

Judgment approved by the Court for handing down

MB v KB (Costs)

Neutral Citation Number: [2023] EWHC 3299 (Fam)

No: FD23P00396

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
IN THE MATTER OF AB (A GIRL) AND BB (A BOY)
AND IN THE MATTER OF THE SENIOR COURTS ACT 1981

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2023

Before:

MR DAVID REES KC

(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

MB

Applicant

and

(1) KB

(2) AB and (3) BB

(By their Children's Guardian LILLIAN ODZE)

Respondents

Mani Singh Basi (instructed by Mackrell Solicitors) for the Applicant
Jane Hayford (instructed by Duncan Lewis Solicitors) for the First Respondent
Cliona Papazian (instructed by Freemans Solicitors) for the Second and Third Respondents

Hearing dates: 27 and 28 November 2023

I direct no official shorthand note shall be taken of this Judgment and that copies of this Judgment as handed down may be treated as authentic

David Rees KC, Deputy High Court Judge

Mr David Rees KC:**INTRODUCTION**

1. These proceedings sought the summary return of two children AB and BB to Qatar. The application was brought by the children's father MB following the removal of the two children to England by their mother KB in July 2023. By my judgment dated 13 December 2023 (*MB v KB (Return under Inherent Jurisdiction: Qatar)* [2023] EWHC 3177 (Fam)), I dismissed the father's application. The facts are set out in that judgment and I do not repeat them here.

2. There are various costs points in dispute. The parties have agreed that I should resolve them on the basis of written submissions. I had understood that the parties had agreed to confine their submissions to a single page of A4. Mr Basi for the father has done precisely that. However, Ms Hayford's submission for the mother extend to four pages and the father's solicitors have sent an e-mail by way of reply to Ms Hayford's submissions. I have read all of these documents and the mother's witness statement of 24 November 2023 which also addressed the issue of costs and have taken them all into account.

3. The issues that I am being asked to consider are as follows:

(1) The costs of the application generally. Ms Hayford seeks an order that the father pays these costs, to be subject to summary assessment on the standard basis. Mr Basi seeks that there be no order for costs;

(2) The costs of the expert report of Mashaal Alsulaiti Law Firm on Qatar law. The mother seeks an order that the father should bear these costs. The father seeks an order that the parents bear these costs in equal shares.

(3) The costs of the translation of documents from the Qatari proceedings. The mother seeks an order that the father should bear these costs. The father seeks an order that the parents bear these costs in equal shares.

(4) The costs of an unsuccessful application by the father for a disclosure order against the Home Office. The mother says that the father should pay her costs of this, to be summarily assessed on the indemnity basis. The father says that there should be no order for costs in relation to this application.

4.4. The sums in dispute are as follows:

Issue	Costs in Dispute
Costs of the case	Mother's costs of £19,033.33 (incl VAT)
Expert	50% of £2816.38 (ie £1,408.19)
Translation costs	50% of £327 (ie £163.50)
Home Office disclosure application	Mother's costs of £1,500 (incl VAT)

Costs generally

5. The mother has referred me to the fact that under CPR r.44.2 the award of costs is within the discretion of the court. CPR r.44.2(2), which provides that the general rule is that the unsuccessful party will be ordered to pay the costs of successful party, is disapplied in

proceedings (such as this case) which are governed by the Family Procedure Rules 2010 (see FPR r.28.2(1)). Notwithstanding this, Ms Hayford’s submissions on behalf of the mother appear to proceed on the basis that CPR r.44.2(2) applies in this case. It does not; although the court retains a general and wide discretion as to the award of costs (see *D v E (Costs)* [2023] EWHC 3171 (Fam) per Theis J at [12]).

6. Some assistance on the principles to be applied in relation to the costs of abduction proceedings can be found in the decision of Hayden J in *SB v MB (Costs in Hague Convention proceedings)* [2014] EWHC 3721 (Fam). The judge in that case identified the following propositions at [4]:

“i) The High Court has jurisdiction to award costs in first instance cases brought pursuant to the 1980 Hague Convention. It is trite that it has such powers in applications made pursuant to the inherent jurisdiction though, for the reasons set out in my substantive judgment, that is of merely academic relevance here;

ii) Though there are few reported cases of cost orders having been made against applicants in this Hague Convention jurisdiction, the basis of the power to award costs was analysed and confirmed by Ryder J (as he then was) in *EC-L v DM (Child Abduction: costs)* [2005] EWHC 588 (Fam), [2005] 2 FLR 772. There Section 11 of the Access to Justice Act 1999 was in focus and the Family Proceedings Rules 1991 that then applied. However, the principles identified in the case continue to hold, by parity of analysis, with the framework of the Family Proceedings Rules 2010;

iii) In each case where a costs application is made there should be an inquiry into the merits *EC-L v DM*

‘it should be the expectation in child abduction cases that the usual order will be no order as to costs, but where a parties conduct has been unreasonable or there is a disparity of means then the Court can consider whether to exercise its jurisdiction in accordance with normal civil principles’;

iv) It is misconceived to talk of a ‘presumption’ of ‘no order’ for costs at first instance in either Hague Convention cases or children cases more generally. In *Re J (Children)* [2009] EWCA Civ 1350 Wilson LJ, as he then was, referred to the ‘general proposition’ of no order as to costs applied to a ‘paradigm’ situation. In *Re T (Costs: Care Proceedings: Serious Allegation Not Proved)* [2012] UKSC 36 ‘reprehensible behaviour’ or ‘an unreasonable stance’ were identified as markers for an adverse costs order;

v) FPR 2010, r 28.1 CPR 1998 r 44.3 do not circumscribe the Judge's discretion on costs and invite the Court to consider ‘all the circumstances’. It should of course have regard to the matters set out at CPR rule 44.2 (4) and (5) :

(4) ‘in deciding what order (if any) to make about costs, the Court will have regard to all the circumstances, including –

a) the conduct of all the parties;

b) whether the party has succeeded on part of its case, even if that party has not been wholly successful;

c) any admissible settlement by a party which is drawn to the Court's attention, and which is not an offer to which costs consequences under para. 36 apply.

The conduct of the parties include—

d) conduct before, as well as during, the proceedings and, in particular, the extent to which the parties followed the practice direction – pre action protocol or any relevant pre action protocol;

e) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

f) the manner in which a party has pursued or defended its case or a particular allegation or issue;

g) whether a claimant has succeeded in a claim, in whole or in part, exaggerated its claim.

vi) It is generally undesirable to award costs where the consequence of such order is likely to exacerbate hostile feelings between parents to the ultimate detriment to the child.”

7. In my judgment the principles identified by Hayden J above are as applicable in cases where a summary return is sought under the inherent jurisdiction as where it is sought under the 1980 Hague Convention. I therefore start from the general proposition that the appropriate order in this case is that there should be no order as to costs, but I must then consider whether there has been reprehensible behaviour or an unreasonable stance on behalf of the father which would justify an adverse costs order being made. In her submissions on this issue Ms Hayford largely focussed upon the fact that the mother had been successful in resisting the father's application, because of her misconception that CPR r44.2(2) is applicable. However, Ms Hayford also criticises the father for pursuing this matter in the light of his knowledge of the children's wishes and feelings as set out in the Guardian' report, and in her witness statement of 24 November the mother raises an allegation that the father is trying to drain her financially by inter alia making her pay double lawyers' fees in two countries.

8. I do not consider that these arguments justify an adverse costs award against the father in this case. These proceedings became necessary because of the decision of the mother to remove the children from Qatar and bring them to the UK without the consent or knowledge of the father and I reject the mother's allegation that the proceedings are part of an attempt by the father to drain her financially. As I explained at paragraph [30] of my judgment:

“The mother's behaviour is not beyond criticism either. It is clear that she undertook the move to the UK (and indeed the earlier trip in April 2023) without the father's consent. The mother sought to suggest that the father was aware that she was planning to move to the UK with the children and knew everything apart from the exact date of the move. I cannot accept this evidence, which I consider to be at odds with the explanatory email of 8 July 2023 that she sent to the father after arriving in the UK. Whilst the mother may have tried to communicate a general intention to

move abroad via the father's brother, she clearly did not tell the father in any detail what she was proposing let alone take steps to obtain his unequivocal consent. I consider that her likely reason for this was that she knew that if the father was aware what she was planning to do, he would have taken steps via the Qatari courts to prevent her from leaving.”

9. Given the circumstances of the children’s removal from Qatar I do not consider that the father should be criticised for bringing these proceedings. I certainly do not consider that these proceedings amount to reprehensible behaviour or an unreasonable stance on the father’s behalf. The decision whether or not to order a summary return was one that I had to determine by reference to the welfare checklist in s.1 of the Children Act 1989. Although I ultimately concluded that the children’s wishes and feelings were a factor of magnetic importance in this case, I do not consider that the father can be criticised either for seeking to explore the Guardian’s report in oral evidence or for arguing that in any welfare assessment greater weight should be attached to other statutory factors.

10. I therefore do not consider that this is a case where the father has behaved reprehensibly in the conduct of the litigation or otherwise taken an unreasonable stance. In the circumstances I consider that, subject to the ancillary points that I deal with below, there should be no order for costs.

Expert Fees

11. Although I found the evidence of the instructed expert to be highly unsatisfactory (see judgment at [32] to [35]), I consider that expert evidence on Qatar law was necessary for me to determine the application. This was also the conclusion of Russell J who, in granting permission for the instruction of the expert, was satisfied that the test of necessity for such expert evidence under FPR r.25.4 was met.

12. Russell J’s order of 9 November 2023 provided for the instruction to be a joint one. The order provided for the costs of the application to be met by the applicant in the first instance, with any dispute relating to the costs of the expert to be reserved to the trial judge.

13. In her witness statement of 24 November, the mother opposes contributing to the costs of the report on a number of grounds. She disputes the necessity of the report on the basis that (i) she did not seek to return to Qatar, (ii) that the children clearly wished not to be returned there, (iii) that the father did not initially seek a direction for expert evidence when he first issued his application and (iv) that the mother is an Egyptian national, and as such the laws in Qatar are not applicable. In my view none of these reasons derogate from the necessity of the Qatari expert report. As part of the welfare assessment that I was called upon to make in this case I needed evidence of the legal system in Qatar to consider whether issues surrounding the children’s welfare were capable of being tried in that country (see *Re J (A child) (Custody Rights: Jurisdiction)* [2006] 1 AC 80 at [39]). That the mother did not wish herself to return to Qatar did

not diminish the need for this evidence. The fact that children were expressing clear a wish to remain the UK indeed emphasised the importance of obtaining this evidence.

14. Although the evidence that was ultimately obtained from the instructed expert proved unsatisfactory, I do not consider that this is something that can be blamed on the father or any other party. In the circumstances I have decided that, given that there was a clear necessity for the expert evidence in this case, the costs of the expert should be met equally by both parents.

Translation costs

15. The order of Russell J of 9 November 2023 also provided for the parties to identify “relevant documents” from the Qatari proceedings to be translated into English. The order provided for the father to meet these costs in the first instance, subject to further consideration by the trial judge.

16. I am satisfied that it was necessary for the Qatari judgment of 14 November 2023 to be translated into English. It was clearly essential that I was able to understand what the Qatari court had decided and the obtaining of a certified translation of its judgment was the only appropriate mechanism of doing so. I am less certain that it was necessary to translate other documents from the Qatari proceedings. The supplemental bundle in this case contains 211 pages of documents from the Qatari proceedings of which around 50 pages are certified translations. In fact very limited reference was made to this bundle during the hearing. That said, I note that Russell J’s order provided only for the translation of documents that the parties considered to be relevant and I therefore assume that the parties did consider these documents to be sufficiently relevant to warrant translation. Moreover, the total translation costs of £327 are a very modest part of the costs in this case. In the circumstances I again consider that the appropriate costs order in relation to the translation of documents is that these costs should be met equally by both parents.

Home Office Disclosure Application

17. Finally, I turn to the father’s application for disclosure against the Home Office dated 11 October 2023. By an order made by Judd J on 29 August 2023 the mother was ordered to file a statement in response to the application which was also to provide “confirmation of her visa (application / outcome)”. The mother’s first statement filed on 22 September 2023 did not provide any details regarding the visa application. Following correspondence between the parties, the mother’s solicitors in an email dated 4 October 2023 identified that the children were in the UK on dependant visas valid until 31 December 2024. Nonetheless, dissatisfied with this response the father issued an application for a disclosure order against the Home Office on 11 October 2023 to provide details of the mother’s visa application(s).

18. This application was considered on the papers by Judd J who did not consider the order to be necessary. She also took the view (a point that was subsequently clarified in correspondence with her clerk) that it was also not necessary or proportionate to order the mother to provide disclosure of her visa applications. No formal order was made on this application.

19. CPR r.44.10(1) (which does apply in these proceedings) provides that where the court makes an order which does not mention costs, the general rule is that no party is entitled to costs.

20. I do not consider that the father's application was such as to justify the making of an adverse costs order against him. There were arguments both for and against this application, and although Judd J ultimately refused it, I do not consider that the application can be properly categorised as either amounting to reprehensible behaviour on behalf of the father or as representing an unreasonable stance on his part. I will therefore make no order for costs on this application.

Conclusion

21. In the circumstances I will order that:

- (1) The mother shall reimburse the father:
 - (a) 50% of the fees of the expert on Qatari law; and
 - (b) 50% of the fees for the translation of documents pursuant to the order of Russell J of 9 November 2023.
- (2) There be a legal aid assessment of the Guardian's costs;
- (3) Subject to the above, no order as to costs.