IN THE FAMILY COURT
(Sitting at Middlesbrough)
Neutral Citation Number: [2020] EWFC 96

No. NE20P02215

The Law Courts
Centre Square
Middlesbrough
TS1 2AE

Thursday, 3 December 2020

Before:

MR JUSTICE MOSTYN

(In Private)

B E T W E E N :

K — Applicant

- and -

K — Respondent

THE APPLICANT appeared in Person.

MR L. DOWLING (instructed by Watson Woodhouse Solicitors) appeared on behalf of the Defendant.

J U D GMENT

MR JUSTICE MOSTYN:

1 This is my judgment on the father's application for the continuation of a Prohibited Steps Order which was awarded *ex parte* on 14 October 2020. That order prohibited the mother from removing the children from the jurisdiction of the court of England and Wales until further order.

2 The background to this application is that the father is a British citizen, who is aged fifty-seven. The mother is aged thirty-six and was born in Nigeria. The father worked for many years in West Africa, predominantly in Nigeria, and it was in Nigeria that he met and began a relationship with the mother in 2011. The mother and father were married in 2013. They lived their married life in Nigeria and in early 2017, their twin daughters, A and B were born, and who are now therefore aged three years and nine months.

3 The decision was reached in 2017 that the family would move to the United Kingdom. There were political difficulties in Nigeria, and according to the testimony of the mother, the father was in some financial difficulty, having lost his employment. The father moved back to the United Kingdom ahead, in order to arrange the necessary immigration consents for the mother and children to join him. That, apparently, took five months, during which period the mother and the children remained alone in Nigeria, without any kind of security or other material support. It was not until December 2017 that the mother moved to England, where the family was reunited and took up residence in the North East of England. Following her arrival in this country, the mother was granted indefinite leave to remain.

4 It is noteworthy that the importance of maintaining the family's Nigerian links was recognised, these children being of mixed race. They have a very valuable and healthy Nigerian heritage which, the parties recognise, should be promoted. For that purpose, in 2019, the family made a visit to Nigeria, where they stayed with the mother's extensive family in the south-eastern part of the country where the biggest city is Port Harcourt. It is in Port Harcourt that the mother's brothers live, although she originates from the adjacent state of Akwa Ibom. Her historic family home is in Akwa Ibom and her mother owns property in that state.

5 Unfortunately, by 2019 the relationship of the parties, which had always had a high toxic element, became terminal and it broke down; they separated in October 2019. Unfortunately, the breakdown of the relationship was characterised by very unfortunate outbursts. Between August 2019 and January 2020, the police recorded five instances of domestic violence where the mother was seen to be the victim. Since the separation, the mother and children have lived in accommodation provided by a domestic violence support organisation.

6 The father denies ever having struck the mother, although he does admit that there has been verbal abuse, fuelled by excess alcohol. It is not necessary for me, for the purposes of rendering judgment on the matter before me, to decide whether or not the father is telling me the truth as to the scope of the abuse that he has been guilty of.

7 Since the separation, the contact between the father and the children has been intermittent, and has ground to a halt in the wake of the Covid-19 pandemic. There was an agreement that the father would have contact on video calls, but the mother says that the father did not

contain himself during those calls and so, as a result, she was forced to stop that form of contact.

8 Following the successful visit to Nigeria in 2019, which must have been a source of great happiness to the mother and the children, given their Nigerian heritage, the mother formed the view that another trip in 2020 would be both in her interest, but more particularly, in the interests of the children. As she put it to me, a trip this year would mean more than anything to her and would be seriously beneficial to all concerned, and would be beneficial to the state of her mental health.

9 There is no doubt the mother made a booking on KLM for a return flight to Lagos, but in common with so many bookings made on airlines in these strange times in which we currently live, the trip was repeatedly cancelled and rebooked. There is no doubt that on 8 September 2020, the mother sent the father a text message, saying that she was planning on going to Nigeria. The father says that she did not say when she was going, beyond saying that she intended to go "soon". However, the father later in his oral evidence retreated somewhat from that statement and said to me in clear terms, "I didn't know what day they were travelling on. It could have been any time."

10 The mother's evidence to me was that she did not tell him that she intended to go soon, rather she told him on that occasion that she was planning to go with the girls to Nigeria in December.

11 Within the bundle, there is a printout from KLM dated 14 October 2020, which I take to be the date on which the flight was rebooked following an earlier cancellation. On 14 October 2020, the ticket was reissued and showed a flight for the mother and the children leaving Newcastle, flying via Amsterdam on 11 December 2020 and the mother and children returning on Tuesday, 12 January 2021.

12 It is my clear finding on the evidence that the mother told the father on or about 8 September that she was planning on going to Nigeria with the girls in December, and I reject the suggestion that she told the father at that time that she was going soon.

13 The great significance of that disclosure by the mother to the father is that she was not harbouring any secret of her intended trip; rather she made it perfectly clear to the father that she was intending to go in December, and to return in January. If she had been clandestinely plotting to leave the country permanently and to resume residence with the girls in Nigeria, in breach of the father's custody rights, then it is inconceivable that she would ever have told him that that was her intention. To put it idiomatically, as I did during evidence, if she had been intending to do a runner, she would have kept quiet.

14 One of the first and most significant factors I identify in the findings that I make, is that the mother intended *bona fide* to return to this country on 12 January, by virtue of having disclosed that fact to the father.

15 At the time, the father was feeling extremely aggrieved about the cessation of contact and about the disintegration of the relationship generally. He formed the idea of making an *ex parte* application to the Family Court for a Prohibited Steps Order. His application is dated 14 October 2020, coincidentally the same day that the airline tickets were reissued. That was, of course, over a month after the mother had told him that she was planning to go to Nigeria in December, as I have found.

16 An *ex parte* application is, by definition, an unjust process because it, by its nature, violates one of the elementary rules of natural justice, which is to hear both sides. Or as the ancients would have put it *audi alteram partem.* That rule of natural justice exists for very good reason, because justice can rarely be done when only one side is heard. Sometimes, *ex parte* applications have to be made in order to prevent imminent harm, but only where there is literally no time for notice to be given to the other party, not even short notice. It is for this reason that the guidance in relation to *ex parte* applications is so clear.

17 On an *ex parte* application, an applicant is fixed with an exceptionally high duty of candour. All matters must be disclosed to the court, whether they are in the favour of the applicant or contrary to his or her interests. The duty of candour is at the very heart of the guidance given by the President on 18 January 2017, *Practice Guidance (Family Courts :Without Notice Orders)* [2017] 1 WLR 478. The Guidance emphasises at paragraph 7 that,

> "A without notice application will normally be appropriate only if
> (a) there is an emergency or other great urgency, so that it is impossible to give any notice, however short or informal or
> (b) there is a real risk that if alerted to what is proposed, if tipped off, the respondent will take steps in advance of the hearing to thwart the court's order, or otherwise to defeat the ends of justice."

18 The court must have been satisfied on 14 October 2020, that it was literally impossible for any notice, however short or informal to have been given to the mother of the application that was being made. I therefore turn to look at the application, to see what is pleaded in relation to the asserted urgency.

19 At section 5 of the application which is headed "Why are you making the application", the question is asked, "What are your reasons for bringing this application to the court, and what do you want the court to do." The father wrote, "Respondent intends to take the children abroad imminently" and at section 6 which is headed, "Urgent" and without headings, where the box requires the applicant to set out the reasons for urgency he writes, "My wife intends to take my children abroad imminently to Nigeria, a very unsafe country, and I have no belief that she may return." It was on the basis of that expression that the mother was about to leave imminently, that this order was made.

20 I am sorry to have to find that the pleading of imminent departure of the mother with the children by the father was simply not true. In the circumstances in which I have described, the mother had told the father, as long ago as a month beforehand, that she intended to go in December. Nothing that she had said in September justified the father stating to the court on 14 October, that the mother was imminently about to leave with the children. Moreover, the duty of candour that was imposed on the father required him to state, and he did not, that the mother had told him that she intended to go on holiday to Nigeria in December. I, therefore, with regret, conclude that the injunction was obtained on an unfair basis.

21 If this were a financial dispute, proceeding either in the Family Court or in the Civil Courts, that breach of candour would, almost certainly, result in the court discharging the order and refusing to regrant it, in order to demonstrate its disapprobation of the breach of the most elemental principle attaching to *ex parte* applications, namely the duty of candour. However, this is an application concerning two children aged nearly four, whereby under section 1 of the Children Act, I must apply the principle of paramountcy. That is to say that the welfare of the girls is the paramount consideration.

22 The court's disapprobation of the father's litigation strategy cannot mean that the court can do otherwise than apply the paramountcy principle and so it is to that exercise that I now turn.

23 When an application is made for leave to remove a child temporary to a country which is not a signatory to the 1980 Hague Convention on the Civil Aspects of International Child Abduction, the overriding principle is the paramountcy principle, as I have just explained. The court can only make the order permitting temporary relocation if it is satisfied it is in the best interests of the children.

24 The relevant principles have developed over the years in the courts, but are most conveniently summarised in the well-known decision of the Court of Appeal of *Re R (A Child)* [2013] EWCA Civ 1115, a decision of the Court of Appeal given on 28 August 2013. Of that decision, I need read only two paragraphs, namely paragraphs 23 and 25. Paragraph 23 states:-

> "23. The overriding consideration for the Court in deciding whether to allow a parent to take a child to a non-Hague Convention country is whether the making of that order would be in the best interests of the child. Where (as in most cases) there is some risk of abduction and an obvious detriment to the child if that risk were to materialise, the Court has to be positively satisfied that the advantages to the child of her visiting that country outweigh the risks to her welfare which the visit will entail. This will therefore routinely involve the Court in investigating what safeguards can be put in place to minimise the risk of retention and to secure the child's return if that transpires. Those safeguards should be capable of having a real and tangible effect in the jurisdiction in which they are to operate and be capable of being easily accessed by the UK-based parent. Although, in common with Black LJ in *Re M*, we do not say that no application of this category can proceed in the absence of expert evidence, we consider that there is a need in most cases for the effectiveness of any suggested safeguard to be established by competent and complete expert evidence which deals specifically and in detail with that issue. If in doubt the Court should err on the side of caution and refuse to make the order. If the judge decides to proceed in the absence of expert evidence, then very clear reasons are required to justify such a course.
>
> …
>
> 25. As the quotation from Thorpe LJ's judgment in *Re K* (see paragraph 19 above) confirms, applications for temporary removal to a non-Convention country will inevitably involve consideration of three related elements:
>
> a) the magnitude of the risk of breach of the order if permission is given;
>
> b) the magnitude of the consequence of breach if it occurs; and
>
> c) the level of security that may be achieved by building into the arrangements all of the available safeguards.
>
> It is necessary for the judge considering such an application to ensure that all three elements are in focus at all times when making the ultimate welfare determination of whether or not to grant leave…"

25 In this case, the father seeks to maintain the Prohibited Steps Order, not merely because he asserts that there is an appreciable risk that the mother will never return with the children, but also because he says that Nigeria is a fundamentally unsafe place at the present time. He says that Nigeria is unsafe in terms of domestic terrorism, sanitation and healthcare. He also alleges, although it has to be said that the matter was not developed to any extent during the hearing before me, that his daughters are at risk of female genital mutilation, were the

mother be allowed to take them to Nigeria. I will deal with all aspects of the father's claim.

26 I cannot accept that the benefit the children will derive from being taken to the land in which they were born, the land of which they are dual citizens, the land which reflects their mixed-race heritage would be anything other than beneficial to them. I cannot accept, putting aside the question of the risk of abduction (which I will deal with separately), that Nigeria is such a fundamentally unsafe place, that the children should be deprived of the benefit of being able to visit their homeland.

27 I cannot accept that in the area of Nigeria where the mother intends to visit (which is for the first part of the holiday Port Harcourt, where her brothers are resident, and for the second part of the trip the state of Akwa Ibom, where she was born and bred) there are risks there which are unacceptable.

28 The father has referred to militants running amok in that area, but that does not sit comfortably with the fact that he agreed to accompany the mother and his daughters there, as recently as last year. I do not accept that the children, either in their visit to Port Harcourt or to Akwa Ibom, would be living in an area which is unsanitary, or that they would be exposed significantly to disease. Obviously being in a tropical country, they are more likely to be exposed to malaria than in the cold climate in which we live here, but I do not accept that the children are under any appreciable risk, or at least not a risk over and above that which the parents have been perfectly happy to take in respect of their children hitherto, as I have explained.

29 In relation to the father's allegation of female genital mutilation, this seemed to be a makeweight which, in my opinion, rather trivialises the significance and seriousness of that allegation where it is properly made. The mother is a Christian, coming from the south of Nigeria where female genital mutilation is completely unknown, as she explained in her oral evidence. I therefore place no weight on that evidence which was, as I have said, thrown into the father's case as a makeweight. I do not accept that there are any reasons, putting the question of the risk of child abduction aside, that militate against the children visiting their homeland for a trip to meet their maternal family over Christmas.

30 I turn to the question of the risk of abduction. Although the Court of Appeal has said that one must look at the three elements in parallel rather than in series, it is more logical to take them one at a time and ask first, what is the risk assessed as a matter of probability. What risk is assessed by me (as a matter of probability) of the mother breaching her promise that was made to me (and which I will come to), as well as an order of the court and retaining the children in Nigeria?

31 The mother has stated to me, on oath, that she promises sincerely to return the children on 12 January 2021 when the holiday comes to an end. She has had it explained to her that breach of that promise would not only be a contempt of court, but would demonstrate that the evidence she had given to me was untrue, and that she would therefore be guilty of perjury, an offence which in this country carries a maximum sentence of seven years' imprisonment. I do not believe that the mother would have so readily have agreed to do that, if she had harboured an intention to break the order casually upon arriving in Nigeria.

32 In my judgment, having regard to the factors that I have outlined, I regard the risk of the mother breaching the order which I intend to make as being vanishingly unlikely. In fact, so

unlikely as to render the subsequent factors to be brought into play as almost insignificant. It is my finding, and it is a finding of a future fact admittedly, that the mother is going to comply with the order of the court and return the children at the conclusion of the trip to Nigeria.

33 Having made that finding, I now turn to the second limb of the test, where I have to consider the magnitude of the consequence of the breach, were it to occur. This is a somewhat counter-intuitive exercise judicially, because I am being asked to consider the consequences of an event, which I have already determined is so unlikely to occur as to be of no forensic relevance. However, the Court of Appeal has prescribed that the exercise should be undertaken and so I shall do so.

34 Were the mother to breach the order and retain the children in Nigeria, then the father would have to take steps in the Nigerian legal system to seek to have them returned to this country. He would probably have to litigate under Nigerian legislation, of which the relevant legislation is an impressive statute entitled, "Childs Rights Act 2003", which by section 69 of that Act, gives the court the usual powers to award custody, and to make ancillary orders and, in so doing, it must apply under section 1 the paramountcy principle just as in this country we are required to do likewise.

35 However, I think it is permissible for judicial notice to be taken by me that the wheels of justice in Nigeria turn exceedingly slowly. Were the father to have to litigate in Nigeria, I can see that that would be an arduous exercise for him to have to undertake. However, the order I propose to make in this case will contain a recital in these terms:-

> "This court respectfully requests that any court in Nigeria which is considering an application by the father for the return of the children to England should –
> (a) recognise that the children are habitually resident in England and Wales, and
> (b) recognise that the mother has promised on oath to return the children to the jurisdiction at the conclusion of their holiday in January 2021.
>
> Accordingly, this court respectfully requests its counterpart court in Nigeria to make a summary order for the return of the children, with the maximum expedition and the minimum costs to the father."

36 The order that I make will include that recital. That recital may do something to mitigate the bad consequences that will, inevitably, flow from a breach by the mother of my order. It may encourage my counterpart in Nigeria were an action to be commenced by the father for the summary return of the father to give effect to it summarily. One can but hope.

37 As I say, the magnitude of the risks of the consequences of the breach, if it occurs, would be serious, but in my judgment their seriousness is overwhelmingly outweighed by my assessment of the very small scope of the risk of breach of the order, were permission to be given by me.

38 The third element of the test I have to undertake is to consider the level of security that may be achieved in order to fortify the available safeguards. The mother is not of any means. The father has asserted that she has no fewer than six rental properties in Nigeria, and that the mother is a co-owner with him of a property which they purchased in Akwa Ibom.

39 The mother has explained to me that before the marriage, she did own one property which was rented out, that she never had as many as six properties. She said to me rightly, that if

she had six rental properties, she would certainly not be subsisting on low wages in this country. She did have, she admitted, one rental property, which was sold in 2017.

40 The property which the father says is co-owned and worth millions of naira or thousands of pounds, the mother says, unambiguously, was never owned by the parties, but was rented by them. The reason why the family surname appears on the outside is because it was used for corporate purposes back in the day. That rental property has been duly relinquished.

41 I accept the mother's evidence, I accept that she does not have any means and therefore, is not in a position to put up a bond by way of security to guarantee performance of her obligation to return the children at the end of the holiday. However, the absence of security does not mean that the application should fail. The application, in my judgment, in this case stands or falls with my assessment of the level of risk that I assess of the mother breaching the order which I intend to make, and refusing to return the children. As I have said, I have assessed that risk as being vanishingly small.

42 I accept that in relation to the second limb, I have not had the benefit of expert evidence. The Court of Appeal has made clear that not every case requires expert evidence, and I dare say that if I were to have had expert evidence, it would have said no more than to outline the matters of which I have already taken judicial notice. As I say, I have taken judicial notice of the delays that beset the Nigerian legal system, but I have done what I can to ameliorate that. Although, as I say, making orders of that nature has an almost unreal aspect to it in view of my primary finding of fact.

43 I am therefore satisfied that it would be in the best interests for these children that the mother should be allowed to take them to Nigeria from the 10 December 2020 until 13 January 2021.

44 I end by dealing with the final question, which is whether this trip should be impacted by the global pandemic which we are all suffering under. The Foreign Office advice at the moment is that, with the exception of the north-eastern part of the country and the coastal southern areas, where the mother is not going to be going, and where travel of any nature is not advised, only essential travel should be undertaken. The result of that is that the mother's insurance policy she has purchased for under £50 will not work and so, were any of the children to fall sick while in Nigeria, they would have to rely on the Nigerian equivalent of the National Health Service which is accepted is going to be rather more rudimentary than we enjoy here.

45 However, the children and the mother are all in good health, and there is no evidence to suggest that they will be any worse position than they were when they lived in Nigeria up to 2017 or during their trip in 2019. Be that as it may, in my judgment, the absence of insurance is not a good reason to deprive the children of the very tangible benefits which will accrue from a visit to their homeland in December.

46 There is no other aspects of the Coronavirus pandemic that militate, in my judgment, against the trip. The mother and children will have to self-isolate on arrival in Nigeria, and they intend to stay with the mother's brother in Port Harcourt for that purpose before travelling to Akwa Ibom, and they will have to self-isolate on their return to this country. That experience is undergone by many people who have been making both business and recreational trips since the pandemic first erupted. The children are at such an age that the risks from the pandemic are for them extremely minor. The mother is of good health and is

of a young age herself. I therefore do not place any weight on the impact of the pandemic in reaching my decision.

47 My order will contain the recital which I have mentioned. It will discharge the Prohibited Steps Order that was made on 14 October, and it will grant the mother permission to take the children to Nigeria from 10 December 2020 until 13 January 2021. The order will say on its face that the mother must return the children on the latter date.

48 I will leave it to counsel to draft the order. When counsel has prepared the draft he is, out of a matter of courtesy, to show it to the father before it is sent to me tomorrow.

49 I direct that my judgment shall be made available to the parties, and that that should happen with expedition, at public expense.

CERTIFICATE

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This transcript has been approved by the Judge