art 13(b) is made out, the central question for this court is whether summarily returning L to the jurisdiction of the State of Israel would lead to a grave risk of exposure to physical or psychological harm or otherwise place L in an intolerable situation by reason of (a) a resumption in what the mother contends is, within the context of the substantial disparity in their respective financial positions, the father's relentless and oppressive use of the legal system in Israel to obstruct her care of L in that jurisdiction and/or (b) a continuation of what the mother alleges are actions taken by the father that are alienating L from her mother and will ultimately lead to a risk that L will no longer wish to live in her care.
36. The second point can be dealt with shortly. Beyond the mother's bald assertion, there is no evidence before the court on which the court could properly assume a risk in this case that the father will act to alienate L from her mother. Indeed, the evidence points in the other direction. There is a clearly identifiable continuity between the opinion of Dr Goltlieb in 2016, who noted that L presented as very comfortable with both her parents, that there was "no withdrawal whatsoever" from either of her parents and a good connection with both, with no reservations noted, and the conclusions of Ms Demery in March 2019 that, having applied the CAF/CASS tool "*Typical behaviours exhibited by a child where they have experienced alienating behaviours*", Ms Demery could find no evidence that L had been influenced by either parent. Further, L's positive and loving relationship with her mother as identified by both Dr Goltlieb in 2016 and by Ms Demery in 2019 speaks against any campaign by the father to alienate her from her mother. L is clear that she loves both her parents very much.
37. The methodology endorsed by the Supreme Court in *Re E* by which the court assumes the risk relied upon at its highest is not an exercise that is undertaken in the abstract. It must be based on an evaluation of the relevant admissible evidence that is before the court, albeit an evaluation that is undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention. 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. Within this context,

am satisfied that it is simply not open to the court in this case to assume that there is any risk of the father seeking to alienate L from her mother, let alone a situation of this nature that would result in a grave risk of L being exposed to psychological harm or otherwise place her in an intolerable situation.

38. The position in respect to the first point is somewhat more complex, albeit I am satisfied that my conclusion is the same. The evidence before the court plainly demonstrates that between 2013 and 2017 there was a high level of litigation between the parents in relation to both L and the financial consequences of their divorce. In the circumstances, it is reasonable to assume that upon L's return to Israel further litigation between the parents may ensue. Indeed, the father has, in response to the mother's abduction of L to this jurisdiction, commenced two actions in the Israeli courts (albeit he evinces an intention not to proceed with his application in respect of custody of L). Further, it is the case that this court has information justifying the conclusion that the father is, financially, in a better position than the mother, to sustain any ongoing litigation. In any event, having regard to the litigation history in this case, it may reasonably be anticipated that any litigation that continues in Israel following L's return will, subject to the decisions of the courts in that jurisdiction, be relatively protracted. However, in assessing whether further litigation regarding her welfare in Israel will lead to a grave risk of exposure to physical or psychological harm or otherwise place L in an intolerable situation, that cannot be the end of the court's analysis.
39. First, consistent with the principle of international comity and subject to the question of habitual residence, this court must regard the courts in the jurisdiction of the State of Israel as competent to deal appropriately with questions concerning L's welfare. In *Re S (Abduction: Intolerable Situation: Beth Din)* [2000] 1 FLR at 463 Connell J, in a case in which the mother submitted that a disparity between her status and that of the father would lead to unfair treatment of her in the Israeli courts, observed as follows:
- “...in my view it is not appropriate for this court to carry out a detailed investigation of the law and principle which will underlie an investigation into child-related matters in Israel. It is not appropriate to treat Israel as a case separate and apart from the other signatories to the Hague Convention because of the dual system available in that country. Such criticisms are, in my view, inappropriate in a Hague Convention case...”
40. Further, by reason of the expert report of Professor Frimer sought by the mother in this case and now before the court, this court has undisputed expert evidence confirming that which the court would in any event have assumed absent the expert report having regard to the principle of international comity. The following features identified by Professor Frimer are of particular note:
- i) The family law courts in Israel are comprised on the Civil Court of Family Matters and the religious courts. For Jews, the religious court of proper jurisdiction is the Rabbinical Court. The Rabbinical Court is part and parcel of the Israeli Judicial system, established by statute and subject to the dictates of Israeli law (see *Sima Amir v The Rabbinical Supreme Court in Jerusalem*, 61(1) Piskie Din 259 at 287 (2006) and High Court of Justice 9476/96, *Saragovi, Adv v The Regional Rabbinical Court of Jerusalem*, Nevo 2006).

- ii) Under ss 17 and 25 of the Capacity and Guardianship Law 5722-1962 the overriding principle in all cases is the best interests of the child.
 - iii) The decisions both the Rabbinical Court and the Court of Family Matters are subject to appeal. Decisions of the Rabbinical Court can be appealed to the Rabbinical Supreme Court. Decisions of the Court of Family Matters can be appealed to the civil District Court. The decisions of those courts can, in certain circumstances, be considered by the Supreme Court of the State of Israel.
 - iv) Both the Rabbinical Courts and the Court of Family Matters are subject to the doctrine of due process, with their respective rules providing for full discovery of documents, the subpoenaing of witnesses and the enforcement of judgments.
 - v) All family matter hearings in the Rabbinical Court and the Court of Family Matters are heard in private and the files are sealed (see The Courts [Consolidated Version] Law; 5744-1984; Section 68(e) and The Rules of Procedure in the Israeli Rabbinical Courts, 5753-1993, Rule 25).
 - vi) The Rabbinical Court recognises the issue of parental alienation and, where necessary, the Rabbinical Court has utilised sanctions and has imposed financial penalties against the alienating parent in order to secure contact between the child and the alienated parent (see Regional Rabbinical Court of Netanya 292687/2 *Peloni v Peloni* Nevo 2017) and on occasion has transferred physical custody of the child (see Regional Rabbinical Court of Tel Aviv 910711/3 *Peloni v Pelonit* Nevo 2017). Pursuant to ss 25 and 68(a) of the Capacity and Guardianship Law 5722-1962 the court can order the psychological assessment of the child in the face of parental opposition to such an assessment.
 - vii) Whilst used sparingly (as is, I observe, the domestic power under s 91(14) of the Children Act 1989) there have been occasions when the Rabbinical Court has issued an order preventing a parent from taking legal action with first applying for permission from the court.
 - viii) Psychological or emotional abuse can, depending on their degree of severity, constitute sufficient cause for the Rabbinical Court to issue protective orders preventing the abusive parent from coming into contact with the child.
41. As I have noted above, the court must exercise great caution with respect to the use of judgments arrived at in respect of the father in the context of separate and factually different proceedings litigated some five years ago. However, in the context of the mother's case regarding the impact of further litigation by the father in Israel, the point regarding the competent approach of the Israeli courts to the issue of L's welfare is reinforced by observations made by Hayden J in one of the authorities to which I was referred by Ms Kirby, namely *SB v MB* [2014] EWHC 3721 (Fam) at [2]:

“I was not surprised, in a case that I had already described as having been 'litigated to saturation point' that my findings were met by an immediate application, on behalf of the father, for permission to appeal. I observe, in passing, that there has been a parallel 'jurisdictional' issue pursued by the father in the Israeli courts. It has been pursued there with what I have come to recognise as the father's hallmark vigour. Following a resounding

rejection of his application at first instance, a judgment that was highly critical of him personally, the points were pursued on to the Court of Appeal in Israel and eventually to the Supreme Court there. That litigation has been entirely futile, on my reading of the respective judgments. What is perhaps most reassuring however is the conformity both of principle and approach in the two country's respective Hague Convention jurisprudence.”

42. In the circumstances, whilst it is recognised internationally that litigation has a caustic effect on children’s emotional wellbeing and should be avoided where possible in favour of mediation and considered compromise, this court can be confident that the courts in the jurisdiction of the State of Israel will take the steps necessary to ensure that any further litigation between her parents, however undesirably protracted, will *not* be allowed to lead to a grave risk of exposure to physical or psychological harm or otherwise place L in an intolerable situation.
43. Further, and once again deprecating the use of litigation in respect of disputes concerning children over mediation and compromise, the court has evidence *in this case*, in form of the report of Dr Goltlieb and Ms Demery that, notwithstanding the high level of litigation between her parents, that litigation has not to date inflicted appreciable emotional harm on L. Ms Demery is clear that L presented as a resilient child who impressed as intelligent and articulate. She assessed L as being confident and assertive with a cognitive maturity commensurate, if not beyond her chronological age. Within the context of the extensive litigation that has taken place in Israel, Ms Demery noted that L was able to give a considered description of her live in Israel and the United Kingdom and made no unfavourable comparisons between her parents, speaking of both positively. In the circumstances, notwithstanding its extent and duration, there is no evidence to suggest that L has been emotionally harmed to date by the undesirable litigation between her parents such that the court could conclude that returning L to Israel would result in a grave risk of exposure to physical or psychological harm or otherwise place L in an intolerable situation.
44. The matters set out in the foregoing paragraph also highlight the absence of evidence in this case to support the mother’s contention that she has been, by reason of the extensive litigation between the parents in Israel, obstructed from caring properly for L. To the contrary, notwithstanding the nature and extent of the litigation between 2013 and 2017 the mother, who has been the primary carer of L throughout that period, has succeeded in raising a happy, well balanced and confident child. Indeed, whilst credit for this outcome must also be given to the father and to the wider family, there is no evidence before the court to suggest that prior to the mother abducting L to England, the mother was incapable of caring for L and meeting her needs. Rather, L was thriving at home and school enjoying her life in Jerusalem. Ms Demery is clear in her assessment that:

“Using the Resilience/Vulnerability Matrix as devised by Calder, M. (2006, I would assess L as a resilient child. Whilst L has experienced adverse life events such as family separation, parental conflict, reported domestic abuse and peremptory removal from her home country, her protective environment, which includes steadfast parental support contributing to good attachment and self-esteem, as well as good support from relatives, has helped L to manage the variables in her life. To ensure a positive outcome for L and to protect her from emotional harm, these factors need to remain in place.”

45. Within the foregoing context, whilst the mother seeks to rely on the decision of the Supreme Court in *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 AC 257, there is no evidence before the court on which the court could conclude that, per Lord Wilson, “on return, the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child”. Beyond her bald assertion, there is no evidence that the mother suffers from any psychological or psychiatric disorder or emotional deficit. The mother has not provided evidence of a predisposition to any condition that may, on L’s return to Israel being ordered, place L in an intolerable situation in the mother’s care.
46. Most importantly, and once again, whilst the mother asserts that her mental health has suffered and will suffer to the extent that she would be disabled from caring for L if L were returned to Israel and litigation were to recommence, the evidence before the court suggests the opposite. As set I have set out in the foregoing paragraph, the evidence before the court demonstrates that, notwithstanding the nature and extent of the litigation between 2013 and 2017 the mother, as primary carer of L throughout that period, has succeeded in raising a happy, well balanced and confident child. Within this context, Ms Kirby herself asserts in her Skeleton Argument that “The mother has proven herself resilient against the great and persistent efforts made by the father to bring her down and to defeat her.” This position is advanced by the mother notwithstanding the additional matters she seeks to pray in aid, namely her allegation that the father stranded her in Israel in 2012 and that there was sporadic physical abuse by the father towards her prior to their relationship breaking down that year, each of which allegations the father denies.
47. Once again, the methodology endorsed by the Supreme Court in *Re E* by which the court assumes a maximum level of risk is not an exercise that is undertaken in the abstract, but rather must be based on an evaluation of the relevant admissible evidence that is before the court, undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention. Having undertaken this exercise having regard to the *evidence* before the court, and for the reasons set out above, I am not satisfied that it is open to the court in this case to assume that any resumption of litigation between the parent in respect of Lin the Israeli courts would result in a grave risk of L being exposed to psychological harm or otherwise place her in an intolerable situation.
48. In all the circumstances, I am not satisfied that the risks the mother prays in aid in this case meet the imperatives of Art 13(b) of the 1980 Convention. In circumstances where the contended for risks does not meet the threshold of Art 13(b), it is not necessary for me to go on to consider the question of protective measures, albeit that the father nonetheless offers in his statement, and through Mr Hepher, the following:
 - i) The father will pay the travel costs of the mother and L returning to the jurisdiction of the State of Israel;
 - ii) The father will undertake not to attend the airport on the date that the mother and L arrive in the jurisdiction of Israel;
 - iii) The father undertakes not to instigate any criminal proceedings in the State of Israel.

- iv) The father will undertake to pay child maintenance to the mother in accordance with the divorce settlement ensure that one months' child maintenance is paid to the mother prior to her departure from this jurisdiction;
- v) The father undertakes not to seek remove L from her mother's care pending the first on-notice hearing in the Israeli court, the father making clear he does *not* seek custody of Land seeks only to enforce his visitation rights.

CONCLUSION

- 49. In the circumstances, and for all the reasons set out above, I am satisfied that I must order the summary return of L to the jurisdiction of the State of Israel and I do so. Subject to any further submissions I may hear, I am satisfied that L should return to that jurisdiction in time to commence her new school term on 24 April 2019.
- 50. I am satisfied on the evidence before this court that the mother's actions on 6 November 2018 constituted a premeditated and blatant act of child abduction, and one intended to circumvent the due process of the courts in the State of Israel. Whilst the mother complains about the father's highly litigious character, in circumstances where the parties had reached agreement in November 2017 to end the extensive internecine litigation between them in Israel, it is ironic that it has been the precipitate actions of the *mother* that has instigated a further round of litigation in respect of L after a year of relative calm. Whilst it may well have been the case that a request by the mother that the father agree to the relocation of L to this jurisdiction would have resulted in a further protracted round of litigation in Israel, notwithstanding the period of calm that followed the parents' agreement in November 2017, the mother's peremptory actions a year later were *certain* to lead to that end and have done so. Moreover, those actions were unlawful.
- 51. What is clear beyond peradventure is that it is well past time for these parents to stop litigating and start cooperating with regard to L's welfare. Whilst I am satisfied that L has, happily, the resilience to meet the challenges presented by her parents seeming inability at times to discharge their collective responsibility as parents without resorting to squabbling and bickering between themselves in the courts, L should not have to rely on that resilience to protect her from the emotional consequences of her parents' inability to collaborate in her best interests. Rather, L is entitled to expect both her parents to prioritise her best interests by co-operating in respect of her welfare. Whilst November 2017 appears now to have represented a false dawn in this regard, it is to be hoped that the parents can now, finally, start putting L first.
- 52. That is my judgment.