



Neutral Citation Number: [2021] EWHC 2186 (Fam)

**IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before:

Mr Justice Poole

Between:

Re: P and Q (Hague Convention: Consent) (Costs)

Andrea Watts (instructed by **Shepherd Harris & Co.**) for the **Applicant Father**
Cliona Papazian (instructed by **Brethertons LLP**) for the **Respondent Mother**

Hearing dates: 20th to 22nd July 2021

COSTS JUDGMENT

Mr Justice Poole:

Introduction

1. This is a judgment on the respondent mother's application for a costs order following my dismissal of the applicant father's applications for return orders under the Hague Convention 1980 and the Inherent Jurisdiction in respect of the parties' two daughters, aged 11 and 12. The parties are both citizens of the United States of America who lived there all their lives until their marriage broke down in 2019 and, in August 2020, the mother came to England with the children for a three year posting as part of her employment.

2. Prior to travel, the father had signed a Consent to Travel document, and a Separation Agreement ostensibly agreeing to the children moving to England with the mother for so long as she was employed here. He contended that his consent had been obtained by misrepresentation or duplicity by the mother and that the children were wrongly removed in August 2020. Alternatively, he contended, the mother had wrongfully retained the children in England. The mother disputed those claims, submitted that the children were habitually resident in England at the time of any alleged wrongful retention, and argued that in any event the defences of grave risk of harm and children's objections were established on the evidence, and that the court should not exercise its judgement to return the children. The mother opposed the father's application under the inherent jurisdiction.
3. I found that the father had consented to the children moving to England with the mother and that there had been no wrongful retention. The children were habitually resident in England by the end of 2020. Had it been necessary to consider them, I would have found that the defence of the children's objections was established but not the defence of grave risk of harm or intolerability. I would not order the children's return under the Hague Convention or the inherent jurisdiction.
4. The father was entitled, as of right, to public funding for his application. The mother was not. Although not wealthy, both parents enjoy a good level of earnings. Had public funding been means tested it is unlikely that the father would have been eligible. The limited evidence I have about the means of the parents does not demonstrate any marked disparity in their earnings or assets.
5. The mother's costs schedule runs to just over £27,000. Due to the disparity in their entitlement to funding for their legal costs then, in the absence of a costs order in her favour, the mother will be out of pocket by that amount, whilst the father will be financially unaffected. Given that he instigated the costly proceedings and that his applications have been dismissed, the mother may understandably feel aggrieved and harbour a sense of injustice that she has paid a substantial financial penalty for the father's failed application whilst the father remains financially immune.
6. Ms Papazian for the mother draws my attention to two first instance decisions: *EC-L v DM (Child Abduction: costs)* [2005] EWHC 588 (Fam), [2005] 2 FLR 772, a decision of Ryder J, and *SB v NB* [2014] EWHC 3721 (Fam), a decision of Hayden J. In the former, the successful defendant applied for a costs order against the publicly funded plaintiff. In the latter, both parties were privately funded. Ryder J reviewed the 1980 Convention, human rights considerations and public policy, but determined that:
 - a. The High Court has jurisdiction to award costs in cases brought under the Hague Convention 1980 and applications for the court to exercise its inherent jurisdiction.
 - b. Article 26 of the 1980 Convention does not prohibit the courts from making otherwise lawful costs orders against a party to Convention proceedings.
 - c. There are no special costs rules for 1980 Hague Convention cases. Accordingly, in each case where a costs application is made there should be a costs inquiry on the merits.

7. The statutory provisions and rules of court that applied at the time of Ryder J's judgment have since changed. Under section 26 of Legal Aid, Sentencing and Punishment of Offenders ("LASPO") Act 2012:

26 (1) Costs ordered against an individual in relevant civil proceedings must not exceed the amount (if any) which it is reasonable for the individual to pay having regard to all the circumstances, including—

(a) the financial resources of all of the parties to the proceedings, and

(b) their conduct in connection with the dispute to which the proceedings relate.

"Relevant civil proceedings" are those proceedings, or the part of proceedings, for the purposes of which civil legal services are made available to the individual under the relevant part of the Act. The LASPO Act refers to regulations providing for the principles to be applied in determining the amount of any costs which may be awarded against a party to whom civil legal services are made available, and limiting the circumstance in which, or the extent to which, an order for costs may be enforced against such a party.. Those are the Civil Legal Aid (Costs) Regulations 2013. Reg. 15 sets out how the court should make a determination of costs. Reg. 15(1) provides:

15.— (1) Where the court is considering whether to make a section 26(1) costs order, it must consider whether—

(a) but for cost protection, it would have made a costs order against the legally aided party; and

(b) if so, whether, on making the costs order, it would have specified the amount to be paid under that order.

"Costs protection" means the limit on costs awarded against a legally aided party in relevant civil proceedings set out in section 26(1) and (2) of the LAPSPO Act. It appears that by reg. 6 there is no costs protection for legal representation in family proceedings for which civil legal services are provided. 1980 Hague Convention applications are family proceedings, as are applications for the court to exercise its inherent jurisdiction. Therefore, no costs protection applies.

Accordingly, I am required to conduct a costs inquiry on the merits. That inquiry is not restricted by reason of the applicant father being publicly funded. Ryder J said at [68],

It should be the expectation in child abduction cases that the usual order will be no order as to costs but where a party's conduct has been unreasonable or

there is a disparity of means then the court can consider whether to exercise its discretion in accordance with normal civil principles.

8. Under the Access to Justice Act 1999 and the Community Legal Service (Costs) Regulations 2000, which applied at the time of Ryder J's judgment, there was costs protection for publicly funded litigants in 1980 Hague Convention proceedings, and linked inherent jurisdiction applications, such as those made by the applicant father, but it appears that under the LAPSO Act and the Civil Legal Aid (Costs) Regulations 2013, there is no such protection. Hence, it is not clear to me that disparity of means should necessarily be regarded as a trigger for departing from the "usual order".
9. "Normal civil principles" were set out by Hayden J in *NB v SB* (above). The general rule in civil proceedings is that the unsuccessful party will be ordered to pay the costs of the successful party - CPR rule 44.2(2)(a) - but that general rule is disapplied in relation to first instance proceedings about children - FPR rule 28.2(1). Nevertheless, CPR r 44.2(4) and (5) do apply – they set out matters to which the Court should have regard:
 - (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
 - (a) the conduct of all the parties;
 - (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
 - (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
 - (5) The conduct of the parties includes –
 - (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
 - (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
 - (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
 - (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.
10. I also bear in mind the overriding objective to deal with cases justly having regard to any welfare issues involved.

11. Aside from the rules governing costs, I need to consider guidance from the appellate courts. In *Re S (A Child) (Access to Justice Foundation Intervening)* [2015] UKSC 20 Baroness Hale repeated the established general rule that no costs orders should be made “Whenever a court has to determine a question relating to the upbringing of a child”. Ryder J considered whether that principle – articulated also in *London Borough of Sutton v Davis (costs) No. 2* [1994] 2 FLR 569 – applied equally to 1980 Hague Convention cases as to other family law cases involving children. He concluded that it did. I adopt his reasoning and conclusion in relation to both the Hague Convention and inherent jurisdiction applications in the present case.
12. Accordingly, as a general principle, I should only make an adverse costs order against the unsuccessful applicant father if there are exceptional circumstances. Such circumstances might arise where he has been guilty of reprehensible conduct or where the pursuit of the case has been unreasonable. Pursuing a weak case is not sufficient – *Re G (Costs: Child Case)* [1999] 2 FLR 250 at 253.
13. In this case I do not believe that it can be said that it was unreasonable for the father to have brought his application or to have pursued it to a final hearing. The mother alerted the court to the written Travel Consent document at the earliest opportunity and put the father on notice that she would make a costs application if she succeeded in defending the case. However, she herself accepted that the written agreement was not the entirety of the agreement between the parties. The father too alleged that the written agreement did not reflect the true or full agreement. Ms Watts was able to make cogent submissions on the issue of consent. The fact that the mother succeeded on the issue of consent does not mean that the father’s case on wrongful removal was hopeless or that it was unreasonable for him to have pursued it. The position is similar in relation to the alternative allegation of wrongful retention.
14. Ms Papazian for the mother also complains that the father unreasonably continued the applications after receipt of the report of Ms Huntington, Cafcass Officer, which clearly set out the children’s objections to returning to the USA. I acknowledge force in the suggestion that the father ought to have reflected on that evidence and considered withdrawing his applications. If he was truly concerned with the welfare of his daughters, then pressing for their return against their clearly stated wishes, in the circumstances of this case where there were no safeguarding concerns arising out of their continued stay in England, their stay was for a limited period in any event, and the parents had been co-operative in relation to contact, was a questionable decision. Nevertheless, the defence of child objections was for the mother to prove and the fact that a Cafcass Officer considered that the children did object and were sufficiently mature for their objections to be taken into account, was not binding on the court. Again, Ms Watts was able to make cogent submissions that the defence was not made out. It was unwise but not unreasonable for the father to continue with his case after receipt of Ms Huntington’s report.
15. It is fair also to note that the mother raised the defence of grave risk of harm/intolerability at the eleventh hour, and that I found, in the event that I was wrong about other matters, that the defence would not have succeeded.
16. The one aspect of the father’s conduct of his case that I am concerned was unreasonable, is that he made a without notice application for a Location Order which

was heard and granted on 30 March 2021. He persuaded the court on that occasion that the mother was not being candid about her address in England, and that there was a risk of flight if notice were given. Having now heard all the evidence in this case at the final hearing, it seems to me that there was no basis at all for applying for a Location Order, or for doing so without notice. The father was in England at the time of his application and the first hearing. Indeed, he was living in the same town as the mother and children. He had been in regular communication with the mother and children. He knew where their home was and if he had been unsure whether they had moved out he could have gone there to check, or emailed, or telephoned. The mother told the court, and I accept, that she and the children did remain living in the same home. Nor was there any real risk of flight. The mother is an employee of the US government. She had gone to great lengths to make arrangements to come to England for the purpose of her job, and to place the children at schools here. The father was heavily involved in those arrangements. The whole basis of the dispute between the father on the one hand, and the mother and children on the other, was that the mother and children wanted to *stay* in England. The mother had never hidden from the father or evaded justice, and there were absolutely no grounds for thinking she would do in March 2021. In my judgement, having heard much more evidence than was before the court on 30 March 2021, it is clear that the application should never have been made and certainly not without notice. A Location Order was unnecessary because the father knew, or ought to have known, where the children were located. The father's conduct in seeking and obtaining a without notice Location Order was unreasonable.

17. Being a without notice application it did not lead to the mother incurring costs of attendance on that date (30 March 2021). Only minor costs would be associated with her having to deal with the order once it was made. She would have had to have attended an "on notice" hearing in any event. Nevertheless, the without notice application was the first step in these proceedings. The mother did have to address it. She had no opportunity to consider the father's applications prior to police officers attending her home, with the children present, to seize their passports. She was given no prior opportunity to seek to resolve matters with the father. The mother had to expend resources in countering some of the matters set out in the father's statement that had been drafted prior to the without notice application. The father set the tone for the application by seeking a Location Order without notice.
18. The Court recited that the respondent mother had been reluctant to reveal her current address to the applicant father who had alleged that she had told the children to lie about this. It was also recited that the applicant father had concerns that the mother had deceived him about various other matters and "therefore there is a risk that she may remove the children to an undisclosed location if given notice of the proceedings." The father's contentions to the court on those matters have been shown to be baseless now that fuller evidence has been considered.
19. The father's conduct in seeking and obtaining a Tipstaff order at the beginning of these proceedings ought, I am satisfied, to be reflected in an adverse costs order, but given that the costs consequences will have been modest, the costs order ought to be proportionate.
20. I am not convinced that disparity of means would, without more, justify an adverse costs order, but in any event I have no evidence of a disparity of means between the

mother and father. The disparity such as it is arises only because the father is publicly funded and the mother is not. Any injustice caused by a disparity in entitlement to public funding results from decisions by parliament and it is not for judges to use costs orders in individual cases to correct the disparity by making an adverse costs order.

21. The best evidence I have is that the father's income was approximately US\$160,000 per annum, and that it is likely that he is currently earning a similar amount. Although I have little evidence on the mother's income, it did not appear to be in dispute that her earnings are in the same region as the father's earnings.
22. Accordingly, I conclude that, although the applicant father's conduct of and in this application should not, in general, be characterised as unreasonable or reprehensible, he was guilty of unreasonable conduct in making a wholly unnecessary application for a Location Order, and doing so without notice.
23. I am satisfied that the applicant father's conduct in this respect was unreasonable and that an adverse costs order should be made. However, the costs order should be reasonable and proportionate having regard to the nature and consequences of his conduct. The direct costs to the mother of the father's application for a Location Order will have been a relatively small part of her total costs. She will have had to obtain advice and responded to the application on the next hearing, but she would have had to have attended a first on notice hearing in any event. She was however deprived of the opportunity to seek to resolve, or narrow, issues between the parties, prior to the first application to the court. She had to correct matters that the father had relied upon in support of his unreasonable application. The way in which the proceedings started set the tone for the dispute that continued to the final hearing. The mother's total costs schedule comes to £27,316.10 inclusive of VAT. I shall order the father to pay to the mother costs in the summarily assessed sum of £4,000 plus VAT of £800, a total of £4,800. This is a sum which it is reasonable for the father to pay having regard to all the circumstances including the financial circumstances of the parties and their conduct in relation to the dispute.