**Re Z and X (Visit to Ukraine) [2024] EWHC 314 (Fam)**

The application and background

This case was an application that concerned two children, a girl, who is referred to as ‘Z’, aged 16 and her younger brother, who is referred to as ‘X’, aged 11. They children are those of the applicant father, NW (‘the father’), and the respondent mother, SW. The parents are both Ukrainian nationals.

The children reside in the UK with their mother and have done since the three of them travelled over from Ukraine in April 2022, shortly after the outbreak of war. Until February 2022, both parents and the children lived in Kyiv, Ukraine. On that date Russian military forces invaded Ukrainian sovereign territory. The father remained in Kyiv and has been unable to travel internationally since due to restrictions under martial law. The parties divorced in May 2023. The mother has a new partner who she has been with for some time.

In October 2022, the father made his first application, under the Hague Convention 1980 for the summary return of the children to Ukraine. The mother opposed the return on the basis of habitual residence, acquiescence, Art. 13(b), and child objections. A CAFCASS report was ordered and Ms Baker of the bespoke CAFCASS High Court Team met with the children and elicited their wishes and feelings. The report noted that the children felt conflicted in that both of them had a good relationship with their father, but that ultimately, they did not wish to return to Ukraine. The mother agreed that she would only allow direct contact in a safe third country and would otherwise facilitate indirect contact by way of an app.

In light of rapidly changing situation at the time, and that Kyiv was widely accepted not to be a safe place, the father sought permission from the court to withdraw his first application. This was granted on 16 April 2023. The Judgment in the case is reported at Z and X, Re (Children: Article 13(b): Return to Kyiv) [2023] EWHC 602 (Fam) (17 March 2023).

Subsequently, the father made a second application, the title case, effectively for direct contact with the children via the ICACU. The application was brought under Article 21 of the Hague Convention 1980, which in its domestic application proceeds by way of an application for an order under section 8 of the Children Act 1989 (‘CA 1989’). The father sought a contact, or ‘time spent with’, order. Specifically, an order that the children travel to Ukraine for a holiday visit with him at Easter, and/or in the summer of 2024, and for repeat holidays thereafter, which would enable direct contact. The father identified the Transcarpathia region as a safe enough area of Ukraine for the visits between himself and the children to take place.

The mother’s position that she was concerned about the children travelling to Ukraine or its borders at a time of an ongoing conflict. She was opposed to the children travelling to Transcarpathia on account of safety, journey times, practicality, the financial implications on her if she were to bear the costs of travel, and that the children themselves were uncertain to make the journey. It was the mother’s view that these issues were inextricably linked.

The court heard oral evidence from the Cafcass officer, the mother and the father. Both the parents were assisted by interpreters

The Issues

On determination of the application, the judge considered that the statute enjoined him to place the welfare of the children at the centre of the decision-making process (section 1 CA 1989) and that, in doing, he must have regard to all of the circumstances of the case, paying particular regard to the factors set out in section 1(3).

*Of those factors, the ‘ascertainable wishes and feelings of the children’, the ‘risk of harm’, and the ‘emotional needs of the children’ are the factors which acquire particular prominence. I also must consider whether (as far as Z is concerned, who is 16 years old) the “circumstances of the case are exceptional”*.

The judge considered the issues on which it would right to focus on, in this case were these:

*[22]*

* 1. *The importance for the children of maintaining and enhancing their relationship with their father; the children and the father’s mutual rights under article 8 of the European Convention on Human Rights to a family life should be respected fully;*
	2. *The parents’ wishes/views;*
	3. *The physical risks associated with the proposed contact in Ukraine; and the risks of emotional harm to the children (which may be caused by anxiety, distress, upset at the long and arduous journey to get there not to mention their current resistance to travel);*
	4. *Risk of abduction of the children to Kyiv by the father, and their retention there;*
	5. *The practicalities of the proposal for the children to travel to Ukraine, and the cost of this proposal;*
	6. *The views expressed by these children given their age and level of maturity.*

The judge also considered Article 8 of the ECHR in regard to the application, which provides that the father and the children have a right to respect for their family life. European and domestic caselaw is clear that contact between parent and child is a fundamental element of family life and is almost always in the interests of the child.

Furthermore, the judge acknowledged that children were emotionally conflicted and considered that this was somewhat inevitable. The judge was satisfied that the children love their father, but are anxious nonetheless about embarking on any journey to Ukraine to see him. The also considered the possibility that the children’s reluctance masked an apprehensiveness about what awaits them when they arrive. It was also noted that:

*[34] Z is an independent young person with her own mind and a “very clear idea of what she wants” (per the mother)*

The father agreed with this view of his daughter and acknowledged that X was in a ‘maturing’ position.

Decision

The judge shared that he had considerable sympathy for both parents in view of the trauma which the war is likely to have inflicted on them both as individuals. The judge also acknowledged the sadness and frustration of the father whilst not being in a position to have direct contact with the children.

It was considered that it was his lordship’s ‘positive duty to promote contact’ and with that he sought to grapple with all the available alternatives for achieving direct face-to-face contact before he abandoned hope of achieving it at the moment. The judge also ascertained that his powers in the case were somewhat limited, in material respects, for instance:

1. *I may make section 8 orders in respect of Z only if I find that the circumstances of the case are exceptional. The circumstances are exceptional in the sense that unusually this applicant father seeks direct contact with his children in a country which is currently at war; but looked at from Z’s perspective, there is nothing about her (as a mature and independent young person) or her relationship with her father (a loving one) which ‘exceptionally’ requires me to make an order;*
2. *I cannot make any order requiring or compelling the mother to accompany the children to Ukraine; if the mother chooses not to travel, I am sure that the children would not go;*
3. *I have limited (if any) powers to direct the mother to pay the not inconsiderable cost of travel either for herself and/or for the children as the father proposes; there has been no detailed examination of her means;*

The judge was also not minded to accept undertakings by the father about the return of the children and not to place them in danger given the court’s uncertainty about the recognition of such in Ukraine although the judge was prepared to accept that:

[27]*…Transcarpathia is not intrinsically unsafe at present; as indicated above, the FCDO is not warning against all travel there, but against all “but essential” travel to this area. It seems unlikely that conflict will break out in the region now on the information before me, although it cannot of course be completely ruled out.*

However, whilst the judge took the view that the Transcarpathia region was not intrinsically unsafe he also considered these factors to be crucial in his decision: that the journey to Ukraine is lengthy, arduous, and unpredictable **[19]**; the children are reluctant to make the visit to see him **[34]**; that the mother had not set out to influence the children against the notion of a visit **[24]**; that he considered the anxiety that was articulated by the children in regard to visit to Ukraine is deeply held **[43]** and that it would not practicable or reasonable to expect the mother to accompany the children to Ukraine **[32]**.

In light of the above, the father’s application for direct contact in Ukraine was refused. The judge also refused permission to appeal.

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29 February 2024