Case No. FD23P00010

IN THE FAMILY COURT

[2023] EWFC 330

The Royal Courts of Justice
The Strand
London
Date: 28 September 2023

Before:

MR RICHARD HARRISON KC

Sitting as a Deputy High Court Judge

Re A (A Child) (Removal to non-Hague country)

The applicant father and the respondent mother both appeared in person and were not legally represented

Hearing dates: 27 and 28 September 2023

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Approved Judgment

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

This judgment was delivered in private. **The judge has given leave for the judgment to be published in this anonymised form.**

MR RICHARD HARRISON KC:

1. I am concerned with a girl, who I will call A, and who is now aged 6.

2. I will refer to A's parents as 'the father' and 'the mother'. They have both appeared before me without legal representation. They both did their best to articulate their respective cases to me, but it is clear that each of them would benefit greatly from being legally represented in what is a complex international matter. The case was listed before me at 10.30am on 27 September 2023. At this point I had received very few of the relevant papers. I had one of the statements prepared by the mother (but not others). I had none of the father's statements and only one of the previous orders. Most significantly, I did not have the Cafcass report. The father helpfully, through the court associate, provided me with a file of papers, but I am not confident that I have seen all the material from two sets of proceedings that may be of relevance.

3. In the circumstances, I have made arrangements for two solicitors who volunteer their services under the duty advocate scheme operated by the Child Abduction Lawyers Association to attend court this afternoon, which they have agreed to do. The solicitors in question are Mr James Netto of iFLG and Ms Janet Broadley of Goodman Ray, whom I understand will be instructing Ms Campbell Brunton of counsel. I am enormously grateful to these highly skilled and specialist lawyers for the assistance they are willing to offer, free of charge. It will be a matter for the lawyers to come to an agreement about who is to represent whom.

4. The case now before the court is the father's application for A's summary return from the jurisdiction of country X to England and Wales.

5. Much of the background is disputed. I have not heard oral evidence and am not in a position to resolve factual disputes. The following is a summary of matters which are either common ground or incontrovertible.

6. The parents met in country X in 2012. They both originate from that jurisdiction, although the father was living in the UK at the time. They married in country X in 2015. A was born in a city in country X in January 2017. Later that year, when A was 8 months old, she and her mother moved to England to join the father where, as I understand it, he had continued to live throughout the parents' relationship. A is a UK national as is the father. I understand that the father also has nationality of country X. The mother is a national of country X but, as I understand it, has a visa which confers upon her the right to remain in this jurisdiction.

7. Unfortunately, the marriage came under strain for reasons which are disputed. In October 2019, the mother and A left the home in which the family were living at the time and where the father continues to live (he told me in his submissions that this was a one-bedroom flat held under a protected council tenancy).

8. The mother obtained alternative rented accommodation soon after moving out and continues to live in that property (during her submissions she told me that it was a two-bedroom flat). A continued to live with the mother until August 2021. The mother told me that A has her own bedroom in the flat where she lives.

9. Upon the parents' separation, all contact between A and the father ceased. The reasons for this are disputed. It is common ground that the father has not had any form of contact with A for approximately four years.

10. In August 2021, the mother took A to country X without the knowledge or consent of the father. Her case is that she believed she did not need his consent as she was the primary carer for the child and the father did not have parental responsibility. If so, she was mistaken as a matter of law. The parents were married when A was born and the father had parental responsibility (section 2(1) of the Children Act 1989). The removal of a child from the jurisdiction without the consent of all holders of parental responsibility is deemed to be 'wrongful' under Article 3 of the 1980 Hague Convention and Article 7 of the 1996 Hague Convention, it being well-established that persons with parental responsibility hold 'rights of custody' for the purposes of those international instruments.

11. In October 2021, the father issued an application for a child arrangements order which was dealt with in the Family Court at West London. The proceedings have a tortuous history, not assisted by the fact that neither party has been legally represented.

12. On 5 December 2022, there was a hearing at which the court was made aware that the mother had removed the child to country X. There is a dispute about when the mother had first made this known. She says she conveyed this information during a safeguarding interview with Cafcass. This is disputed and the safeguarding letter dated 21 November 2021 makes no mention of A having been taken to country X. For today's purposes, this not an issue I need to resolve.

13. It is unclear to me who heard the case on 5 December 2022. I have seen an order made on that date which contains a recital stating that the hearing took place in the West London Family Court before a legal adviser only; the order, however, is drafted as though it was made by HHJ McKinnell. I have also seen what appears to be the first page only of a separate order made by HHJ McKinnell sitting in the Family court at Barnet.

14. At all events, it appears that the court formed the opinion that, in the light of the child being in country X, no order could or should be made. According to a recital contained in the order expressed as having been made in West London, the father was advised by the legal adviser that he may wish to make an application in the High Court for A to be returned to the UK. Paragraph 1 of the order provided that no order was made in respect of his application. Paragraph 2 then provided that this was a final order and that in the event that the child returned to the jurisdiction, either parent was able to make a fresh application.

15. On 10 January 2023 the father applied to the High Court for an order for the return of the child from country X to England. On 9 February 2023, at a hearing attended only by the father an order was made for A to be summarily returned to the United Kingdom. This order was later set aside by Mr Justice MacDonald on 20 July 2023. He did so on the basis that the order had purported to be made under the 1980 Hague Convention and country X is not a signatory to that Convention. He directed that the matter be listed for this two-day hearing to consider the father's application for a return order under the inherent jurisdiction.

16. Mr Justice MacDonald gave various other directions including for a report to be prepared by an officer of the Cafcass High Court team in relation to:

a. The child's views, wishes and feelings in respect of returning to this jurisdiction;
b. The child's maturity; and
c. Whether the child should be separately represented.

17. Both parents were directed to file further evidence, which they have done.

18. The essence of the mother's case is that, having been required to leave the father's home, she found herself in a situation in which she was struggling to manage financially. She decided to obtain a nursing qualification as a means to improving her circumstances in the medium to long term. She did not feel, however, that she could adequately care for A while pursuing her studies and working part time. On her case the father has perpetrated domestic abuse and misused cannabis; she says that it would be contrary to A's interests to stay with him for these and other reasons. In those circumstances, in the summer of 2021 she considered that the best option for A was to stay with the maternal grandmother in country X with a view to her returning to England to live with her in 2025 upon the completion of her studies.

19. The father denies the allegations of domestic abuse and makes various allegations against the mother and her family. He asserts that the mother has chosen to prioritise her studies over A's interests. He says that A is a British citizen who is currently being denied the advantages of being educated in this jurisdiction. He also emphasises that for so long as A remains in country X, he is unable to have a relationship with her; he does not believe this can realistically be restored through video contact.

20. The father also emphasises his own ill health. He has chronic renal failure and is on a waiting list for a kidney transplant; he undergoes dialysis several times a week. He believes he would be in a position to care for A at present, but says that by 2025 his condition may have deteriorated to an extent whereby having contact may be difficult. He wants to create what he described as a 'memory bank' for A while he remains well enough to do so. He told the Cafcass Officer that he can still walk for approximately 100 metres. He receives support from an allocated social worker.

21. A Cafcass report dated 15 September 2023 was prepared by Mr Lill. Although neither parent had requested his attendance at court (as required by MacDonald J's order), he very helpfully made himself available to give evidence at short notice. I found Mr Lill's evidence to be helpful and insightful. I have no hesitation in accepting it.

22. Mr Lill emphasised the limited ambit of the report he had prepared; he had not undertaken a full welfare assessment. On the basis of his enquiries, it appeared to him that A was doing well at school in country X and that she was well cared for by her grandmother. A spoke in positive terms about both her grandmother and other family members in country X. She also spoke warmly about her mother, whom she sees only infrequently but with whom she communicates regularly by video. She had some awareness that her stay in country X will not be forever and spoke about returning to live with her mother in 2024 (sic) when the mother 'finishes school'. She expressed that she would be happy to live with her mother at this point.

23. Mr Lill disagreed with the father's suggestion that A had been subjected to parental influence. Amongst other things he pointed to the fact that she did not speak negatively

about her father; on the contrary she responded positively to the idea of meeting him, believing that he loves her.

24. The father put various propositions to Mr Lill in evidence to the effect that there were welfare considerations which militated in favour of making a return order at this stage rather than waiting until 2025. In essence (and I paraphrase) he contended that (a) although A appeared to be settled in country X, she was missing out on having a proper relationship with him (as well as her mother) and on an English education; (b) time was of the essence as his health is in decline; (c) there was a risk that the mother may choose never to bring A back to England such that he might be denied a relationship with her for most or all of her childhood; and (d) there is some suggestion that A may be on the autistic spectrum and this should be the subject of a proper assessment which can only take place in England. He sought to emphasise that in the light of those matters there was no advantage in waiting until 2025.

25. Mr Lill readily acknowledged that most of the points made by the father were potential arguments in favour of a return before 2025 but made plain that he had not undertaken a full welfare assessment. He did not perceive any indicators that A has autism, but acknowledged that he is not an expert in this field. He made clear in his oral evidence that in any welfare assessment, matters such as those raised by the father would be properly evaluated and balanced against the potential disruption that would be caused by a return. In circumstances where the mother is heavily committed to her studies and her work and the parents' finances are tight, there does not appear to be a straightforward solution to how A would be cared for following any return. He said that the normal timescale for the Cafcass High Court Team to prepare a welfare report was six to eight weeks.

26. Given its limited ambit, Mr Lill's report does not contain a clear recommendation. He concludes, however, by suggesting the potential for the scope of the proceedings to be widened with A being represented through a children's Guardian, thus enabling a more thorough welfare evaluation to be undertaken. He cautions that a return to England will require a '*significant change*' for A and that '*the Court is likely to need reassurance that the changes to A's are arrangements have been carefully thought through, particularly given the relative stability she currently experiences in [country X] and her planned return to London in 2025*'.

27. Mr Lill does not consider the father's suggestion that A could immediately move to live with him to be realistic given that she has not seen him for nearly 4 years and has no memory of him. His ability to look after a young child would also need to be carefully assessed in the light of the difficulties with his health and the allegations of domestic abuse which the mother has made and which remain unresolved.

28. In making my determination, I am guided by A's best interests which are my paramount consideration. A's removal to country X may have been '*wrongful*' but there is not scope for applying Hague Convention principles to a case involving a non-Hague state: see *Re J (A child)* [2005] UKHL 40.

29. Although this application is made under the inherent jurisdiction, the Supreme Court made clear in *Re NY* [2019] UKSC 49 that the court should have regard to all of the matters in the welfare checklist. It was also emphasised in that case that if a court is '*considering whether to make a summary order, it will initially examine whether, in order sufficiently to*

identify what the child's welfare requires, it should conduct an inquiry into any or all of those aspects [of the welfare checklist] and, if so, how extensive that inquiry should be'. The same approach applies in relation to the need to consider allegations of domestic abuse in the light of Practice Direction 12J.

30. Having considered the guidance from the authorities, the written evidence and submissions from the parents and, in particular, the written and oral evidence from Mr Lill, I am not satisfied that it is in A's interests to make an order for her summary return to England on the basis of the limited information I currently have and the narrow scope of the enquiry undertaken by Mr Lill to date. In my judgment, as Mr Lill has suggested, the scope of the welfare enquiry needs to be widened to enable the court to reach a conclusion on an issue which is not straightforward.

31. I have come to this conclusion for the following reasons:

    (a) It is common ground that A has been in country X for nearly two years during which time she has had no contact at all with her father and limited direct contact with her mother. Removing her from country X will entail disrupting the life with which she has become familiar and in which she appears to be reasonably happy and settled, based upon Mr Lill's limited enquiries to date. A return to England may be the appropriate outcome following a fuller welfare enquiry, but it would need to be managed with some care.

    (b) The reintroduction of contact between A and her father will also need careful thought given that he has not seen her at all for four years and is a stranger to her. In common with Mr Lill, I formed the view that an immediate transfer of care to him was not realistic, even without considering the issues with his health or the unresolved allegations of domestic abuse. I should record that the mother's case is that she would like the father and A to have a relationship, but one which proceeds at a very cautious pace commencing with some form of supervised contact.

    (c) The fact that the parents are both acting in person has meant that the written evidence is more sparse and less focused on issues relating to A's welfare than would otherwise have been the case had they been represented. For example, I asked each of them about their financial circumstances and living arrangements in order to gain some understanding of what the practicalities of a return order would entail. I formed the impression that there would be significant practical and financial obstacles to a smooth return, but none of the financial and housing information I was given orally is the subject of written evidence let alone any documentary corroboration.

    (d) The parents acting in person makes the task of resolving disputed allegations harder. The Domestic Abuse Act 2021 precludes either from cross-examining the other. This is an issue which may require further consideration at the case management hearing I propose to order although I hope it may fall away if both of them are able to obtain representation.

    (e) Given the limited nature of his enquiries, Mr Lill was unable to provide the court with a full welfare analysis in relation to whether a return should be ordered.

Although a full welfare analysis is not essential in every application for a summary return (as *Re NY* makes clear), I do consider it necessary in this case in view of the matters above, in particular the limitations in the parents' evidence, the length of time A has been in country X and the difficult nature of the balancing exercise which in my view will need to be undertaken by the court.

32. I bear in mind all of the matters in the welfare checklist. In my view A's own views are unlikely to hold significant weight given her age and limited understanding, although they do tend to corroborate the fact that (as Mr Lill has indicated) she is currently in a relatively stable situation and appears to be happy. Of the various factors in the welfare checklist, it seems to me that those of particular significance are (i) A's needs (especially her emotional needs, but also her educational and physical needs), (ii) the effect upon her of any change in her circumstances that would be caused by a return to England, and (iii) the potential risks of harm she may face, both if she is returned to England and if she remains in country X, as the mother wishes, until 2025. These matters are difficult to evaluate and I do not consider I can properly do so on the basis of the information I currently have.

33. My conclusion is that there needs to be a fuller investigation in which the court will be able to consider a range of options for A. There may, for example, be a middle ground between making a return order and simply dismissing the application, entailing a regime whereby she comes to England periodically to spend time with her parents and vice versa. All potential options need to be carefully evaluated and, in my view, this can only adequately be done by widening the ambit of the enquiry as Mr Lill has suggested.

34. As I have indicated, Mr Lill raised the potential for A to be separately represented by a guardian who will be able to evaluate thoroughly whether a return is in her interests. I propose to make such a direction. In my view the appointment of a guardian for A is in her best interests. I have considered the matters set out in FPR PD 16A at paragraphs 7.1 and 7.2. Although Mr Lill did not say so in terms in his written evidence, I gained the impression from his oral evidence that he considered that A should have the benefit of a guardian and independent legal representation. In my view, her standpoint and interests are not capable of being adequately represented by the adult parties. Neither is living with her on a day-to-day basis; each of them is driven to an extent by their hostility towards the other.

35. I should finally record that I am satisfied that the court has jurisdiction to deal with all welfare issues relating to A. When the father issued proceedings in October 2021, I find that that A continued to be habitually resident in England and Wales. She had been subject to a clandestine removal. Following the removal she was placed in a wholly unfamiliar environment where she was to be brought up by neither of her parents on a time-limited basis while her parents continued to live in England. She had previously lived for almost all of her life in England; she was and is a UK national and had and has deep-rooted connections to this jurisdiction. In those circumstances, a transfer of habitual residence from England to country X could only have happened following a significant period of time. I am satisfied that such a transfer did not occur in two to three months between August and October 2021 (indeed, habitual residence may not have transferred at all, although I do not need to determine that point). It seems to me that the order of 5 December 2022 is likely to have been made on the basis of a misapprehension by all concerned to the effect that the Family Court was powerless to make orders while A remained outside the jurisdiction

and that separate proceedings needed to be issued in the High Court (which occurred relatively soon afterwards). I propose to set that order aside and direct that those proceedings be consolidated with the present proceedings.

36. On the basis of my finding as to habitual residence, the court has jurisdiction either under the 1996 Hague Convention or, alternatively, residually under section 2(3) the Family Law Act 1986. In any event, the court would have jurisdiction to make a welfare orders '*in connection with*' the divorce proceedings that have concluded between the parties: see section 2A of the Family Law Act 1986, *Lachaux v Lachaux* [2019] EWCA Civ 738, and *Re T* [2023] EWCA Civ 285. I am aware that as matters stand the Court of Appeal has yet to resolve the issues of whether (i) for the purposes of the 1996 Convention habitual residence falls to be determined on the date of the application or the date of the hearing and
(ii) whether Article 7 applies in cases involving a removal to a non-Hague state; given my determination on jurisdiction I do not consider it necessary to attempt to resolve such issues in this interim judgment.

RHKC
28.9.23