Neutral Citation Number: [2019] EWHC 709 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/03/2019

Before:

THE HONOURABLE MRS JUSTICE KNOWLES DBE

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Re A (Withdrawal of Applications)

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This application was determined on the papers

Miss Cabeza for the local authority
Miss Gasparro for the mother
The father of A and B did not appear and was not represented
The father of C, D and E appeared in person
Miss Houghton for the children through their children's guardian.

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JUDGMENT

Mrs Justice Knowles:

Introduction

1. I am concerned with five girls: A aged 12 years; B aged 9 years; C aged 4 years; D aged 1 year and E aged three months. The issue is whether I should permit the applicant local authority to withdraw its applications for female genital mutilation protection orders with respect to all five girls, for a forced marriage protection order with respect to A, and for orders pursuant to the inherent jurisdiction. A and B are wards of court and on 12 December 2018 I made female genital mutilation protection orders with respect to all five girls, those orders being due to expire on 12 April 2019. On that date I also made A the subject of a forced marriage protection order, that order also being due to expire on 12 April 2019.

2. The applicant for these protection orders is the local authority in whose area the girls and their mother live. The respondents to the proceedings are the girls' mother, A and B's father (to whom the mother was previously married) and the father of the three younger girls to whom A's mother is presently married. The family are of Somalian origin. A and B's father resides in Somalia with his present wife and their children.

3. I have determined this application on the papers, having read a bundle of documents and submissions from the local authority, the mother and the children's guardian. All parties are united in inviting me to grant the local authority permission to withdraw its applications for protective orders with respect to all five girls and to discharge the existing wardship and protection orders.

Summary of Background

4. I summarise the background to the proceedings as follows. The family were not known to the local authority until October 2018 when a referral was made by A's former primary school. The school reported that it had been informed that A had not taken up her place at a local secondary school and that the mother had said A had stayed in Somalia with her father following a family holiday over the summer. In response to that referral the local authority undertook an assessment of the mother which found there were no concerns in relation to her ability to meet the children's basic needs. However, the circumstances in which A had been left with her father coupled with concerns that A might be the subject of either a forced marriage or female genital mutilation, led the local authority to issue proceedings on 30 November 2018. A had had no direct contact with her father for the previous 8 years before travelling to Somalia in summer 2018 and her mother was unable to be sure that A would not be safe in her father's care. I note that the mother was herself the victim of female genital mutilation as a child.

5. On 7 December 2018 HHJ Turner QC (sitting as a Deputy High Court Judge) made A and B wards of court; made all five girls the subjects of short-term female genital mutilation protection orders; made A the subject of a short-term forced marriage protection order; and made orders preventing A's removal from her current address in Somalia and preventing B's removal from this jurisdiction. The matter was listed before me on 12 December 2018.

6. On 11 December the mother informed the social worker that A was on a flight to London and would arrive at Heathrow later that day. A and her mother attended court on 12 December 2018. Before me, the mother sought the discharge of the wardship orders with respect of A and B. I refused that application and made the orders set out in paragraph 1 above together with order prohibiting the girls' removal from this jurisdiction. I listed the matter for a final hearing commencing on 8 April 2019 and for further directions on 30 January 2019.

7. By 30 January 2019 matters had developed as follows. A underwent a medical assessment at University College Hospital which confirmed that she had not been subject to female genital mutilation. The mother had also engaged in work with Forward UK. This is a support and campaign charity which aims to support African women, in particular with respect to female genital mutilation. Forward UK was to undertake work with the mother to increase her insight into the dangers of female genital mutilation. Feedback from this work indicated that the mother had engaged meaningfully and that her level of understanding and insight was excellent.

8. A was interviewed by the social worker and the children's guardian and gave a similar account to each of her time in Somalia. She was clear that she had not been maltreated in any way and had not been forced to stay in Somalia against her wishes. There had been no suggestion of marriage during her time in Somalia. A said she wanted to attend school in this jurisdiction and complete her education here.

9. The mother told the children's guardian that she was strongly opposed to female genital mutilation, having been cut herself at the age of 9. She did not want her daughters to go through this experience and knew that the practice was unlawful in this jurisdiction. She was also very opposed to forced marriage and said that she had not been forced to marry either of her two husbands. The mother explained that she had left A in Somalia with her father as she trusted him to care for her properly. However, she was glad A was back in this jurisdiction and had returned her in December 2018 because she had nothing to hide. The mother's male cousin was also seen and was very clear that the family regarded female genital mutilation as a terrible thing which they would not allow to happen to the children in their family.

10. The father in Somalia was also spoken to by the children's guardian and confirmed his opposition to female genital mutilation and forced marriage. He was happy for A to live with her mother and complete her education in this jurisdiction and had agreed with the mother that A should return in December 2018 to be educated in this jurisdiction.

11. The assessment of the local authority and of the children's guardian was that the evidence did not establish a risk of either female genital mutilation or of forced marriage. All the children in this jurisdiction were well cared for and there were no other child protection concerns. All the parties thus invited the court to permit the local authority to withdraw its applications and to discharge the existing framework of protective orders.

The Relevant Law

12. I turn to the relevant law. The requirement to obtain permission to withdraw proceedings is imposed by Rule 29.4 of the Family Procedure Rules 2010 ["the FPR"] which reads as follows:

"Withdrawal of applications in proceedings

29.4

(1) This rule applies to applications in proceedings –

(a) under Part 7;

(b) under Parts 10 to 14 or under any other Part where the application relates to the welfare or upbringing of a child or;

(c) where either of the parties is a protected party.

(2) Where this rule applies, an application may only be withdrawn with the permission of the court.

(3) Subject to paragraph (4), a person seeking permission to withdraw an application must file a written request for permission setting out the reasons for the request.

(4) The request under paragraph (3) may be made orally to the court if the parties are present.

(5) A court officer will notify the other parties of a written request.

(6) The court may deal with a written request under paragraph (3) without a hearing if the other parties, and any other person directed by the court, have had an opportunity to make written representations to the court about the request."

13. When exercising any power given to it by the FPR, the court must seek to give effect to the overriding objective set out in Rule 1.1 (Rule 1.2). This requires the court to deal with a case justly, having regard to any welfare issues involved. Rule 1.1(2) includes a number of matters to which the court should have regard when dealing with a case justly such as saving expense and ensuring that the parties are on an equal footing.

14. The family court's power to make female genital mutilation protection orders is contained in Part 1 of Schedule 2 of the Female Genital Mutilation Protection Act 2003 ["the 2003 Act"]. Section 1(2) provides that:

"In deciding whether to exercise its powers under this paragraph and, if so, in what manner, the court must have regard to all the circumstances, including the need to secure the health, safety and well-being of the girl to be protected."

A provision in almost identical terms relating to forced marriage protection orders is contained in section 63A(2) of the Family Law Act 1996 ["the 1996 Act"] as amended by the Forced Marriage (Civil Protection) Act 2007. The only difference is that section 63A(2) refers to a "*person*" rather than to a "*girl*". Consideration of both Section 1(2) of the 2003 Act and section 63A(2) of the 1996 Act is necessary when

the court is considering either making or discharging an order. Additionally, section 63A(3) of the 1996 Act requires the court, in ascertaining the person's well-being, to have regard to the person's wishes and feelings (so far as they are reasonably ascertainable) as the court considers appropriate in the light of the person's age and understanding.

15. The making or discharge of orders in wardship is governed by section 1(1) of the Children Act 1989 which states that, when determining any question with respect to the upbringing of a child or the administration of a child's property or the application of income arising from it, the child's welfare shall be the court's paramount consideration.

Discussion

16. In Re M (Female Genital Mutilation Protection Order: No Order on Application) [2019] EWHC 527 (Fam) I allied myself to the comments made by Hayden J in A Local Authority v M & N [2018] EWHC 870 (Fam) to the effect that female genital mutilation was an abomination, being inhuman, torturous and degrading to its victims (paragraph 24). I also expressed the view that, when practised on those under the age of 18, it was child abuse pure and simple and, if attributable, to parental behaviour, would comfortably fall within section 31(2) of the Children Act 1989 as being significant physical harm which would justify the making of a public law order (paragraph 25). I remain of that view. Likewise, I endorse the approval by Singer J of the description of forced marriage set out in a press release from the then Home Secretary dated 27 October 2004, namely that it is "*simply an abuse of human rights. It is a form of domestic violence that dehumanises people by denying them their right to choose how to live their lives*" (paragraph 5 in Re SK (Proposed Plaintiff) (An Adult by Way of Her Litigation Friend) [2004] EWHC 3202 (Fam), [2005] 2 FLR 230). When the family court is considering the exercise of its jurisdiction to make or discharge protective orders, it is, in my view, crucially important to bear in mind precisely what harms the protective orders in the 1996 and the 2003 Acts are to guard against.

17. When determining the application to withdraw the proceedings pursuant to the 1996 Act, the 2003 Act and in wardship and to discharge the orders presently in place, the local authority submitted that the welfare of the children would be the court's paramount consideration as the applications were all applications governed by the paramountcy principle. Whilst discharge of the wardship proceedings are plainly proceedings governed by the paramountcy principle, the application of that principle to discharge of the proceedings under the 1996 and 2003 Acts is less clear. Whilst the paramountcy principle applies in full to the decision-making process in relation to many substantive orders under the Children Act 1989 such as a child arrangements order or a parental responsibility order, it only applies in other cases to the decision to make orders once the court is satisfied that additional criteria are satisfied, for example, the threshold criteria in section 31(2) of the Children Act. However, there are some decisions with respect to children or which affect children to which the paramountcy of the child's welfare does not apply, such as an application for a secure accommodation order or orders pursuant to the Child Abduction and Custody Act 1985.

18. The test in section 63A(2) of the 1996 Act and in section 1(2) of the 2003 Act requires the court to consider all the circumstances including the need to secure the health, safety and wellbeing of the person/girl to be protected. Although there are no specific words requiring the court to have regard to welfare as its paramount consideration, it seems to me that health, safety and wellbeing are words which, when read together, equate to "*welfare*" in its broadest sense. The specific reference to those factors in the test in the 1996 and 2003 Acts suggests to me that Parliament intended welfare-based considerations to be matters of particular weight and importance when the court exercises its protective powers.

19. In Re M [see above for citation] I came to the view that, when deciding to exercise its powers under the 2003 Act, the health, safety and well being of the girl to be protected was the court's first and paramount consideration (see paragraph 27). I came to that view, having scrutinised the 2003 Act through the prism of the Article 3 analysis set out by Hayden J in A Local Authority v M & N [see above for citation]. I see no reason in this case to alter that analysis.

20. Likewise, when viewed though the prism of respect for a private and family life contained in Article 8 of the European Convention on Human Rights, the health, safety and wellbeing of the person to be protected from forced marriage must also be the court's first and paramount consideration. Additionally, Article 12 provides that men and women of marriageable age have the right to marry and found a family, according to national laws governing the exercise of this right. Although the consent of the intending spouses is not mentioned in Article 12, it is fundamental to the exercise of the right. It is thus plain that forced marriage represents, at the very least, a profound and unjustifiable interference with an individual's right to respect for his/her private and family life and with their right to marry freely. Whether it also constitutes a violation of a person's Article 3 right is not a matter which I need consider in this ruling. The breaches of Article 8 and 12 rights inherent in forced marriage add force to my view that the health, safety and wellbeing of the person to be protected from forced marriage should likewise be the court's first and paramount consideration when it exercises its powers under the 1996 Act.

21. Before applying the above to the discharge applications, I turn to the application to withdraw all three sets of proceedings. Miss Cabeza submitted that the paramountcy principle applied to all three set of proceedings as the court was determining a question with respect to the upbringing of a child. I disagree. Even though I consider that, in exercising its powers under the 1996 and 2003 Acts, the health, safety and wellbeing of the person to be protected should be the court's first and paramount consideration, that analysis does not necessarily apply to an application to withdraw those proceedings. Rule 29.4 read alongside Rule 1.1(1) and Rule 1.1(2) requires the court to survey all the circumstances, having regard to any welfare issues but does not give priority to welfare above all other matters.

22. The recent case law relating to the withdrawal of care proceedings is of limited assistance in this case as there are no additional precursor criteria (like the threshold criteria in section 31(2) of the Children Act 1989) to be applied when the court is considering whether to exercise its powers under the 1996 or 2003 Acts. However, I accept Miss Cabeza's submission that the court should, when surveying the circumstances, consider if there is some solid advantage to the person to be protected from continuing the proceedings [see London Borough of Southwark v B [1993] 2

FLR 559 at 573; followed in Re N (Leave to Withdraw Care Proceedings) [2000] 1 FLR 134 at 137]. That consideration is really part and parcel of dealing with a case justly having regard to welfare and in ways which are proportionate to the nature, importance and complexity of the issues (Rule 1.1(2)(b)).

23. I deal first with the applications to discharge the wardship orders, forced marriage protection orders and the female genital mutilation protection orders. In this case, there is little evidence on which it might be said that continuing such orders was justified. Both the mother, the father and A have been consistent in saying that A remained in Somalia to live with her father rather than a means to procuring either her forced marriage or female genital mutilation. A did not feel under threat whilst in Somalia and was not forced into marriage or genitally mutilated whilst there. Looking to the future, both A's mother and father are opposed to forced marriage and female genital mutilation. They are supported in that stance by the maternal extended family. The mother has engaged meaningfully with an assessment by Forward UK, a specialist resource with experience of working with African women about female genital mutilation and has also co-operated with the local authority and the children's guardian. Both the mother and father accept that A should complete her education in this jurisdiction rather than in Somalia. It is also evident that the mother recognised the need to demonstrate that A was safe by taking steps to return her to this jurisdiction within a very short time of the matter being first before the court. Finally, there are no other child protection concerns in circumstances where all five girls appear to be thriving and well cared for.

24. In order to come to a meaningful assessment of future risk, I have evaluated these factors mindful that the court should look beyond mere compliance with its orders or lip-service (by parents and sometimes by the person to be protected) to the convention that forced marriage and female genital mutilation are profoundly harmful. I note that the local authority's concerns about the risk to A of female genital mutilation and forced marriage appear never to have been adequately explored with the mother prior to the issue of these proceedings. Had they been, these proceedings might not have been necessary. In that respect, the swift return of A to this jurisdiction very early in these proceedings indicates to me that the family wished to co-operate with the court and the professionals and were anxious to show they had nothing to hide. That co-operation has continued to date as I have summarised in paragraph 23 above. In these particular circumstances and with the girls' welfare in its broadest sense as my first and paramount consideration, I am satisfied that the wardship orders, forced marriage orders and female genital mutilation protection orders should be discharged.

25. Turning to the application to withdraw the various proceedings, the local authority's request was in written form and gave reasons. The parties present at the directions hearing on 30 January 2019 all signalled their agreement to the local authority being given permission to withdraw these applications. The father of A and B was not at court and was not on notice of the local authority's wish to withdraw. It is plain from his discussions with the children's guardian that the father had no concerns about A and B's welfare and he cooperated with the mother to return A to this jurisdiction. There is, accordingly, no basis upon which this court might believe the father would wish the proceedings to continue. I have decided that I should dispense with the formal requirement to give the father notice of the local authority's application to

withdraw. This is proportionate in the circumstances in helping the court deal with the matter justly.

26. I accept Miss Cabeza's submission that there is no solid advantage to the proceedings continuing. The evidence now before the court rebuts the circumstantial evidence that gave rise to a legitimate concern that A had been left in Somalia as part of a plan for her to be forced into marriage and/or subjected to female genital mutilation. For the proceedings to continue would be disproportionate; would generate further expense for the local authority and for the Legal Aid Agency; and would delay the expeditious resolution of the proceedings. It would also not be in the children's welfare especially in circumstances where future risk is assessed as being low and where no purpose would be served by an enquiry into how A came to be left in Somalia and whether she was at risk of forced marriage/female genital mutilation. Indeed, it is highly doubtful if the local authority could establish on the evidence any case for the making of protective orders under either the 1996 or the 2003 Acts.

27. In those circumstances, I grant the local authority permission to withdraw its applications for wardship, forced marriage protection and female genital mutilation protection orders.

28. That is my decision.