

**IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION**

Royal Courts of Justice
Strand
London

Before Rt Hon SIR ANDREW MCFARLANE (President of the Family Division)

IN THE MATTER OF

[Person D] (Applicant)

-v-

[Person E] (Respondent)

MS N WISEMAN, instructed by Kaja Viknes of London Family Solicitor, appeared on behalf of the Applicant

MR M S BASI, instructed by Cris McCurley of Ben Hoare Bell, appeared on behalf of the Respondent

**JUDGMENT
7th MAY 2024**

WARNING: 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.

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SIR ANDREW McFARLANE P:

1. This judgment is given in the course of proceedings under the Hague Convention for the Civil Aspects of International Child Abduction. It relates to five children. I will not recite the names and ages of each of them, but they are a family with the same parents. The parents married as long ago as 2007 and effectively all of their married life has been conducted in America. These are children who were born in America and it is accepted by their mother that they were habitually resident in America when she removed them to this jurisdiction in June 2023.

2. Whilst the couple, I think, both originate either from Ireland or from the UK, the father has lived all his life in America, from the time when he was a very small child. The mother moved to America soon after the marriage, but effectively, all of her family remained living in England. Both father and mother, who are first cousins, come from the travelling community, and the mother's family, in England, live as part of a permanent travellers' community in London. At least one of the mother's cousins, [Person A], has lived for a time, at least, in America, and features to some short degree in the evidence before the court.

3. The habitual residence of the children being accepted, it is also accepted that the mother's departure, with the children, to England, if it were not with the consent of the father, is a wrongful removal. Hague Convention proceedings were started by the father somewhat late in the day, in January 2024, and they come on before the court today for final hearing.

4. Because of a need to consider an application for a potential adjournment with respect to one of the defences that the mother has raised, but because the father has come over from America for the purpose of this hearing, to be available to give oral evidence on the issue of consent, which is one of the other matters the mother raises, the court proceeded to hear the oral evidence on that discrete issue this morning and has heard short submissions from counsel, Miss Wiseman for the father and Mr Basi for the mother, and I am invited to give judgment on the consent issue at this stage. Depending on the outcome of this decision on consent, it may well be the case that further directions are needed as to how the proceedings will develop after this stage.

5. The history of the relationship is catalogued in statements that each of the couple have filed. In essence, it has been, at times, a volatile relationship, despite the fact that it has endured over 15 or 16 years. It is common ground that when there has been a flare up in the couple's relationship, the mother has, at least on a number of occasions, left the USA and brought the children back to England. It is accepted that on each of those occasions, she did so without the consent of the father. Neither of them, at the time, regarded the breakdown in their relationship as being more than temporary; on each occasion he followed her over here and persuaded her to return with the children and with him, back to America. He has developed a successful building construction business, the family lived in a house that was big enough to accommodate all of them, and that was the setting in which they were living in the early part of 2023 when matters came to a head.

6. It was in March 2023 that the youngest child, [Person B], was born. The birth was apparently not easy and the mother's physical health was compromised by the development of an injury to her kidney, but by then the relationship had deteriorated and the couple separated around the time of [Person B]'s birth. Both of them regarded that separation as being of a different quality to what had preceded it down the years; both of them regarded the marriage as being at an end, and to that extent it was qualitatively different from previous ruptures in their time together.

7. The mother continued living in the former matrimonial home with the five children, and it is again common ground, for much of the ensuing period after the separation, the father lived in a nearby hotel. The mother makes a number of allegations about the father's behaviour at that time, but it is not necessary for me to consider the details of those in the course of considering the disputed point about whether he consented to her leaving the USA on 17 June 2023 with the five children, permanently, to come to England.

8. The evidence about that is necessarily piecemeal. To a degree, it relies upon the oral account given by each of them to the court today, which in turn is based on the more ordered and measured account that they have put forward in their statements. There are some documentary or electronic points of reference that point in different directions to assist the court in deciding where the truth of the matter may lie.

9. It is common ground that the court should approach the decision on consent with the summary of the law offered by Peter Jackson LJ in the case of *G (Abduction: Consent/Discretion)* [2021] EWCA Civ. 139 at paragraph 25, and I would reproduce that paragraph 25 into my judgment at this stage. I remind myself that at all times on this point, the burden of proof is on the mother to prove her assertion that the father consented, and the standard of proof is the ordinary civil standard, namely that I am persuaded on the balance of probabilities that it is more likely than not that he did consent.

10. Of the aspects of the test highlighted by Peter Jackson LJ, the following seem to me to be of particular relevance to this case. First of all, the primary focus is likely to be on the words and actions of the remaining parent, namely the father. Secondly, that the consent must be clear and unequivocal. Thirdly – and this is of particular importance – that the consent must be valid and remain operative at the time of removal. To quote Jackson LJ at subparagraph 7:

“Consent must be given before removal. Advance consent may be given to removal at some future but unspecified time, or upon the happening of an event that can be objectively verified by both parties, but to be valid, such consent must still be operative at the time of removal.”

Also, 8:

“Consent can be withdrawn at any time before the actual removal. The question will be whether, in the light of the words and/or conduct of the remaining parent, the previous consent remained operative or not.”

11. Well, what is the mother's case? It is firstly that her past conduct has always been that, in the event of a split between them, she would return home to her family home in England, with the five children. That is what she has always done. Not to be held to any precise number, but she thought this may have happened some 10 times down the years, and the father did not put forward a different figure and accepted that it was roughly of that order. Her case is that once they separated, and once, as was the case, that he was saying that she should leave the former matrimonial home, she had nowhere else to go, so her case before the court is that it would have been obvious to him that if she was to leave the matrimonial home, she would want to come to England with the children.

12. The second point she makes is that he was asking her to leave. She gave graphic evidence orally to the court that that was what he was saying over and over again to her, but graphic or not, he accepted that he wanted her out of the matrimonial home.

13. The third element of her case is of particular note, it seems to me. It is that young [Person B], being only a month or so old, had a passport, obtained for him in April 2023. The court has been taken to screenshots of text or WhatsApp messages passing between the couple. No date is shown on the screen, but plainly, these messages precede the obtaining of the passport in April. The date of the passport is 21 April. I will quote some of the messages. This is from the father: "I can ring the passport office and we can sort this out. You can get him urgency." Mother: "I don't love you either, I'm waiting fir (f-i-r) more me passport." I take that as reading "I'm waiting for the passport." Father: "I'll tell you what, you write the power of attorney letter, give me your id and I will go in person in myself and get the passport for you and hand it to you in your hand. We could go in together and get it but I don't wanna be around you"

14. The mother's case is that the father can have been in no doubt that the purpose of obtaining the passport was to complete the set, as it were, so that she had the passports of each of the five children, and her own, and was then free to fly to England, and that he must have known this, and he did know it, and that that was the reason for some urgency. The father's evidence, it has to be said, I concluded, was somewhat disingenuous on this point. He, having had those observations put to him, said "Well, people need a passport for a baby because sudden events can happen in a family, a bereavement or some other short notice need to travel, and it is important for the baby to have a passport." It was put to him that it was obvious that the mother wanted the passport to go to England, and he would not accept that. He said he really did not know. It was me who asked the question, and he said "Your guess is as good as mine."

15. Looking at this discrete part of the evidence, my guess, my analysis of it, is that the mother wanted the passport in order to be free to gravel to England with the baby, and that was her intention at that time, and he must have realised that. The text messages show that he was, of the two, perhaps even keener on getting the passport, and the mother's case, I think, is at its highest in this respect when those actions are applied to his – on her case, which I accept – oft-repeated plea for her to leave and leave the matrimonial home. She had nowhere else to go in America, and again, it must have been clear that if she left the matrimonial home, a primary option for her would be to go to England. That was put to the father and again he backed away, saying "Well, I didn't expect her to leave immediately; it would only be once we'd resolved all of the financial arrangements and other decisions that we had to take."

16. In that regard, the couple engaged, very sensibly, an acquaintance of theirs who was an accountant who worked for the father but who was also an authorised notary, to act as a mediator or go-between between them to negotiate terms of a possible settlement. No settlement was ever achieved by them but the court has been shown what can only be partial extracts of the various communications. One, of note, is a short audio transcript. It seems that the intermediary, [Person C], was wont to send or keep audio clips taken from WhatsApp communications, and in one, says this:

“[Person D1] to his accountant: ‘You know what? Tell her I will buy her a new trailer, a new caravan, and she can live with her family in England because she lives there. She’s going to

live there. Tell her I'll buy her a new, a brand new caravan to live in."

17. Those negotiations, according to the mother's evidence, but it is accepted as I understand it, were being undertaken in May 2023. A further extract from [Person C]'s involvement is in an undated screenshot of WhatsApp messages, in which the mother says:

"Yes, tell him, give me the custody of the children to that's fine. I'm going home, my father said he will raise the children for him" – end of quote.

And then [Person C] says:

"OK, I will talk to him and get back to you."

That message timed at 5.37 pm. It is followed by one 11 minutes later at 5.48 pm:

"he said he will sign the authorisation to leave the country, but not the custody because he still wants to see the children, and also, he wants to be there for them in anything that you need."

18. Well, again, that is important evidence; it shows that the topic of leaving the country was being discussed, and the potential for the father to give formal consent through some form of signed authorisation was being discussed. The father, in his evidence, has no recollection of this stage in the negotiations. I asked him what he thought had happened between [Person C] sending the message at 5.37 and the second one at 5.48, and he said he did not know, but that it certainly did not relate to any agreement that he had indicated at the time.

19. That again is potentially credible evidence from the mother that the prospect of her returning to England was on the table in May and was being actively discussed between them with the father certainly, at some stage, indicating that he would agree to it, subject to his rights of custody being adequately met and respected.

20. There is other evidence the mother relies upon, which really takes the case no further. There are a number of Facebook screenshots showing that the house was, at some stage, put on the market for rent with vacant possession, and that interior furnishings, bedroom furniture and the like, was being sold off on the Facebook website, but these screenshots are not dated and the father's account, which was that this all took place after she had left is one that I accept, partly because the mother's case is that he did not come into the house for any degree of time while she was there, and partly because of the mother's own evidence which was that in a text message on the day that she arrived in England, the father texted her mother to ask for him to be told where the keys to the house were.

21. Similar observations can be made with respect to one screenshot of one bank account, which shows, on the day it was taken – again, I think, in May – a zero balance. It is impossible for the court really to take that matter one way or the other. It is plain that the mother relied upon the father as a source of income. She did not have money from him or from any family bank account that they had together to fund the flight of herself and the children to England; she says that was all financed by her family sending her the money and she then buying the tickets.

22. Turning to the case against a finding in favour of consent, a number of factors have to be recorded. The first is that after the separation – it is not plain precisely on what date, but again, it seems to be around May – the mother obtained a restraining order against the father. This, he felt, was unjustified, but it also prevented him going to the property to access the garage or whatever the outbuildings may be, where he kept a lot of his plant and machinery for use in his business, and so he wanted the restraining order at least varied, if not lifted, and they both went to court, and this court has a copy of the order made by the Superior Court of New Jersey on 5 June 2023 which shows the mother as the plaintiff and the father as the defendant.

23. It may be that the restraining order was varied on that day, but the text of the document that we have does not deal with that one way or the other. What it does do, however, is make provision for what we, in this jurisdiction, would call maintenance; namely for the father to pay the household expenses which are listed out in broad categories, and for him to pay the mother \$750 a week in “unallocated support” pending any further hearing. Thirdly, it provides for parenting time for the father to be every weekend with a drop-off and a pick-up at the police station. All other relief was adjourned to any further hearing.

24. Now, the importance of that order is that it was made only two and a half weeks before the mother eventually departed. The case for the father is that it is completely at odds with a man who knew that she was going to go to England and was agreeing to her doing so. These are arrangements for her to stay in America, be supported in America, and for him to see the children every weekend in America.

25. The next matter of note is that the father accepts that he was asking the mother to leave the family home, and in paragraph 44 of his statement to the court he says so in terms, but he explains: “That was because we were considering a divorce and living under one roof only resulted in hostility. I didn’t want the children growing up in a toxic home.” The father is plain in his oral evidence that he did not want the children to leave America; he wanted to continue his relationship with them, despite the divorce.

26. The circumstances of the mother’s departure are also of note. It seems that she purchased the tickets on 16 June for a flight on 17 June. She was unable to say, in her evidence, that she had told the father at all about her intentions to depart at that time. She then changed her oral evidence to explain that he had come round to the house on the day that she was packing her bags, and that he had seen what she was doing. I am afraid the way that evidence was given, it not having appeared in her written statement at all, and coming from her very shortly after she had said she had not seen him on 16 June, was not evidence that I feel able to accept.

27. The father’s actions - I remind myself of Peter Jackson LJ’s focus on the actions of the remaining parents – are particularly telling. The court has a copy of the police report from South Plainfield Police Department which records activity by a police officer at 3 o’clock in the afternoon on 19 June, 24 hours or so after the mother had departed. This is a detailed account which says this:

“[Person D2] stated he went to their residence and looked through the window and it was empty inside. [Person D2] stated [Person E1] has blocked him on all social media and he has not tried to contact her family members. As a result, I tried to contact [Person E1] and didn’t receive an answer. I also contacted [Person E1]’s niece, [Person A], to find her most

recent whereabouts. I spoke to [Person A], who stated she has not spoken to [Person E1] in the past week and there was no indication that [Person E1] would be going to England.”

The officer then describes how he contacted the port authority and found the records for the mother’s departure on a flight from Newark airport to London on 17 June.

28. Put simply, if the father was in agreement with the mother departing to England, it is very difficult to understand how he would, 24 hours later, be round at the police station getting them to try to find out whether she had gone, and if so, where and when, getting them to talk to [Person A], to find out whether [Person A] knew whether she had gone, and formally making a complaint to the police. It is also telling, as Miss Wiseman urges me to find, that the niece, [Person A], with whom the mother had had a close relationship, had not spoken to her for the past week and did not know, or said that she did not know, that she was going to England.

29. The inescapable finding must be that the mother left the USA surreptitiously, that is, without telling the father that she was going to go. She did so having bought the tickets 24 hours, if that, before departure. Why do that if she knew that she was going with his blessing and his consent? It is very difficult to explain that. Why, if he knew he had agreed and had been in agreement consistently from April when the passport was obtained, from May when the discussions with [Person C] were undertaken, and accepting that she was going, did he straightaway go to the police? On the following day – I think it is the following day – he went to the local court in Middlesex County and obtained orders for the children to be brought back to this jurisdiction. Why would he do that if he was consenting to what had taken place?

30. It is also of note that these actions by the father – going to the police; going to the court – are the first occasions that he has taken such actions. Whenever the mother has previously departed on any of the 10 or so previous occasions, he has simply accepted that she had gone, followed her over to England and tried to coax her back, and done so successfully. What was different on this occasion was that the couple both knew that this was the parting of the ways, this was the end of the relationship, and when she went, he knew that she had gone and that he needed to take action. Well, that behaviour by him, I find, is wholly incompatible with him consenting to their departure at that time.

31. The earlier evidence is indicative of a willingness on his part to be agreeable to them going, but as Miss Wiseman observed early in the course of the hearing, it is important to have the timetable, the chronology, clear in this case. The mother’s witness statement – and this is no criticism of her or of her solicitors – does mix up the various stages, and it is possible to read that and be attracted to the obtaining of the passport, to the discussions with the accountant, as if they are all happening at the same time, almost immediately before the plane takes off, but that was not the case. I have laid them out, as I hope I have, in chronological order, and I think it is possible to find that the father at an earlier stage in April or May, may have been willing to consent to her going, he certainly was willing to contemplate her going, but he did not formally agree, and by the time we get to June and the restraining order had been placed upon him, they have gone to court and he is represented, the order of the court of 5 June is really wholly incompatible with a man who was by then agreeing to the fact that she was about to go back permanently with the children to live in England. It is also not possible to read his actions in going to the police and obtaining a further court order in America in that way.

32. Of course, the truth is never clear-cut and for a court in a case like this the court must approach the matter in accordance with the law, and the law is that the mother asserts that the father has consented, and she must satisfy the court on the balance of probabilities with cogent evidence to find in her favour, and whilst I can see some merit in the various evidential points that she makes, for the reasons that I have given, they do not satisfy me that at the time the children departed, in the middle of June, the father was consenting to their removal from the jurisdiction of America to England, and I therefore reject her defence of consent.

This transcript has been approved by the Judge