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IN THE HIGH COURT OF JUSTICE  
FAMILY DIVISION  
[2021] EWHC 890 (fam)



No. ZC20P01401

Royal Courts of Justice  
Strand  
London, WC2A 2LL

Thursday, 25 March 2021

IN THE MATTER OF AA AND BB

Before:

MR JUSTICE HOLMAN

(In public)

B E T W E E N :

The father Applicant

- and -

The mother Respondent

MR W. TYLER QC and MR W. TYZACK (instructed by Linkilaw Solicitors) appeared on behalf of the applicant.

MR T. GUPTA QC and MISS J. RENTON and MISS J. PERRINS (instructed by Family Law in Partnership) appeared on behalf of the respondent.

J U D G M E N T

( A s a p p r o v e d b y t h e j u d g e )



MR JUSTICE HOLMAN:

1 This hearing today is a sequel to a hearing which took place before Mr Nicholas Cusworth QC, sitting as a deputy High Court judge, on 17 February 2021, in which he handed down judgment on 1 March 2021. His judgment is now publicly reported (with anonymisation) on the BAILLI website under neutral citation [2021] EWFC 17. His judgment sets out in considerable detail the family history and the procedural context of the present proceedings. I will not repeat that detail in this short judgment for the purposes of today's hearing.

2 In very brief summary, both parents are Russian citizens. The father is also a citizen of Greece. Accordingly, both the children also have dual Russian and Greek citizenship. The parents were married to each other and have two children. The elder, A, is now aged 14, and the younger, S, is now aged 4.

3 Although I have not the slightest idea as to the scale of the assets and means, it is obvious in this case that the wife is a person of some substantial wealth. I say that because, amongst other things, she owns two apartments in Kensington in London which cost in aggregate between £13 and 14 million. She also owns a substantial house in Siberia. It is quite clear that the parties have enjoyed a comfortable, or even luxurious, lifestyle. Their children are privately educated. They have the service of a nanny and other advantages.

4 Probably also because of the relative wealth of the family, these proceedings are currently being litigated with an intensity and degree of complexity that one would not find with less well-advantaged families.

5 It seems clear that this is a family which currently and in recent years has, as it were, had feet both in Russia and in London, England. As I have said, the wife owns properties in

both countries. It seems clear that both parents and their children have spent significant amounts of time in both countries. Currently, however, both children are attending regular schools here in London.

6 Sadly, the marriage between the parents seems irretrievably to have broken down and events all came to a head during the period from about September to November 2020 after the parties returned to London with the children after a period of disruption referable to the COVID-19 pandemic. The father, in his capacities both as father and also as husband, commenced proceedings in England for child arrangements orders and also for an English divorce. The mother commenced proceedings in Russia for what we would describe as child arrangements orders and also for a Russian divorce.

7 I will not, in this judgment, and for the purposes of what I am dealing with today, make any reference to the precise timing and dates of each party's respective proceedings, since there is a lot of controversy, in particular in relation to the timetable in Russia. But a situation clearly arose where there was potential for a conflict between courts here and in Russia, with each of which there were, and are, obvious connecting factors.

8 So far as the English divorce proceedings are concerned (which are, of course, completely separate and discrete from issues in relation to the children), there is currently listed a hearing in June 2021 before Mr Cusworth to consider the jurisdictional basis of the husband's English divorce proceedings. There are undertakings in place pursuant to the *Hemain* jurisdiction which were intended to "hold the ring" and postpone any divorce being granted in Russia until after that hearing. Very recently, however, the wife says that, without, she says, any intervention by her, the Russian court has already granted a divorce which, subject to appeal, will soon become final. So that is an entangled situation in the background of this case, but it does not impact directly on today.

9 At the hearing on 17 February 2021, Mr Cusworth was considering an application advanced by the mother in the children proceedings to the effect that pursuant to Article 13 of the 1996 Hague Convention on the Protection of Children the English court should abstain from exercising any jurisdiction in deference to prior proceedings in the Russian court. In fact, by that date, the Russian court had not decided whether or not it did have jurisdiction in relation to these children and, if so, whether it should exercise it. By paragraph 6 of his formal order dated 1 March 2021 Mr Cusworth recorded that:

“... the Russian court has not yet determined its own jurisdiction on the basis of the children’s habitual residence.”

10. At paragraphs 55 and 59 of his judgment of 1 March 2021, Mr Cusworth clearly considered and ruled that it was premature for this court to give effect to Article 13 when the Russian court had, at that time, itself not decided whether or not it had, or should exercise, jurisdiction. So he said at paragraph 55:

“Before the Russian court has determined that it considers itself to have jurisdiction, I am clear that it would not be appropriate for this court to declare now that it will abstain from exercising jurisdiction...”

At paragraph 59 he said:

“I do not, therefore, consider that this court should now take the decision to defer the determination of whether it has jurisdiction, in the absence of parental agreement. That issue should remain listed for resolution as it is currently, subject to a review in the event that the Russian court comes to a positive determination first.”

But Mr Cusworth also clearly considered and clearly expressed in his formal order of 1 March 2021 that if, meantime, the Russian court did conclude that it had jurisdiction in relation to the children and did decide to exercise that jurisdiction, then the effect of Article 13 of the 1996 Convention came into play. At paragraph 7 of his order he recited:

“After the court determined that in the event the Russian court accepts jurisdiction over the children, Article 13 of the 1996 Hague Convention applies as a result of the mother’s first in time application in Russia dated 27 October 2020; *and in those circumstances that the English court **must abstain** from exercising such jurisdiction as it determines that it has over the children unless that jurisdiction is otherwise conferred by the 1996 Hague Convention.*” [My emphasis]

11. In my view, that recital at paragraph 7 of the order of 1 March 2021 is the clearest possible recording of an actual determination and ruling by a judge of co-equal jurisdiction with myself that, in the event that the Russian court accepts jurisdiction over the children, the English court “must abstain” from exercising such jurisdiction as it determines that it has over the children.

12. The father very strongly maintains that in his judgment and in making that order Mr Cusworth erred. As a result, the father has lodged within time an application to the Court of Appeal for permission to appeal from the decision and order of 1 March 2021. That application was only lodged at the beginning of this week and there may be a period of time before the decision of the Court of Appeal on permission is known. Further, even if permission is refused on paper it would be open to the father to renew his application for permission to an oral hearing.

13. By paragraph 12, an earlier order had fixed today, 25 March 2021, as a hearing listed before myself for consideration, in particular, of issues of contact between the father and the children. By paragraph 12 of the order of 1 March 2021, Mr Cusworth further fixed a second hearing, also before myself, on 14 and 15 April 2021 to consider “the disputed issue regarding the children’s habitual residence”. That, however, was expressed to be “subject to a review of the English court’s position in the event that the Russian court accepts jurisdiction.”
14. There has now been a hearing of several days’ duration before a court of competent jurisdiction in Siberia, Russia. Neither party was personally present at that hearing, and neither party themselves gave any oral evidence at that hearing. A number of other witnesses did give oral evidence. The mother appears to have been very fully represented by a lawyer/s at the hearing. I am less clear as to the extent of actual representation on behalf of the father at the hearing, but it is absolutely clear from the resulting judgment of the Russian court that that court had, and gave full consideration to, detailed written evidence from the father. That appears, amongst other places, from pages 12 and 13 of the English translation of the Russian judgment.
15. That hearing resulted in a judgment of considerable length dated 18 March 2021, which appears to have been sealed on 23 March 2021. So it is, of course, very recent. The judgment is, if I may respectfully say so, very thorough, and again and again in the factual narrative within the judgment one sees echoed and repeated exactly the same contentions, both as to the facts and the legal position, that these parents are making within these English proceedings. The Russian court clearly decided that it does have jurisdiction to make substantive orders in relation to these children; and, indeed, clearly considered that the children are habitually resident in Russia, notwithstanding that they currently attend schools during term time here in England.

16. The Russian court also clearly decided that the children should reside with their mother at a place of their mother's choosing. At page 33 of the English translation of their judgment they carefully explain why they are not specifying the address or, for that matter, the country in which the children should reside with their mother, because they wished to leave that in the choice and discretion of the mother. But the judgment as a whole makes plain that the mother regards her place of residence as being the property which she owns in Russia, and there is no doubt that the mother has made clear that it is her desire that the children should live with her primarily in Russia and not in London.
17. As to the precise status today of that judgment, there is a twist. The twist is that by virtue of Article 209 of the Civil Procedure Code of the Russian Federation, the decision of a court of first instance only enters into legal force after the expiry of the time period fixed for lodging an appeal. Further, if an appeal is lodged, then the decision at first instance only enters into legal force after the appeal has been considered. The very end of the judgment on page 37 of the translation makes express that the decision may be appealed to a higher court "within one month from the date when the decision in the final form was issued". I am not quite clear whether that means one month from 18 March 2021, when the judgment appears to have been given or handed down, or 23 March 2021, when it appears to have been stamped by the court, but nothing turns on those few days.
18. Thus, it does appear that that decision and judgment has not yet entered "into legal force" in Russia. Nevertheless, it is, to my mind, a document that requires great respect. It cannot simply be ignored on the basis that it is not yet of any "legal force". In my view, indeed, it clearly represents evidence that the Russian court has accepted jurisdiction over these children and, indeed, has made a substantive order in relation to them, albeit that it has not yet entered into legal force.



19. That is the factual and convoluted legal background to this hearing today. There is one further twist which I should mention. The twist is that very recently indeed, namely yesterday afternoon, the father's solicitors have issued yet another application in a case which is already littered with applications, in which they ask this court to set aside the decision and order of Mr Cusworth of 1 March 2021 on the grounds, in summary, that there has been non-disclosure of a particular Russian court order such that, it is said, the decision of Mr Cusworth was made on a false basis. The father asks in that application that today I should give appropriate directions for the determination of the set aside application, to include listing it before Mr Cusworth with a time estimate of one day.
20. Today, the father primarily asks me to make substantive orders in relation to contact between himself and the children, and asks me to make various directions. The mother asks me today to apply a formal stay to these English proceedings in relation to the children, and to give directions so that the children's passports may be returned to her and she can travel with the children to Russia.
21. In my view, I must today loyally follow and apply that which Mr Cusworth, being a court of co-equal jurisdiction, decided and recorded in his order of 1 March 2021. As things stand today, in my view, I must "abstain" from exercising further jurisdiction over the subject matter that has already been the subject of the decision of the Russian court. I stress very strongly the word "today" where I have just used it. I am well aware that, as I have explained, the father has a subsisting application to the Court of Appeal for permission to appeal from the decision and order of Mr Cusworth, and I am well aware that the father has just issued the application, to which I have recently referred, for Mr Cusworth himself to set aside his own order. But the legal position today is that that order has not, at the moment, been set aside, either by Mr Cusworth or by the Court of Appeal. It subsists.

22. Unlike the position which apparently obtains in Russia under Article 209 of the Civil Procedure Code, the jurisprudential situation in England and Wales is that an order of the court, once made, comes into effect as soon as it has been made, notwithstanding any subsequent appeal. There was no application to Mr Cusworth in any way to stay his order. I am not aware that there is any application to the Court of Appeal to stay that order, and in any event, it is for the Court of Appeal and not me to exercise any such jurisdiction.
23. My overarching position at this hearing is, accordingly, that in application of Article 13 of the 1996 Hague Convention, and in loyal obedience to the judgment and order of Mr Cusworth of 1 March 2021, I should today “abstain” from exercising any substantive jurisdiction in relation to these children or any matters which clearly fall within the territory of the Russian proceedings and judgment.
24. I turn from that overall position to the discrete matters that I have been asked to consider today, which I take in no particular order of priority or importance, but simply the order in which they have been raised with me today.
25. First, there is the question of contact. By paragraph 21 of his order dated 1 March 2021, Mr Cusworth made an order for interim child arrangements as to the amount of time the children should spend with each parent. In summary, he provided that the children should spend three hours with their father on three occasions each week, to be supervised, plus such further or other times as may be agreed between the parties.
26. It is a very sad fact that the subsequent contact between the father and the elder child, A, was fraught with difficulties, of which both parents are well aware, and which I do not propose further to describe. That child is now aged 14 and a half, and realistically the

resumption of a good relationship between A and her father is going to require the utmost tact, care, patience, and time, and it would not be wise for any court to jump in in a heavy-handed way today.

27. The situation in relation to S, who is only 4 and a half, is happily very different. Several occasions of contact have taken place during the last month. They appear to have been wholly successful and greatly appreciated and enjoyed by S herself.
  
28. Mr Will Tyler QC, on behalf of the father, has very strongly urged and pressed me now to increase quite considerably the duration of contact between S and her father, and to relax the requirement of supervision. I am not prepared to do so today for a number of reasons. The first is that, in my view, that would be inconsistent with the requirement to abstain from exercising jurisdiction which now bears down on me, unless and until the decision and order of Mr Cusworth is set aside, either by himself or on appeal. Mr Tyler strongly submits that Article 11 of the 1996 Convention is in play. That provides that:

“In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.”

He submits that it is a necessary measure of protection and a case of urgency that I should now, if only on an interim basis, increase the level of contact that is currently taking place between S and her father. I do not accept that. If there was simply no contact at all between this child and her father (as was the situation up to 1 March 2021), then I can see that Article 11 might well be in play. But this child is seeing her father regularly three times a week. Of course, there is room for consideration of whether those periods should be longer; whether they should include overnights; and whether they require to be supervised. But the fact is

that this child is now regularly seeing her father. In my view, there is no longer a situation of “urgency”, nor any requirement of a “necessary measure of protection” for this child, such that Article 11 continues to apply, notwithstanding the application and effect of Article 13.

29. Further, however, there has not been any order in this case for any section 7 investigation or enquiry by CAFCASS or any other body. There is the briefest of risk assessment reports by CAFCASS, but that is a document based purely on papers. CAFCASS have not seen either of the children nor seen either of the parents, and I simply have no independent assessment of the situation as between the father and the children.
  
30. Further again, it is the case that both parents make very considerable allegations against the other. The mother, in essence, alleges that the father is very controlling; that recently he has acted in aggressive and irrational ways (although I stress not directly to the children); and, indeed, that on occasions his behaviour has been affected by alcohol. Provisionally, it seems to me that the allegations made by the mother are such that Practice Direction 12J may require that there is some fact-finding hearing of the mother’s allegations before the court could make any extensive order as to contact. Mr Tyler quite correctly and fairly says that the father makes no less serious allegations against the mother, substantially to the same effect. So this may be a case where each parent is a pot calling the kettle black. So, submits Mr Tyler, it is very unfair if the effect of the mother’s allegations is currently that the father’s time with the children is restricted and supervised, when they are otherwise living with their mother, despite the allegations which the father makes. I understand how that must seem unfair and, indeed, maybe is unfair to the father, but it is not the effect of the Practice Direction that just because each side is making similar allegations against the other that somehow means that they cancel each other out and contact can simply take place without a due fact-finding exercise.

31. So, for those reasons in combination, namely, that I should abstain from exercising jurisdiction in any event, that I have no CAFCASS material, and that the Practice Direction is in play, I decline today to make any order at all in relation to the father's application today for increased contact. As far as I am concerned, I simply leave in place that which Mr Cusworth has already ordered at paragraph 21 of his order of 1 March 2021.
32. As I have already recited, that does make reference to contact at such further or other times as may be agreed between the parties. I am very glad indeed to record in this judgment that during the course of today, at my encouragement, the parties have had a negotiation outside the court room and as a result there is an agreement for more extensive contact during the forthcoming school holidays. The details of that will be recorded in inter-solicitor correspondence and I need not go further into the details now.
33. The next question that was raised is as to the status of the father's set aside application. Enquiries have been made today which indicate that Mr Cusworth is himself available to hear that for directions on 1 April, and substantively on 14 April 2021. To my mind, when there is a set aside application on the grounds that the judge was misled, then if at all possible that application should be heard by the same judge. I will accordingly give formal directions for that application to be heard by Mr Cusworth on those dates.
34. The next matter is as to the hearing that had been fixed before myself on 14 and 15 April 2021 to consider the whole disputed issue as to where the children were habitually resident on any dates material to jurisdiction. It is clear to me, and, indeed I think both leading counsel agree and accept, that that matter cannot now be heard by this court at all until the outcome of the set aside application and the father's quest to appeal the order of 1 March 2021. Accordingly, I propose to vacate the hearing that was fixed before me on 14 and 15

April 2021, and the question whether or not this court should determine and rule upon the children's habitual residence will be adjourned until the conclusion of the proposed appeal and the set aside application.

35. The next matter today is an application that the mother has made for me to stay today all these proceedings. Mr Teertha Gupta QC strongly submits that now that the Russian court has delivered its judgment I should formally stay all these English Children Act proceedings as the logical consequence of the decision and ruling of Mr Cusworth. To my mind, however, there is a distinction between abstaining from exercising a jurisdiction and formally staying the proceedings in question. I am not myself willing to make a formal stay today when I know that there is a subsisting application to set aside the order of Mr Cusworth of 1 March 2021, and also a subsisting application to the Court of Appeal for permission to appeal from that order. In my view, it would be premature today for me, being of co-equal jurisdiction with Mr Cusworth, to go to the next step of staying these proceedings. Accordingly, on the mother's application for a stay, the order which I propose to make today is that:

“The court today declines to make any order staying these proceedings on the grounds of prematurity. It neither grants nor refuses a stay today, and that application may be further considered after the appeal and the set aside application are concluded.”

I wish to stress and emphasise that the essence of that provision in the order is simply that I do nothing today. I stress I am neither granting nor refusing a stay, and the whole question of the stay will fall for consideration once the outcome of the set aside and appeal proceedings is known.

36. The next matter for consideration today is an application which the mother has issued for her solicitors to be permitted to release to her the passports of the children. Currently, her solicitors hold those passports pursuant to an order made by Russell J on 11 March 2021 which required the father's former solicitors, who are no longer on the record, to release the passports to the mother's current solicitors. The order goes on to provide that the current solicitors are directed to then hold the children's passports to the order of the court until further order. The mother wishes to travel to Russia, in particular for the forthcoming Easter school holidays. She wishes to take the children with her. She argues that in the light of the Russian decision and order she should now be permitted to do so.
37. Again, I am not willing today to make an order permitting her solicitors to release the passports, which will have the consequence that the children have to stay in England and Wales into the foreseeable future. I am not willing to make that order for two principal reasons. The first is that, consistent with my approach to the father's application for contact and generally to this hearing today, I intend to "abstain" from exercising any jurisdiction in relation to these children. More particularly, there is little doubt that if these children were now able to travel to Russia with the mother it would be a very long time indeed before they were enabled to return to England. The mother has frankly said in a recent statement that if she is able to return with the children to Russia she would keep them there and not permit them to travel again to England until she was quite confident that she would not be "ensnared" (her word) by further legal proceedings here.
38. The situation here, however, is that these children have been living here in England for several months, since last September, wherever they may be habitually resident. The father currently has his set aside application. He also has his application to the Court of Appeal for permission to appeal. Each of those applications would be rendered nugatory and of no practical effect if, meantime, the children were back in Russia with little prospect of his

prising the children out again. In my view, until at least the outcome of the set aside application and the outcome of the application for permission to appeal are known, these children will have to remain here in England and Wales and, accordingly, their passports must remain firmly held by the mother's solicitors to the order of the court.

39. I will make plain, however, that if the Court of Appeal finally refuses permission to appeal or finally dismisses any appeal for which permission is granted, and/or if Mr Cusworth sets aside his order of 1 March 2021, the mother may forthwith renew her application for the release of the passports on proper notice to the father. It may be, of course, that the Court of Appeal, once they have determined the father's application to it, may decide to give some direction in relation to the passports, but that is entirely a matter for the Court of Appeal. I will further make clear in the order that my declining to make any order today in relation to the passports is, in any event, subject to a liberty to the mother to apply in the event of any relevant change in the circumstances.
40. A further matter was raised today in relation to some audio recording or recordings in the possession of the father. After hearing submissions from both leading counsel, I propose to make a straightforward order ensuring that those recordings cannot be relied upon in any proceedings without their being produced and disclosed to the other side a reasonable period of time beforehand, and it is not necessary for me to say more about that in this judgment.
41. It may seem, therefore, that today has been a long day (it is now 5.15 p.m.) with very little achieved. But for the reasons I have endeavoured to explain, it does not seem to me that I should go further at this precise juncture in these very conflicted and convoluted proceedings than I have been willing to go today.





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