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Case No: FD17P00343

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/02/2019

Before:

THE HONOURABLE MRS JUSTICE KNOWLES

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RE W (CHILDREN) (ABDUCTION: IMPLEMENTATION OF RETURN ORDER)

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Mr Turner QC and Miss Perrins (instructed by Osbornes) for the Applicant Father
Mr Hames QC and Miss Amiraftabi (instructed by International Family Law Group LLP) for the Respondent Mother

Hearing date: 14 February 2019

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Judgment Approved

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.

Mrs Justice Knowles:

1. This judgment concerns itself with an application made by the father in child abduction proceedings for directions to implement a return order made on 30 November 2017. I heard submissions from counsel about that application at a hearing on 14 February 2019. On that date I also heard submissions and gave an ex tempore judgment determining the mother's application for a reduction in the father's interim contact with his children. There was insufficient time for me to consider submissions about implementation of the return order and to give a judgment. This is my reserved judgment on that issue.

2. I have read a bundle of relevant material and also written submissions from both parties. I am very grateful to counsel for their helpful submissions in what is an unusual case within 1980 Convention proceedings.

Background

3. What follows is a summary of matters pertinent to the issue I must determine.

4. This case concerns proceedings brought by the father against the mother seeking the return of their two children, Y now aged 6 years and Z now aged almost 5 years, to Texas in the USA, pursuant to the provisions of the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the 1980 Convention") as given domestic effect in this jurisdiction by the Child Abduction and Custody Act 1985. The mother and father were married in the USA and both children were born there. They lived as a family in Texas, together with other members of the father's family, until December 2016 when the mother abducted the children to England. Following a contested substantive hearing, I made an order dated 30 November 2017 requiring the return of the children to the USA. The detailed background history and the issues at the hearing were set out in my transcript of judgment and I do not need to repeat them here.

5. The mother's original defence to the father's application was based upon her contentions that (a) he had consented to the children's removal from Texas or had acquiesced in their retention in this jurisdiction; and (b) that the return of the children to the USA would place them in an intolerable situation within the meaning of Article 13(b) of the 1980 Convention. The mother's Article 13(b) defence included a contention that she personally faced immigration problems in securing her entry to the USA and that it would be intolerable for the children to be returned to the USA without her. I rejected all the mother's defences. Given the mother's personal immigration problems, I acknowledged that, in an ideal situation, the children should return with their mother and so I deferred the operation of the order for return until after the determination by the US immigration authorities of an application by the mother for a humanitarian parole visa. However, I made it clear that, even if the mother was not able to return to the USA herself, the children must nevertheless be returned to that jurisdiction without her. I gave the parties permission to apply for implementation of the

order in the event of a rejection of the mother's application to the US immigration authorities. The mother gave me an undertaking that she would apply for and use her best endeavours to obtain humanitarian parole to enter the USA.

6. The mother appealed my substantive decision to the Court of Appeal who allowed her appeal in part. She was successful in persuading the Court of Appeal that, if she was unable to obtain entry clearance to the USA, it would be intolerable for the children to return without her. The Court of Appeal in paragraph 59 of its judgment made clear that "… provided a visa is granted to the mother by the authorities in the requesting state, the children will return. Moreover, the judge's order contained a provision granting the parties liberty to apply as to the timing and implementation of the order. If there is any indication that the mother is not pursuing her visa application, the matter can be restored to the judge for further directions". The return order of 30 November 2017 was replaced with a different return order dated 27 March 2018 requiring the children to be returned to the USA provided that the mother was first granted permission by the US immigration authorities to return to and enter the USA with them. The return was not to take place until 14 days after the determination of the mother's application for a humanitarian parole visa to re-enter the USA. The Court of Appeal gave the parties permission to apply to me as to the implementation and timing of the said return. The recitals and undertakings given by the parents in the 30 November 2017 order remained in force. The Court of Appeal's decision is entitled Re W (Children) [2018] EWCA Civ 664.

7. The mother duly applied for humanitarian parole on 19 January 2018. The US Citizen and Immigration Services Section (USCIS) of the US Department of Homeland Security issued a denial notice on 2 April 2018 rejecting her application. This was communicated to the father's solicitors on 10 April 2018. The father's solicitors then suggested an appeal against USCIS's decision and on 23 April 2018 the mother's solicitors confirmed there was no right of appeal. Some three months later, on 19 July 2018, the father's solicitors suggested that the mother apply for a B2 visa, relying on an email dated 13 July 2018 from an officer of the US Embassy in London, Ms Wallace. This stated that (a) the rejection of the mother's application for humanitarian parole was not the same as the denial of a visa to enter the USA; (b) before pursuing humanitarian parole, a person must have been denied a visa; and (c) explained that a visa for certain purposes (such as participating in custody hearings or other related proceedings in a US court) might be available to the mother. On 7 August 2018 the mother stated that she did not intend to apply for a visa.

8. On 12 November 2018 the father issued an application for further directions to implement the extant order for the return of the children. He sought a direction or alternatively an order requiring the mother to make the necessary visa application. That application came before me on 13 November 2018 and was adjourned to allow the mother to respond by way of a witness statement and for sufficient court time to be allocated for a hearing. I was informed that the father had just heard that his application for funding to pursue an appeal to the Supreme Court had been granted after very significant delay on the part of the Legal Aid Agency. The matter was listed on 15 January 2019.

9. On 15 January 2019 the matter was further adjourned to 14 February 2019, it being expected that the Supreme Court would, by then, have made a decision in relation to the father's application to appeal to that court. I gave additional direction to facilitate the mother's contact application. On 11 February 2019 the Supreme Court refused permission to the father to appeal.

The Relevant Court Orders

10. The wording of the Court of Appeal's order is crucially important in the determination of the father's application for implementation directions/orders. To place it in context, it is helpful to consider the relevant parts of my return order dated 30 November 2017.

11. There were several recitals to my order which concerned the return of the children and the mother to the USA. These read as follows:

> "7. The court respectfully requests the US Embassy in London and/or the US immigration authorities to forthwith and urgently issue a humanitarian parole visa to the mother to enable her to re-enter the USA in order to return the children in compliance with paragraph 11 of this order and to enable her to remain in that jurisdiction pending a decision of the court in that jurisdiction as to the children's future arrangements.
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> 8. Without prejudice to the decision made by a competent court in the USA, it is this court's view that the best and preferable option for the children is to return to the USA in the care of the mother and to remain in her care pending the first hearing before the family court in that jurisdiction."

I should explain that I had accepted advice from a single joint expert on US immigration law, Mr Heller, that the quickest method by which the mother might obtain entry to the US for the purpose of participating in legal proceedings there was via an application for a humanitarian parole visa. Applying for a B1/B2 visa was unlikely to be successful in Mr Heller's opinion.

12. The return order read as follows:

> "11. The children [Y] and [Z] shall be returned forthwith to the jurisdiction of the USA and by no later than 14 days after the determination of the mother's application for a humanitarian parole visa. The mother shall return or cause to be returned the children in accordance with this paragraph."

I attached a penal notice to this paragraph and included an order that:

> "17. There be liberty to either party to apply to the court and to Mrs Justice Knowles if available, as to timing and implementation of this order save that no application for enforcement of paragraph 11 of this order may be made until the mother's application for a humanitarian parole visa to enter the US has been determined by the relevant US Immigration authority."

13. The mother gave an undertaking to me that she would "immediately apply to the US Embassy in London and/or the relevant US Immigration authority and use her best endeavours to obtain a humanitarian parole visa to enable her to enter and remain in the USA with the children".

14. Given the Court of Appeal's decision to discharge my order providing for the return of the children without the mother if her visa application was refused, paragraph 11 and 17 of my order were replaced in the Court of Appeal's order as follows:

> "3. Paragraphs 11 and 17 of the order made by the Honourable Mrs Justice Gwyneth Knowles on 30 November 2017 are hereby set aside and replaced by the provisions set out in paragraphs 4 and 5 respectively.
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> 4. The subject children, [Y] and [Z] shall be returned to the jurisdiction of the USA, provided that their mother is granted permission by the US immigration authorities to return to and enter the United States of America with them, and such return shall take place by no later than 14 days after the determination of the mother's application for a humanitarian parole visa to re-enter the US jurisdiction. The mother shall return, or cause to be returned, the children in accordance with this paragraph.
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> 5. There is permission to each party to apply to the High Court (the Honourable Mrs Justice Gwyneth Knowles if available) as to the timing and implementation of the said return."

The Court of Appeal's order did not alter any of the undertakings given by the mother on 30 November 2017.

The Parties' Positions

15. The father's position was that a substantive order for the return of the children to the USA remained extant, this having been upheld by the Court of Appeal. Even though the directions given to progress the implementation of the Court of Appeal's order had not resulted in the mother being able to return to the USA, there was no reason why further directions could not be given in an attempt to secure implementation. Mr Turner QC drew an analogy between this situation and those situations in child abduction cases where serial directions are given to locate an abducted child or where directions are made to implement a return by resolving the arrangements for the necessary protective measures on a return. He relied on the remarks made by the Court of Appeal in paragraph 59 of its judgment (the relevant quote being found in paragraph 6 above) and upon paragraph 5 of the Court of Appeal's order.

16. Mr Turner QC invited me to make an order that the mother should by a certain date apply for a B1/B2 visa to enter the USA. In a draft order submitted at the start of the hearing, he invited me to vary paragraph 4 of the Court of Appeal's order as follows:

> "The subject children, [Y] and [Z], shall be returned to the jurisdiction of the USA, provided that their mother is granted permission by the US immigration authorities to return to and enter the United States of America with them, and such return shall take place by no later than 14 days after the mother is notified that she has been granted a visa to enter the USA. The mother shall return, or cause to be returned, the children in accordance with this paragraph."

In exchanges with me, Mr Turner QC accepted that the word "visa" should be better replaced by the words "entry clearance" and it is this refinement which he commends to me. The jurisdictional basis for making an order, given the mother's reluctance to apply for entry clearance to the USA, was founded in section 37 of the Senior Courts Act 1981. The relevant principles were set out by the Court of Appeal in Goyal v Goyal [2016] EWCA Civ 792 (see especially paragraphs 24-28, 41 and 43). Those paragraphs explain that section 37 of the 1981 Act does not create a free-standing power, but rather a power that is ancillary to or

supportive of a separate substantive legal right. The substantive right in respect of which the father sought support was the extant order for the return of the children to the USA.

17. The mother opposed the father's application on the basis that there was no return order to implement or enforce. It was only when permission to return had been granted that there was an order to implement. She had complied with all other directions and with all her undertakings and there was thus no breach of direction or undertaking to enforce. In those circumstances, the court had no jurisdiction to order the mother to apply for a visa herself. As there was no return order to implement, the court had no jurisdiction to make orders ancillary to or supportive of that order (see paragraph 41 of Goyal v Goyal). If the court considered it did have jurisdiction to entertain the father's application, it should not order the mother to apply for a visa on grounds of cost, best interests and the alleged misconduct of the father during contact proceedings.

Discussion

18. This application begs two questions: first, do I have jurisdiction pursuant to paragraph 5 of the Court of Appeal's as to "the timing and implementation" of the Court of Appeal's substantive order; and second, if I have jurisdiction, whether I should exercise it.

19. The answer to the first question is found in careful scrutiny of paragraph 4 of the Court of Appeal's order. I have considered the plain meaning of the words in that paragraph on the presumption (a) that the language of that paragraph has been used carefully and correctly and (b) that this wording was approved by the Court of Appeal. Paragraph 4 contains a condition precedent which must be fulfilled prior to the return order becoming operational and capable of implementation. The condition precedent is "provided that their mother is granted permission by the US immigration authorities to return to and enter the United States of America with them" and can be clearly demonstrated if the wording of paragraph 4 is re-ordered as follows:

> "Provided that their mother is granted permission by the US immigration authorities to return to and enter the United States of America with them, the subject children [Y] and [Z] shall be returned to the jurisdiction of the USA…"

The remainder of paragraph 4, namely "…and such return shall take place by no later than 14 days after the determination of the mother's application for a humanitarian parole visa to re-enter the US jurisdiction…" is subordinate to the order for return with its condition precedent. This subordinate clause concerns matters of timing which paragraph 5 makes plain are matters over which I have jurisdiction.

20. Mr Hames QC submitted that the plain wording of paragraph 4 meant that, if and when the mother was granted entry clearance by the US immigration authorities, the children were to be returned. It was only when entry to the mother was granted by the US immigration authorities that the return order could be remitted to me for implementation/timing in accordance with paragraph 5 of the Court of Appeal's order. I accept that submission. This reading of the Court of Appeal's order is, in my view, entirely consistent with the decision to uphold the mother's appeal on the basis that it would be intolerable to return the children to the USA without their mother. The analogies relied on by Mr Turner QC in paragraph 15 above are all valid but they are not on all fours with the situation in this case where an

unfulfilled condition precedent precludes this court from considering matters of implementation.

21. Paragraph 5 contains no words of express permission allowing me to vary paragraph 4 of the Court of Appeal's order. Mr Turner QC suggested that I was able to do so (as set out in paragraph 16 above) to address the mischief contained in the subordinate clause represented by the words "humanitarian parole visa". It appears to be the case, given the contents of Ms Wallace's email, that humanitarian parole is entirely distinct from a visa but correcting that phrase is not really the purpose of the amendment sought by Mr Turner QC. The re-wording of paragraph 4 he contended for would focus on the outcome of any application for entry clearance rather than the mechanism by which entry clearance was sought (be it an application for a visa or otherwise). This refinement would, Mr Turner QC submitted, permit the court to direct the mother to apply for not only a B1/B2 visa but also to make a further application for humanitarian parole if her visa application was rejected (as seems likely from Mr Heller's advice). The variation he contended for was, he submitted, a matter of implementation permitted by paragraph 5.

22. I am unable to accept Mr Turner QC's submission. I have already noted that there is no explicit permission for me to vary paragraph 4 of the Court of Appeal's order. Further, the change contended for is not a matter of implementation which takes place after entry clearance has been granted (the subject of paragraph 5). On the contrary, it relates to matters which require to be addressed before any decision is made by the US immigration authorities, namely the type of application/s the mother should make in an attempt to gain entry clearance. The type of entry clearance application the mother should make was dealt with by way of undertaking from the mother attached to my order of 30 November 2017. She has, I note, complied with that undertaking in full. It would have been open to the Court of Appeal to require a more generous undertaking from the mother such as an undertaking to exhaust all avenues available to her, including by way of any permitted appeal process, in order to gain entry clearance to the USA. It did not do so because, I suspect, it took its direction both from my return order which was predicated on the outcome of an application for a humanitarian parole visa and from the mother's undertaking to me to apply for humanitarian parole. In circumstances where the non-fulfilment of the condition precedent operates to deny me jurisdiction to consider matters of implementation and timing, I cannot vary the order in the manner contended for by Mr Turner QC.

23. Mr Turner QC's submissions as to the availability of s.37 as a remedy do not bite if, as I have held, there is no extant order for return because the mother has not been given permission to enter the USA. In those circumstances, there is no power to compel the mother to make an application for a visa either under section 5 of the Child Abduction and Custody Act 1985 or under the inherent jurisdiction or under section 8 of the Children Act 1989. The use of section 37 permitted by Goyal v Goyal is ancillary to a substantive right - in these circumstances, the father has no such right as the condition precedent has not been satisfied.

24. I have concluded that I do not have the jurisdiction to entertain the father's application.

25. That conclusion is one I have reached with no great enthusiasm. It seems to me that the Court of Appeal intended that the children should return to the USA if their mother could go with them. Though she has complied to the letter with her undertakings, the mother's apparent refusal to exhaust all the avenues available to her to obtain entry clearance to the USA renders the Court of Appeal's order nugatory. Her statement dated 4 December 2018

said it was too expensive to make a further application, but I note that the father has offered to defray those costs. She further complained of ongoing uncertainty over whether she and the children would be returning to the USA and suggested that, even if she were granted entry clearance, this would be for a limited period only and might require her to leave the USA in order to apply for re-entry (with no guarantee she would be permitted to re-join the children). The weight to be given to these submissions is not a matter for this court.

26. I observe that there remains a residual power available to the Court of Appeal to deal with some exceptional change in circumstance which might render its own order impracticable to enforce or, putting it another way, the implementation impossible of fulfilment [paragraph 23, Re B (Children) [2001] EWCA Civ 625]. It will be a matter for each of the parties to consider whether to return to the Court of Appeal in order that it might consider the practicalities of enforcing/implementing its order.

Conclusion

27. Having determined that I do not have jurisdiction to entertain the father's application, it is not necessary for me to consider how I might exercise any such jurisdiction.

28. During exchanges with counsel, I deprecated the ongoing litigation between the parents when this case was capable of resolution if the parents were minded to put their emotions to one side and to co-operate in the interests of the children's welfare. They love their children and should try to do what is best for them even if that does not accord with their own wishes and feelings. I offer them this child-focussed solution which I hope they both consider carefully.

29. Accepting the verdict of the Court of Appeal that the children should remain in the mother's care as she is their primary carer suggests that both children should live with the mother in this jurisdiction. The father is a busy working man whose children and elderly parents are financially dependent on him. He cannot give up work to meet the children's needs as their day to day carer even though he may wish to do so. The mother's return to the USA is not guaranteed and it seems doubtful that she would be permitted to settle there during the remainder of the children's minority. In any event, a return to the USA would cut her off from the practical and emotional support of her family on whom she relies.

30. At present, given his immigration problems, the father is shut out of the children's lives save for Skype contact. That is not a long-term solution best suited to preserving the children's relationship with either him or with their extended paternal family. If they live here, there should be provision for them to visit their father in the USA on one or more occasions each year, depending on cost. Whilst they are young, a maternal relative could accompany them to the USA and a paternal relative could accompany them back to this jurisdiction at the end of their holiday. They should continue to have Skype contact with their father and, from time to time, his family. This solution, buttressed by any additional safeguards thought necessary, could be incorporated in an order which would have effect in both this jurisdiction and in Texas where the father lives.

31. If both parents are willing to consider a child-focussed end to this litigation, I urge them to do so without delay before further hearings erode whatever goodwill is left. Their legal representatives will help them achieve a consensual resolution of these proceedings if this is what they want.

32. That is my decision.