



Neutral Citation Number: [2019] EWCA Civ 1284

Case No: B6/2018/2540

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Central Family Court
His Honour Judge Meston QC
ZC17P00641

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/07/2019

Before:

LORD JUSTICE UNDERHILL (VICE-PRESIDENT OF THE COURT OF APPEAL,
CIVIL DIVISION)
LADY JUSTICE KING
and
LORD JUSTICE MOYLAN

Between:

ANNA TIMOKHINA **Appellant**
- and -
ALEXANDER TIMOKHIN **Respondent**

Joshua Viney (instructed by **Hughes Fowler Carruthers**) for the **Appellant**
Stephen Jarmain (instructed by **Withers LLP**) for the **Respondent**

Hearing date: 25th June 2019

Approved Judgment

Lady Justice King:

1. This is the appeal of Anna Timokhina (the mother), against an order of His Honour Judge Meston QC, dated 2 October 2018, by which the judge ordered her to pay £109,394 in respect of the costs of Alexander Timokhin (the father) incurred during the course of litigation concerning the future arrangements for the care of their children.

Background

2. The mother and father are Russian. They relocated from Russia to London in 2014 together with their two children, MA who is fifteen, and MR who is rising eight.
3. Following the breakdown of the marriage, bitter proceedings ensued in relation to the arrangements for the children. On 13 November 2017, the father applied for permission to remove the children permanently to Russia to live with him. In April 2018 during the course of the proceedings, the mother travelled to Russia where she was arrested on 27 April 2018 after attempting to bribe a police officer to instigate criminal charges against the father in order to further her own claim on the children. The mother was remanded in custody by the Russian Criminal Court which transferred her to a prison outside St Petersburg.
4. On 16 May 2018 as a result of the mother's incarceration, District Judge Gibson adjourned the final hearing of the father's application to relocate and relisted the trial for hearing on 27 June 2018.
5. At the adjourned hearing on 27 June 2018, despite requests made on her behalf, the mother was not permitted by the Russian authorities to appear before the court by video link and her subsequent application to adjourn the hearing was refused by District Judge Gibson. The court has read the judgment of the district judge in which she sets out her reasons for refusing further to adjourn the hearing listed to determine the future of the children. The district judge took into account that the mother's imprisonment meant that her participation in the trial was necessarily limited, but ultimately refused the adjournment because of what she described as the "pressing welfare needs of the children".
6. The judge went on to hear the substantive case. In particular, she heard evidence from an independent social worker who was most concerned about the delay for the children and was clear that if the children were to return to Russia, it should be at the beginning of the school holidays to allow them to settle in before starting at their respective new schools after the summer break. This was of particular importance as one of the children was returning to England in the autumn to continue her education at a boarding school here. The independent social worker was equally clear that the mother had significantly failed to meet the emotional needs of the children whilst they had been living with her in England and that their best interests now lay in them living with their father and in permission being given for him to remove the children permanently from the jurisdiction.
7. The judge set 28 July 2018 as the date for the children's return to Russia, which allowed the mother time to appeal whilst they were still in this jurisdiction.

8. In the light of the judge's order, the father's solicitors (Withers) wrote during the early part of July to Hughes Fowler Carruthers (HFC) who represent the mother, seeking confirmation that there was to be no appeal against the order of the district judge. No reply was received to that letter or to a subsequent one which sought to deal with the children's immigration status.

The proceedings in front of HHJ Meston

9. On 25 July 2018, the mother issued an application for permission to appeal the order of District Judge Gibson. By her application she applied not only for permission to appeal but also a stay of the order which allowed the father to remove the children from this country on 28 July 2018. It would appear that Withers were informed of the application in the late morning of 25 July but did not then receive any papers until the afternoon. It was at this point in the late afternoon, that Withers were also told that the hearing of the application for a stay had been listed as a matter of urgency the next day (26 July 2018).
10. On 26 July 2018 the parties appeared before the judge. The mother was represented by leading counsel and the father by leading and junior counsel. The judge refused the mother's application for a stay of the order of 17 July and listed a further hearing for 2 October for determination of the application for permission to appeal with the appeal to follow if granted. Any application by the father for a security for costs order was to be made by 9 August 2018. Importantly, in relation to the present appeal, the order of 26 July 2018 was silent as to the costs.
11. Little happened during August save for a letter of 9 August in which Withers wrote to the mother inviting her to withdraw her appeal. No application was made on behalf of the father for security for costs.
12. Significant developments, however, occurred during September. On 5 September 2018, the mother pleaded guilty to the charges laid against her in Russia and she was sentenced to four years imprisonment. The mother immediately indicated an intention to appeal the sentence and Withers were told that the appeal would be heard in October or November 2018. The court has been told that the mother's appeal against sentence has been dismissed.
13. Unsurprisingly given this turn of events, on 6 September 2018, the day after she was sentenced, Withers again wrote to HFC inviting the mother to withdraw the appeal and asking for confirmation that she had done so by 11 September 2018. The letter put the mother on notice as to costs. Having received no reply, a chasing letter was sent on 11 September.
14. On 17 September HFC wrote to Withers seeking an adjournment of the application for permission to appeal until after the mother's appeal against sentence in Russia had been determined. The following day, Withers refused the request and said that they would be seeking their client's costs in full, on an indemnity basis, at the hearing on 2 October "to include the costs of her application for an appeal and stay and his costs in the substantive Children Act proceedings".

15. Later that day, 18 September 2018, HFC replied saying: “my client will agree to withdraw her appeal on the basis that there is no order as to costs. Please confirm that that is agreed”.
16. The next day (19 September) correspondence resumed. First of all, Withers wrote to HFC refusing to agree to the appeal being withdrawn on the basis of “no order for costs”. There followed a telephone conversation between the solicitors during the course of which Withers told HFC that their counsels’ briefs would be “deemed to have been delivered” at 9am the following morning (20 September 2018). With the potential costs implications of this ringing in their ears, HFC wrote to Withers at 17.56 saying:

“I write further to our conversation this afternoon.

For the avoidance of doubt our position is that the appeal will be withdrawn and that there should be no order for costs. I understand that your counsel’s brief fee will be deemed at 9am tomorrow. It is simply absurd for further costs to be incurred by you instructing counsel to argue in respect of this issue. I will seek instructions from my client in respect of your letter sent earlier today as soon as possible but will not be able to do so by 9am tomorrow.”

17. The state of play at close of business on 19 September 2018 was, in my judgment, clear; namely that the mother had said, in terms, that her appeal would be withdrawn and that such withdrawal was no longer subject to the father agreeing not to seek an order for costs. The only remaining issue, therefore, was as to costs. Further, in the same way that Withers had earlier flagged up their intention to seek indemnity costs in relation to the proposed appeal, HFC, on behalf of the mother, now flagged up their contention that it would be “simply absurd” to incur substantial counsels’ fees in respect of what was now the only outstanding issue, namely costs. It is not disputed that Withers had had the letter of 19 September before the 9.00am on 20 September 2018, the deadline for the delivery of briefs.
18. Notwithstanding this, Withers wrote to HFC on 24 September 2018 saying that counsels’ fees were now “deemed” and that they would be seeking indemnity costs at the forthcoming hearing. This was followed up by a costs schedule which, while on Form N260, did not have appended to it a schedule of work done on documents. The standard Form N260 has appended to it a schedule of work done on documents.
19. On 27 September 2018, a further concession was made on behalf of the mother in a letter saying as follows:

“As we have made clear, our client was prepared to withdraw her appeal. The only remaining issue was the question of costs. It is unreasonable for your client to continue to insist that a full bundle and the documents prepared in the light of that.

In order to compromise this matter our client confirms that she is prepared to pay your client’s costs on a standard basis to be assessed if not agreed.”

20. Withers rejected the offer and this led to a final letter from HFC. In this letter, HFC protested on behalf of the mother that indemnity costs were inappropriate. They alleged that the costs schedule was excessive and disproportionate and, in particular, objected to Withers seeking a costs order in respect of the hearing on 26 July 2018 where no order for costs had been made. HFC protested that the father was:

“.....seeking costs for the forthcoming hearing of leading and junior counsel when we informed you on 19 September 2018 that our client would withdraw the appeal and asked that there be no order for costs. At that time the only issue was costs. You informed this office through a telephone call on that date that counsels’ fees had not yet been incurred. For you then to incur leading and junior counsels’ fees for the sum set out when the only issue at question was costs is disproportionate.”

21. The letter went on to say that, in the light of the stance taken on the part of Withers, they felt they had no option but to themselves instruct counsel to attend the hearing in order to argue the question of costs.

The hearing on 2 October 2018

22. Following on from this final exchange, the parties appeared before the judge on 2 October 2018 where, as anticipated, the only issue was costs.
23. The mother was represented by Mr Viney who appears again today. Mr Viney’s brief fee for the hearing on 2 October 2018 was £1,500. Representing the husband was Ms Deborah Eaton QC, marked at £25,000, and Mr Jarmain (who appears, also unled, before the court today) marked at £12,500. These Counsels’ fees on behalf of the father were in addition to the fees already incurred by them on 26 July which were respectively £20,000 for Ms Eaton, and £10,000 in respect of Mr Jarmain.
24. At the beginning of the hearing on 2 October 2018, the judge identified that the “only issue is whether it should be indemnity or standard costs”. He heard submissions from both sides in respect of that issue but also as to whether an order for costs should be made in respect of the “stay” hearing on 26 July 2018.
25. The judge having heard submissions, gave a short ruling dealing first with the hearing of 26 July:

“I accept the submissions on behalf of the father. The reality is that although there is no direct reference to costs in that order, and perhaps there should have been, there was no consideration given to costs at the end of that hearing, and it seems clear to me that the issue of costs in respect of that hearing and this subsequent appeal remained at large and was in effect left over until today, when the court would be considering not only any liability for costs in relation to the appeal but also the possible application for security of costs. Had it been suggested that in fact the order being silent as to costs was determinative of costs, I imagine there would have been an application for amendment

under the slip rule, which to my mind would have been readily granted.”

26. The judge, having held that the father was entitled to his costs on 26 July 2018, went on to consider the basis of the assessment in respect of both the hearing on 26 July 2018 and the hearing he was then conducting. In holding that indemnity costs was the proper basis of assessment on the facts of this case the judge said:

“The legal principles are not in dispute. Before considering whether or not to grant indemnity costs it is necessary to identify some conduct or circumstances which take the case out of the norm and which might justify indemnity costs. It is not necessarily enough that an appeal or an application is speculative or weak. The court has to consider the reasonableness or otherwise of the application to the court, and it is firmly submitted on behalf of the father, that in the light of the findings of fact of the district judge and in the light of the subsequent conviction, the mother’s appeal and pursuit of that appeal were wholly unreasonable and well within the type of conduct considered to deserve an indemnity order under the established principles. The submissions on behalf of the father... have been amplified in oral submissions, and I accept them entirely as justifying an order for indemnity costs. It is not enough simply to say, as has been said on behalf of the mother today, that her appeal was in some respects not entirely spurious and that there were Article 6 arguments. There were indeed Article 6 arguments, but the reality is that the basis of any appeal has been entirely undermined by her criminal conviction, whether that be on the basis of a plea of guilty or otherwise, and in the circumstances her prospects of attacking the findings of fact made by a district judge on an appeal were almost entirely hopeless.”

27. Having determined the basis of assessment, the judge went on to hear submissions as to whether there should now be a summary assessment of the father’s costs and, if so, to specify quantum. The judge decided to conduct a summary assessment.
28. Each party then addressed the judge in relation to the detail of the costs for the purposes of a summary assessment. Having heard the submissions, the judge gave the following brief ruling:

“The position now is that I have to consider a summary assessment of costs incurred on behalf of the father between 25 July and today, and bear in mind that I have determined that this should be assessed on an indemnity basis. The revised statement of costs which has been provided, dated yesterday, 1 October including the costs incurred today, 2 October, amounts to £109,394 odd. I have listened to the argument about individual items on that statement. Inevitably, on a summary assessment the information is somewhat sparse. I have been assisted by both the submissions on behalf of the father and also observations by

his instructing solicitor indicating the reasons for the costs being formulated in the way that they have been. This was not a straightforward case and even at the point when the appeal appeared to be conceded, it ceased to be entirely straightforward, and I am satisfied that the fees referred to in the statement of costs were properly incurred by the fee earners. In terms of counsels' fees, I am satisfied that it was appropriate in the circumstances of this case to have retained both leading and junior counsel who dealt with the matter throughout and whose continued involvement was, in the circumstances, justified up to and including today's hearing."

Costs in Family Proceedings

29. Costs in family proceedings are governed by Family Procedure Rules 2010 (FPR). FPR 28(1) and (2) provide:

"28.1 The court may at any time make such order as to costs as it thinks just.

28.2 (1) Subject to rule 28.3 Parts 44 (except rules 44.2(2) and (3) and 44.10(2) and (3)), 46 and 47 and rule 45.8 of the CPR apply to costs in proceedings.....

(rule 28.3 has no application to the present case)

30. So far as is relevant, the excluded rule provides:

- (i) CPR 44.2(2) says:

"(2) If the court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order."

And

31. CPR 44.10(2) is excluded pursuant to FPR 28.2. The totality of CPR 44.10 provides:

"(1) Where the court makes an order which does not mention costs –

(a) subject to paragraphs (2) and (3), the general rule is that no party is entitled –

(i) to costs;

(2) Where the court makes –

- (a) an order granting permission to appeal;
 - (b) an order granting permission to apply for judicial review; or
 - (c) any other order or direction sought by a party on an application without notice,
- and its order does not mention costs, it will be deemed to include an order for applicant's costs in the case."

32. The impact upon the discretion conferred upon the court by FPR 28.1 as a consequence of the incorporation of parts of CPR 44 is, therefore, as follows:
- i) By virtue of the exclusion of CPR 44.2(2), all family proceedings which are covered by the FPR are exempted from the rule under CPR 44.2(2) which says that "the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party"; however
 - ii) The general rule is that where an order does not mention costs, no party is entitled to costs: CPR 44.10(1)(a)(i); but
 - iii) By virtue of FPR 28.2, the general rule found at CPR 44.10, stands alone for the purposes of family proceedings. The three exceptions which, pursuant to CPR 44.10(2)(a) – (c), result in the making of a deemed costs order are excluded for the purposes of the general, wide-reaching discretion as to costs found in FPR 28.1.
33. For completeness it should be added that the general rule that costs will follow the event does not apply to an appeal to the Court of Appeal in any family proceedings (CPR 44.2(3)) and that only rarely will costs orders be made in children proceedings; see: *Re S (A Child)(Costs: Care Proceedings)* [2015] UKSC 20 [2015] 2 FLR 208. The concession on behalf of the mother that she should be responsible for costs (at least on a standard basis) in respect of the withdrawn appeal, rightly recognised that, on the facts of this case, notwithstanding the general approach to costs in cases involving children, an order for costs could legitimately have been made; see: *Re T (Care Proceedings: Costs)* [2012] UKSC 36, [2013] 1 FLR 133.

The Appeal

34. The mother filed four grounds of appeal; briefly put, they are as follows:
- 1) The judge was wrong to award the costs of the hearing on 26 July 2018 when the order was silent as to costs and the general rule is that no party is entitled to costs;
 - 2) That the judge was wrong in assessing costs on an indemnity basis;
 - 3) The judge was in error in conducting a summary assessment of costs without the necessary information in order to conduct such an assessment;

- 4) The judge was wrong in awarding the father the entirety of his costs and in doing so failed appropriately to weigh whether the costs were proportionate or reasonable.

Ground 1: Costs of 26 July 2018 Hearing.

35. The order made following the hearing on 26 July 2018 is silent as to costs, or to use the phraseology of CPR 44.10, “does not mention costs”. The appellant, therefore, relies on CPR 44.10 (1)(a)(i) submitting that, as there is no order for costs, no party is entitled to costs in relation to that hearing.
36. Mr Viney in support of his appeal, submits that the court should approach the matter by looking at the entirety of the rule, including CPR 44.10(2) (a)-(c) (the exceptions to the general rule) notwithstanding that by the terms of FPR 28.2 those very exceptions are excluded for the purposes of costs in family proceedings (FPR 28.1). Mr Viney submits, that, where an order is silent as to costs, an order can only be made if, on the facts of the case, the matter falls within one of the exceptions within CPR 44.10(2). As none of the exceptions apply in the present case, Mr Viney submits that no order for costs can be made pursuant to CPR 44.10.
37. In any event, Mr Viney argues that whilst the costs regime in family proceedings is governed by FPR 28.1 and 28.2, and CPR Part 44 applies (save, inter alia, for CPR 44.10(2) and (3)), FPR 28 does not allow the court retrospectively to make an order for costs. A retrospective order can, he submits, only be made via one of two routes, namely either:
 - i) Under the ‘slip rule’ (CPR 40.12) as considered by the Court of Appeal in *Bristol-Myers Squibb Co. v Baker Norton Pharmaceuticals inc.* (2) [2001] EWCA Civ 414 (*Bristol-Myers*). Put shortly, *Bristol-Myers* emphasised that the slip rule cannot be used to enable the court to have second or additional thoughts, and that once an order has been drawn up, any mistakes in it have to be corrected by an appellate court. The slip rule can be used however to amend an order so as to give effect to the intention of the court;
 - ii) The rule in *Tibbles v SIG Plc (trading as Asphaltic Roofing Supplies)* [2012] EWCA Civ 518, [2012] 1 WLR 2591 (*Tibbles*) in which the Court of the Appeal considered the jurisdiction of the court to vary or revoke its own order under CPR 3.1 (7).
38. Mr Viney submitted that the circumstances of the present case do not fit within either the ‘slip rule’ or *Tibbles*. That being the case, and the hearing of 26 July not fitting within the “exceptions” in CPR 44.10(2), Mr Viney submits that the judge had no power to make a costs order in respect of the hearing on 26 July 2018.
39. In response, Mr Jarman argued that neither the slip rule nor *Tibbles* are relevant. The judge, he argues had jurisdiction to make the order under FPR 28.
40. Pursuant to FPR 28.1, Mr Jarman submits, the court may make an order at any time thus importing to the judge a wide discretion which allows the court to make such order as he or she “thinks just” retrospectively or otherwise. Mr Jarman acknowledges that CPR 44.10 is incorporated, in part, into the FPR but, submits, where CPR 44.10(1)(a)(i)

refers to a “general rule” it means precisely what it says and should have no gloss added. Had the intention been to make the rule absolute, subject only to the “exceptions” in CPR 44.10 (2) and (3), the word “generally” would not, he says, have been necessary.

41. Mr Jarmain goes on to submit that such an interpretation sits comfortably, not only with the less draconian approach to orders for costs in family proceedings evidenced by the fact that they have their own bespoke costs regime, but also with the court’s overriding objective as set out in the FPR. FPR1.1 and FPR 1.2 provide:

1.1 These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.

1.2 The court must seek to give effect to the overriding objective when it –”

(a) exercises any power given to it by these rules; or

(b) interprets any rule.”

42. Mr Jarmain submits that the rules need to be interpreted by reference to what they are trying to achieve, that is to say, a fair outcome. The narrow interpretation of CPR 44.10 (1)(a)(i), sought on behalf of the mother, would not, he says, achieve such an outcome.

43. Mr Jarmain submits that the facts of this case demand the making of a discretionary order for costs notwithstanding that the order of 26 July does not “mention” costs. Mr Jarmain emphasises that the hearing was listed at extremely short notice on 26 July, and the court had before it both the application for a stay and for permission to appeal. The judge held over the application for permission to appeal to 2 October. Although Mr Jarmain accepts the hearing on 2 October was not technically part heard, it had, he submitted, ‘the feel’ of a case that was part heard. The fact, he said, that the costs were not specifically dealt with was not surprising given that the outcome of the application for permission to appeal would have informed a court as to what was the appropriate order for costs in respect of the stay application. The only order which would conceivably have been made on 26 July 2018, would have been “costs reserved”.

44. Whilst Mr Jarmain accepts, as did the judge, that it would have been better if the likely order, namely that “costs be reserved”, had been incorporated into the order of 26 July 2018, the reality was that the mother had suffered no real prejudice by the fact that the costs of that hearing were not considered until 2 October. The fact that they were not, whilst unfortunate, does not, he submits, take the matter out of FPR 28.1 and the general rule at CPR 44.10 (1) and into the realms of *Bristol-Myers* or *Tibbles*.

45. In my judgment the starting point to the issue of jurisdiction is FPR r.28. The rule is the overarching provision and says in terms that the court may at any time may make such order as to costs as it thinks fit. I do not accept that the rule prohibits the making of a retrospective order where no order has been made. Whether a court will in fact make such an order will depend upon the circumstances of the case and where costs have not been mentioned in the original order, an application will be necessarily considered by the court against the backdrop of CPR 44.10 (i)(a) that as a general rule, the party seeking the order for costs, is not entitled to an order.

46. Given its incorporation into FPR 28, the court's approach is informed by the proper interpretation of CPR 44.10 (i)(a), an interpretation which will be the same for all purposes regardless of whether or not the application is made under the umbrella of the FPR.
47. Further, I do not accept that the exceptions to the general rule identified in CPR 44.10(2)(a) – (c) are intended to be exhaustive, even setting aside the fact that FPR 28(2) specifically excluded those exceptions in family proceedings leaving only the general rule at CPR 44.10(1)(a)(i) coupled with the broad discretion at FPR 28.1.
48. Neither counsel has been able to take the court to any decided cases where consideration has been given as to the limitations of CPR 44.10, if any, or in respect of the interpretation of the expression 'general rule' as used in the Civil Procedure Rules.
49. Unfortunately, the court was not taken to the Statutory Instruments referred to in the explanatory notes to the Rule in the White Book, although tracing those Statutory Instruments is in fact illuminating. As originally enacted on 26 April 1999, para (1) of the then rule, stated simply that where the court makes an order which does not mention costs "no party is entitled to costs in relation to that order". This was amended with effect on 25 March 2002 when the absolute nature of the rule was softened to say:

 “(1) Where the court makes an order which does not mention costs-

 a) The general rule is that no party is entitled to costs in relation to that order.”
50. The rule had therefore been amended to provide a 'general rule' which, given the earlier wording, was clearly intended to leave the court with a residual discretion to make a costs order if it felt it to be appropriate. It was not until the Civil Procedure (Amendment) Rules 2008/2178, which came into force on 1 October 2008, that the exceptions now found at CPR 44.10(2)(a)-(c) were introduced.
51. By CPR 44.2(2), costs follow the event. Each of the three exceptions in CPR 44 (1)(2) are examples of cases where an order for costs (had it been made) would have resulted in a costs order in favour of the applicant. The exceptions therefore simply remove the necessity for a specific ex post facto application to be made where, for whatever reason, the order fails to mention costs.
52. In my judgment the position is clear; CPR 44.10 is exactly what it says it is - a general rule. When the statutory instruments are traced through, it becomes apparent that following the amendment to the rule by statutory instrument on 25 March 2002 the rule ceased to be an absolute rule. Had the intention been to restore that position, the word "general" would have been removed when the exceptions were added in 2008. Further, as noted above, the principle that costs follow the event does not apply in family proceedings. The exclusion of CPR 44.10(2) therefore fits logically into the wholly discretionary approach to costs in family proceedings and reinforces the view that, in referring to a "general rule" in CPR 44(1)(i), the intention of the draftsman was to leave the court with a residual discretion.

53. For those reasons I agree with Mr Jarmain that the judge had the jurisdiction to make an order for costs in respect of the 26 July hearing, and further that, contrary to the judge's view, jurisdiction was not dependent on the slip rule (or the so-called *Tibbles* jurisdiction).
54. The connection with and continuity between the applications on 26 July and 2 October is plain. Equally plain in my submission is that it was a proper exercise of the judge's discretion and entirely in accordance with the overriding objective for an order for costs to be made against the mother in respect of that hearing.
55. Ground 1 is therefore dismissed.

Ground 2: The basis of assessment.

56. Ground 2 can be dealt with shortly; the issue is whether the judge was wrong in having assessed the costs on an indemnity basis. The parties are agreed that *Three Rivers District Council v Bank of England* [2006] 5 Costs LR 714 (*Three Rivers*) sets out the principles that should guide the court's determination as to whether to award costs on an indemnity basis.
57. The law in this regard is well established and in my judgment it is unnecessary to go through *Three Rivers* in order to conclude that it was plainly within the ambit of this judge's discretion to make a costs order on an indemnity basis. The mother's appeal was, in my judgment, always hopeless. The mother obviously knew that she was guilty of the criminal charges brought against her in Russia, conduct which resulted in a substantial term of imprisonment following her guilty plea. In addition, the evidence before District Judge Gibson and, in particular, from the independent social worker was overwhelming. The children's best interests were unequivocally served by going to live with their father in Russia. The submission made on behalf of the mother that she had arguable Article 6 submissions to make on appeal in relation to her inability to take part in the trial, in my judgment takes her nowhere. The Article 6 issues had been carefully considered by District Judge Gibson who had given a scrupulously fair and considered separate judgment in that respect.
58. Ground 2 is therefore dismissed.

Ground 3: Summary assessment

59. Mr Viney submits that the judge should not have conducted a summary assessment of costs. He pointed to the alleged deficits in the schedule of costs prepared on behalf of the father submitting that detailed assessment would have been more appropriate. Mr Jarmain reminds the court that by CPR. PD 44. 9.1:

“1. Whenever a court makes an order about costs...the court should consider whether to make a summary assessment of costs.”

60. The general rule is that costs should be summarily assessed at the conclusion of a hearing that has not lasted more than one day (CPR,PD 44.9.2(b)) unless there is a good reason not to do so. Mr Jarmain took the court to *Lemmens v Brouwers* [2018] EWCA 2963, a case where summary assessment in a longer case was approved and in which

no N260 (or similar) had been filed at all. In *Lemmens v Brouwers* the court once again emphasised the wide discretion of the court in matters of costs. Mr Jarmain again anchors his submission to the overriding objective which requires the court to deal with cases “expeditiously”, “fairly” and in a proportionate way and saving expense (FPR 1.1(2)a-e).

61. This court had the benefit of the transcript of the hearing of 2 October 2018 and it can be seen that whilst the judge’s assessment was succinct, he had the benefit of detailed submissions which the court has had the opportunity to read. In my judgment, the judge was entitled, in the exercise of his discretion, to conduct a summary assessment of the costs in this matter.
62. Ground 3 is therefore dismissed.

Ground 4: Principle and quantum of costs.

63. Mr Viney moves on to submit that the judge was wrong, notwithstanding his wide discretion, to make an order for costs in relation to these two brief hearings in a total sum of £109,394.
64. CPR 44.4 provides:
- 1) The court will have regard to all the circumstances in deciding whether costs were –
 - (a) if it is assessing costs on the standard basis –
 - (i) proportionately and reasonably incurred; or
 - (ii) proportionate and reasonable in amount, or
 - (b) if it is assessing costs on the indemnity basis –
 - (i) unreasonably incurred; or
 - (ii) unreasonable in amount.
 - 2)
 - 3) The court will also have regard to –
 - (a) the conduct of all the parties, including in particular –
 - (i) conduct before, as well as during, the proceedings; and
 - (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
 - (b) the amount or value of any money or property involved;
 - (c) the importance of the matter to all the parties;

- (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
- (e) the skill, effort, specialised knowledge and responsibility involved;
- (f) the time spent on the case;
- (g) the place where and the circumstances in which work or any part of it was done; and
- (h) the receiving party's last approved or agreed budget.

65. Whilst Mr Viney takes exception to some of the solicitors' costs, in particular the figure of £15,639.50 in relation to "work done on documents", his real focus is in relation to counsels' fees which accounted for the lion's share of the father's costs; some £67,500. Mr Viney submits that in respect of the hearing on 26 July (which it will be recollected related to the application for a stay) it was unnecessary for both leading and junior counsel to attend that hearing and highlighted that the mother was represented by leading counsel alone.
66. The application for the stay was made very late and came before the court just two days before the father and children were due to be leaving for Russia. Mr Jarmain submits that it was reasonable for the father in those circumstances, given the history of the case and the unpredictability of the mother's litigation stance to date, to be represented by his established legal team; particularly given the profound importance to the children of this hearing, (a stay would mean that the children could not leave the country as planned in two days' time).
67. I accept the submission of Mr Jarmain that, given the critical importance to the children that their planned relocation should not be disrupted or delayed, it cannot be said that it was outside the judge's discretion to consider it reasonable for the father's entire legal team, namely leading and junior counsel, to attend the hearing on 26 July 2018. Whilst for my own part I have significant reservations as to the level of fees incurred for that hearing, it would not be right for me to 'tinker' with that part of the order which must necessarily refer to the 26 July hearing, by seeking to reduce the total amount of the fees charged on behalf of counsel.
68. Mr Jarmain deploys the same submission in respect of the hearing on 2 October 2018. Again, he submits that it was reasonable for the father to have his entire legal team at that hearing. Mr Jarmain further submitted that the letter of 19 September only amounted a 'conditional withdrawal' of the appeal by the mother and that Withers were therefore entitled to deem briefs to have been delivered the following morning and to attend the hearing at full strength.
69. This was a submission which had been made by Ms Eaton at the hearing on 2 October. The judge's response was that: "This was not a straightforward case and even at the point when the appeal appeared to be conceded, it ceased to be entirely straightforward, and I am satisfied that the fees referred to in the statement of costs were properly incurred by the appropriate fee earners."

70. With respect to the judge, I do not accept that the letter from HFC sent on the afternoon of 19 September (set out at [16] above) can be interpreted as in any way a conditional withdrawal by the mother of her appeal. In my judgment the letter was unequivocal in its terms and it was abundantly clear that the only remaining issue was as to costs.
71. Mr Jarmain rightly reminds the court that the judge was making a costs order on an indemnity basis and therefore, pursuant to CPR 44.4, the costs do not have to be “proportionate”, the test is whether they are “unreasonable” and that pursuant to rule 44.3 (3):
- “Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.”
72. I have those principles firmly in mind, as I have the importance of this court resisting the temptation inappropriately to interfere with the exercise of discretion of the first instance judge. However, in my judgment, counsels’ fees for the hearing on 2 October 2018 are, on any basis, unreasonable. The costs were “unreasonable in amount” pursuant to CPR 44.4(1)(b)(ii).
73. By the time the matter came to hearing, the principle of costs had also been agreed, leaving only the question as to whether they should be summarily assessed and if so, whether on a standard or indemnity basis.
74. The mother was attended by Mr Viney on 2 October who was marked at £1,500 for the morning’s work. In my judgment, for Ms Eaton QC to have attended this low-level hearing where there was no longer any threat to the welfare of the children, let alone marked at £25,000, was unreasonable, even absent a requirement for proportionality and notwithstanding the CPR 44.3(3) presumption in favour of the receiving party where indemnity costs are ordered.
75. Mr Jarmain has appeared unled in this appeal where he has skilfully and successfully repelled three of the four grounds of appeal in relation to which permission was granted. There can be no question but that he was more than capable of dealing with a summary assessment of costs without the guiding hand of Ms Eaton. It follows that in my judgment Ms Eaton’s fee was unreasonably incurred pursuant to CPR 44.4(1)(b)(i).
76. In my judgment, Mr Jarmain’s fee of £12,500 whilst reasonably incurred, was unreasonable in amount. Comparisons are odious, but one cannot help but compare it with the £1,500 on Mr Viney’s brief; Mr Viney having also appeared before this court unled and having presented the appeal equally skilfully.
77. For those reasons, I would allow the appeal on Ground 4 in relation to quantum to the extent that I would reduce the global figure by £31,250, namely a figure equal to Ms Eaton’s brief fee and half of that of Mr Jarmain. Accordingly, if my Lords agree, I would substitute an order for costs in the sum of £78,144 in place of that of £109,394 as ordered by the judge.

Lord Justice Moylan:

78. I agree.

Lord Justice Underhill:

79. I also agree.