



Neutral Citation Number: [2019] EWHC 2613 (Fam)

Case No: 2019/0028
ZC17P01334

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM THE CENTRAL FAMILY COURT AT LONDON
ORDER OF HIS HONOUR JUDGE TOLSON QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/10/2019

Before:

MS JUSTICE RUSSELL DBE

Between:

B
- and -
A

Appellant

Respondent

Ms Jessica Atkinson (instructed by **Duncan Lewis**) for the **Appellant**
John Buck (instructed by **Law Lane Solicitors**) for the **Respondent**

Hearing dates: 12th September 2019

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.

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Hon Ms Justice Russell DBE:

1. The Appellant (B) seeks to appeal part of an order made in the Central Family Court on 25th January 2019 following a hearing which took place on 7th and 8th January 2019 at which the judge heard the oral evidence of B and the Respondent (A) and from a Cafcass Officer. The case concerns the parties' son (L) who was three years old at the time. B (his father) had made Children Act 1989 applications for child arrangement orders and for a prohibited steps order (PSO); A (the child's mother) had applied for a child arrangements order and an oral application to remove the child, temporarily, from the jurisdiction to Iraq. The parties made an oral application for an expert report on safety and security in Iraq along with any means of return should L be retained in Iraq which is a non-Convention country. At trial the judge considered the report prepared by the jointly instructed expert, whose evidence was not challenged.
2. The order made following the judgment given on 25th January 2019 was that the child should live with his mother A; in the order arrangements were set out for L to spend time with his father B; the application for the PSO was dismissed. The order allows A to take L abroad, for a period of up to one month. B appeals against that part of the order dismissing his application for a PSO prohibiting L's removal from this jurisdiction. There was a delay in obtaining the transcript of the judgment which in turn contributed to delay in hearing this appeal. This court stayed that part of the order which discharged of the PSO and provided for the return of the child's passport to his mother pending the appeal hearing.
3. The Facts. The parties were both born in Iraq, both have substantial connections within the Kurdistan region of Iraq, and the city of S. The trial judge's findings that L was entirely legitimately in the primary care of his mother, in the country to which she has primary connections, when B removed to England L without her knowledge or consent in October 2017, is not challenged or appealed. B has obtained British citizenship; A has leave to remain. B moved to the UK from Iraq in 2002; it would seem that he may have sought to mislead the authorities as to his age at the time as there is contradictory evidence as to his date of birth in the documentary evidence before the Family Court. He met A on his return to Iraq in 2012 and they were married there on 8th June 2014. L was born when his parents were still living in Iraq. In June 2016 they moved to Italy and in August 2016 to the UK. The parties did not agree as to their intentions in coming to the UK in 2016 when they gave evidence to the trial judge; B said it was to remain in the UK permanently and A had said it was only for long enough for her to get a spousal visa and leave to remain.
4. B obtained employment here in June 2017 and had travelled to the USA for training. After B left for the USA A took L to Iraq. B claimed that this had been without his knowledge or agreement despite the fact that B's sister (who lives in London) accompanied A to the airport. There is an absence of any contemporaneous evidence to support B's claim; and the fact that he then took six weeks to travel to Iraq himself having resigned from his job in the UK led the trial judge to consider the evidence ran contrary to B's claim that he intended to return to the UK immediately or to reside here permanently.

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5. In fact, by then, the parties' relationship had begun to deteriorate and as can be seen in the messages A had sent to B; their relationship did not improve, and it became clear that she saw her future in Iraq. On B's return having resigned from his job in the UK, B did not live together with A but she co-operated over child-care; B taking L to and from his nursery. On 12th September 2017, B returned to the UK and obtained another passport in L's name. The trial judge concluded that this had been "*in the main*" B's reason for returning to the UK and that it was likely that his family members had been involved when B returned to Iraq on 29th September 2017 and, without notice or warning to A, removed L bringing him to the UK on the 12th October 2017 without her agreement or consent. It is axiomatic that as B did not inform A of the whereabouts of her infant son until he was in London, she was caused considerable worry and distress. At trial the judge rightly observed that A needed a full apology from B over this abduction.
6. On 16th October 2017 B issued the proceedings and sought a PSO restricting the removal of L from his care; later the trial judge observed it was "*painfully apparent that [B] had not...*" fulfilled his obligation to give the Family Court the full truth on that occasion. By 19th October 2017 A had returned to the UK and she has remained here since, albeit subject to considerable restriction on her movements imposed by the Family Court. No point was taken by A in respect of the jurisdiction of the Family Court, and, at the time of the hearing in early January 2019 it was accepted that L was habitually resident in the UK. It was A's oral evidence, accepted by the trial judge, that she intended to remain in the UK and to return to Iraq regularly for holidays to see the maternal family.
7. Child arrangements were, by the time of the trial, largely agreed. L was, and is, to live with his mother and to spend alternate weekend with his father along with alternate visits during the week. School holidays will be split equally between both parents. There remained issues over the length of the visits, handovers and the commencement of these arrangements, which are not the subject of the appeal, and, in any case, followed the recommendations of the Cafcass officer who had given evidence in court and had worked successfully with both parents. More controversially the child arrangements order contained a standard provision which allowed A to take L to Iraq for up to one month at a time; the Appellant did not agree and sought the imposition of a PSO and to withhold L's passport from his mother's possession.
8. The trial proceeded, with the agreement of both parties, in the absence of expert evidence as to the situation "on the ground" in Kurdistan region of Iraq and the city to which the parties had both previously returned. The unchallenged legal expert's report before the court, which formed part of the evidence as a whole, was directed to law and specifically the means by which the return of the child be secured if L were to be retained there (by his mother). The questions put to the expert all related to this, although he was asked to identify another expert on safety and security in Iraq. Nonetheless, the report, which was accepted by the Appellant, set out the situation in Kurdistan vis-à-vis the rest of Iraq in some detail at paragraphs 12 to 18.

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9. While the author explicitly accepted that he was not a security expert, reference was made to the most recent FCO advice; this and the report formed a legitimate and accepted part of the evidence considered by the judge. This report included (at paragraph 12) the observations that the region in question, while not trouble free, was not subject to the same terrorist violence commonplace in Baghdad or Mosul and the quality of life for the Kurdish people and foreigners who live there was that they did so, without great fear for the personal safety and that the quality of life was for many is considerably higher than in the rest of Iraq. Reference was also made to the level of autonomy exercised by the Kurdish authorities and the efficacy of registering orders made by the courts in the UK with the Kurdistan Representative in London as well as the Iraqi Embassy.
10. The Appellant did not make a Part 25 application for further expert evidence at the commencement of the trial. This court understands that the parties could not agree on an appropriate expert, and that the Legal Aid authority had, in any case, refused to fund half the cost of a further expert report and the Respondent was unable to pay for the report on her own. In addition, the Appellant did not seek to adjourn the hearing for further time to secure funding or for any other reason concerned with the evidence in respect of safety and security in Iraq or more particularly and pertinently the Kurdistan region. For these reasons, must have been well known to the Appellant, there was no expert opinion on the issue of safety and security before the court in January 2019.
11. At trial the Appellant was able to produce the latest FCO advice and recent decisions of this court, which the judge considered and later made reference to in his judgment. The judge's decision and his reasons for that decision, namely, that he did not consider that the Appellant himself had concerns about safety or security in Kurdistan based on the Appellant's own actions in returning to the region himself on more than one occasion, and remaining there for a number of years between 2012 and 2016, and are set out clearly and succinctly at [36]; it is not necessary to rehearse them here in full. His decision is not unreasonable given the evidence and the Appellant's own conduct over a period of years nor are they ill-founded and as such they cannot be said to be wrong thus that part of his decision do not form a ground to appeal as set out in FPR 2010 Part 30 r30.12 (3) (a).
12. The Grounds of Appeal. The Appellant does not appeal against any findings of fact made by the trial judge. Ms Atkinson, on behalf of the Appellant has had the opportunity to develop her arguments in a skeleton argument, a position statement filed on the morning of 12th September 2019 and in oral submissions. Mr Buck responded, in writing and orally, on behalf of the Respondent. The Respondent gave her counsel instructions in respect of further safeguards in response to questions from this court and was willing to give undertakings in respect of possible criminal proceedings against the Respondent in Iraq.

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13. The grounds of appeal and skeleton were considered by this Court on the 1st July 2019 after the transcript of the judgment had been obtained. It was fairly accepted by Mr Buck in his response filed on behalf of the Respondent, that there is some confusion as to the limits imposed on this appeal in the order of the 1st July 2019. It was agreed before me that there were in essence three grounds which reflect the three-related assessment of risk and balancing exercise described by Thorpe LJ in the Court of Appeal in *Re K (Removal from Jurisdiction: Practice)* [1999] 2 FLR 1084: the first is that the judge failed to consider adequately the risk that the respondent would not return L to the jurisdiction and the concomitant risk to L of harm if he were to be retained. The second is that the judge failed to adequately assess the risk to L's safety and security in Iraq, which I have already dealt with in part. The third is that the judge had then failed to put adequate safeguards in place.
14. Both the Appellant and the Respondent agreed that permission to appeal the fourth ground (as set in the Appellant's grounds) "*that the judge failed to consider properly or at all the inconsistencies in the relation to her stated intention to live in the UK in 2016, her stated intention to live in Iraq in June 2017 and her ability to promote the father's relationship with the child*" had been refused. The Appellant did not pursue that ground before me.
15. The Law. There is no argument as to the law which applies or the relevant authorities. I have considered the authorities which bind this court and referred to in counsels' documents namely, *Re R* [2013] EWCA Civ 1115; *Re H* [2014] EWCA 989 and the judgment of Lord Justice Ryder in that case as well as the decision of Baker J (as he then was in *AM v DF* [2017] EWHC 2034. The judge referred to *Re R [Ibid]* and clearly had it in his mind when considering the risks to L's safety and security on any visit to his family in Iraq, as he did the advice from the FCO.
16. Following *Re R* in each case of temporary removal to a non- Hague Convention Country the best interests of the child remain the overriding consideration of the court. The Court of Appeal has set out the matters with which the court should be routinely involved in investigating where there is some risk of abduction (and the obvious risk to the child were that risk to materialise). In this case the evidence before the court in respect of any risk of abduction was that the risk lay with the Appellant and not the Respondent. The judge makes reference to it in paragraph 45 of his judgment. He found that the child had not been abducted by his mother previously, but by the Appellant, his father. Having heard the oral evidence of both parties the judge was entitled to prefer the evidence of the Respondent and he set out his reasons for doing so.
17. No appeal is made against the judge's findings and yet it is asserted that he failed to have given sufficient weight to the risks that the Respondent would retain L in Iraq. This ground of appeal rests largely on the limited links that the Respondent has in, and with, the UK. The judge considered it [40] and concluded that it was in the interests of L's welfare to allow his mother to travel with him to and from their family in Iraq, having previously referred [39] to welfare reasons for L to travel to Kurdistan to experience his heritage and culture which he has inherited from both parents. That effective restriction on the Respondent's freedom of movement would have be detrimental not only to her, but, in turn, be harmful to L is self-evident, as rightly concluded by the judge. In this case *both* parents have close connections with the country and region in question.

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In his judgment the judge placed weight on the Respondent's commitment to promoting L's relationship with the Appellant throughout his life, in reaching agreement over child arrangements and on the Cafcass officer's analysis of her parenting abilities. He cannot be faulted for doing so, nor can he be criticised for considering these factors when deciding the risk of retention.

18. In respect of the risks to L's safety and security in Iraq there was no evidence before the court that the Appellant himself was either at risk or considered himself to be at risk during the time he chose to live there between 2012 and 2016. Neither parent put forward a case that they had fled Iraq because they were in fear of their personal safety or security. This evidence supports the decision made by the judge that the Appellant did not genuinely hold the views he sought to present to the court that L would be put at risk of physical harm because of violence and unrest.
19. The ability of the Appellant to travel to Iraq is said, by him, to have been diminished by the existence of an arrest warrant following his abduction of L to this jurisdiction in 2017. There was before the trial judge and is before this court no independent objective evidence to support his assertions. Similarly, without any objective evidence to support his case, Ms Atkinson sought to advance arguments about the lack of safeguards in place and asserted that even if such safeguards were in place, the Respondent's family were wealthy and would have undue influence with and over the courts in Kurdistan. When asked directly what other safeguards should be put in place counsel struggled to provide an answer other than suggesting a surety. It was apparent that the Appellant would not or could not give any consideration as to what safeguards would be acceptable to him, instructing his counsel to say that there were no safeguards that he would consider adequate. This was contrary to what had been advanced on his behalf in the grounds of appeal and his apparent intransigence before this court that it served to bolster and add weight to the conclusions in respect of the Appellant's conduct and attitude towards the Respondent as found by the judge in the court below.
20. As the Appellant was unwilling or unable to instruct his counsel what safeguards would have been adequate and advance his argument in a manner congruent with his grounds of appeal it hampered this court's consideration of what if any safeguards should have been in place. Before this Court the Respondent said through her counsel that she would use her best endeavours to intercede with the authorities in respect of any extant arrest warrant and would not pursue any prosecution or action against the Appellant in Iraq (of which more below). The judge did not consider that safeguards were necessary as he accepted, having heard her in evidence, that the Respondent would return with L to England after holiday visits to S, but on behalf of the Appellant it was argued that the judge had not adequately analysed the safeguards that could be put in place "*wholly or comprehensively*". In the absence of argument as to what should be in place is difficult to sustain this ground of appeal.
21. As previously observed, in reality the Appellant's case is that there are not any safeguards that would be adequate or sufficient. This was not argued in the court below, where the Appellant made much of physical risks to the child in going there at all and of the wealth and influence of the Respondent's family in respect of retention alleging that they would wield it to interfere in the courts in S in favour of the Respondent.

In the absence of arguments as to what safeguards should have been put in place it is difficult if not impossible for the Appellant to argue that there was some serious procedural or other irregularity in the judge's decision or analysis of this issue and for this court to allow the appeal.

22. As to the assertions in respect of the influence of the Respondent's family, the legal expert had set out in his report, which was and remained unchallenged evidence, an overview of the legal system in Kurdistan. It included his view that there was a great deal of corruption in the Kurdistan Region and the courts and the judiciary are not immune, nonetheless, the report continued that in his opinion "*the majority of judges in the Kurdistan Region of Iraq are attempting to do justice according to the law*" although he then went on to say that notable families are able to influence the outcome of a case by virtue of who they are rather than by crude attempts to bribe or threaten. In the relevant area of S (where the parties come from) such influence would be from families connected to the PUK (Patriotic Union of Kurdistan). It was accepted by the Appellant that the Respondent's family did not have such connections. While her family may well be relatively wealthy the expert evidence was that it was the status of the family in respect of PUK which would carry most weight, they do not have that connection; thus, the independent evidence before the court did not support the Appellant's case and the judge was not wrong to conclude, as he did, that the Appellant's arguments were largely selfish and not as a result of a fear of the situation in Iraq; or to conclude that at [37] "*the factors in this case serve to differentiate between the general and that which in my judgement is specific to [L]*".
23. Nor is it wrong to reach the decision that there was no risk in terms of physical harm which would justify L not travelling to Iraq on the facts of this case. It is the child's welfare which governs the decision of the Family Court and that well-established principle was referred to by the judge in his judgment. The risks to L were he not to return are obvious, and those risks to his relationship with his father were referred to by the judge [41] and it is not necessary to set the obvious in detail. It is commonplace in the Family Court for judges to consider as part of their analysis which parent is the more likely and able to promote a relationship with the other and weigh that in the balance when considering arrangements to be made for a child. In this case the judge, who had the benefit of hearing from both parents, decided, as he was entitled to on the evidence before him, that the Respondent had consistently promoted L's relationship with the Appellant, including at times when the situation between the parents was difficult in 2017 and had continued to do so [42] & [44].
24. The judge clearly had the child's welfare in mind when considering whether or not he should be allowed to go to Iraq with his mother; he sets out his reasons for doing so at [39]. This child on any view has close and extensive links with the Kurdistan Region in Iraq, not only with his mother's family but with the family of the Appellant, his father. This court considers that the judgment was wholly and properly concerned with L's welfare which is referred to throughout as the judge considered all the arrangements to be put in place for L to spend time with his father and to live with his mother. The judge's decisions in respect of L's welfare are not wrong, manifestly unreasonable or antipathetic to the child's best interests.

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25. Conclusion. In respect of the appeal against the judge's conclusions and the argued lack of scrutiny of the risk of retention in Iraq or Kurdistan by the Respondent, on any objective analysis the greater risk of retention lies with the Appellant. The judge, who had the benefit of hearing the parties and considering their oral evidence, cannot be criticised for reaching the decision that he did in respect of the low risk of retention by the Respondent having considered the actions as well as the oral evidence of both parties. The judge was well placed and able to weigh their evidence and consider what weight to give to each party's evidence; that was his judicial responsibility at first instance and on review of the case, the evidence filed and the transcript of his judgment there is nothing to support the Appellant's argument that he was wrong in his analysis and the conclusions he reached; nor were his conclusions as has already been observed illogical or capricious. The judge concluded that the risk of retention by the Respondent was low and the decisions he made about the safeguards logically, even inexorably, follow on from that decision.
26. Another judge may have considered putting safeguards in place, such as those suggested by the legal expert, even though the Appellant did not argue for them, it is arguable that they could have assisted in providing a more settled legal framework might have been helpful in the longer term. Notwithstanding this observation on the part of this court, the judge acted within his discretion and given low level of risk he had found his decision was clearly based on his assessment of both parents. This court would accept that the additional safeguards offered by the Respondent in respect of her conduct in S and in the Kurdistan Region of Iraq in the child's best interests would amount to further evidence in support of her commitment to promoting L's relationship the Appellant
27. The appeal is dismissed.
28. Consequential orders. [Counsel may make submissions on the order which will be made after the perfected judgment is handed down.] For the reasons set out above the appeal is dismissed. There will be no order continuing the stay. The orders of His Honour Judge Tolson QC will remain in force in their entirety. The undertakings offered by the Respondent are accepted by this court.