

IN THE HIGH COURT FAMILY DIVISION

[2018] EWHC 2981 (Fam)

Before:

HER HONOUR JUDGE HILLIER
SITTING AS A JUDGE OF THE HIGH COURT

B E T W E E N:

AH (Mother)

and

AMH (Father)

IMPORTANT NOTICE

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.

MR. EDWARD BENNETT appeared on behalf of the Applicant
instructed by Dawson Cornwell (Mr. James Netto)

The Respondent appeared in person

JUDGMENT

The judge has directed that this written judgment should be used rather than a transcript.

HHJ HILLIER:

The Issues

1. This is the final hearing of the mother's application for the summary return of the parties'

son to the Republic of the Sudan. I shall refer to him as B. She made the application on 14 August, and the case was heard on a without notice basis by Roberts J who made the child, a boy aged ten years, a ward of court. There were difficulties locating the father and a disclosure order against HMRC was made by Parker J on 23 August. There was a hearing before Mr. Darren Howe Q.C. sitting as a Deputy High Court Judge on 7 September and, on 27 September, Knowles J gave permission for the instruction of an expert in Sudanese law. On 2 October the father commenced proceedings in the Khartoum Court of Personal Affairs for custody of B. The case is next listed in the Sudanese Court on 21 October. On 7 September Mr. Howe Q.C. ordered that the father was to facilitate Whatsapp contact between the mother and B at least 3 times per week and for telephone contact.

2. The issues for my determination were firstly, should the child be summarily returned to Sudan? If so, how should the child be returned and if not, what are the appropriate child arrangements?
3. The father represented himself at the hearing. He applied for an adjournment which I refused, giving my reasons in a short *ex tempore* judgment.
4. I decided to hear the parents' evidence on the issue of consent insofar as it reflected on the child's welfare, namely how he came to be in the UK and whether that was due to a welfare based decision by his parents.

Essential Background

5. B has both British and Sudanese Nationality. The mother is a Sudanese National and the father is a British National of Sudanese descent. They married in Sudan in 2007 and B is their only child. The mother initially came to the UK on a spousal visa. She returned to the Sudan where B was born. The mother and B came to the UK and lived for a short period with the father. The parents separated and the father commenced wardship proceedings. Within those proceedings the mother applied to relocate permanently with B to the Sudan. Hogg J granted the application in July 2009 and contact arrangements were agreed. B and the mother returned to Sudan in September 2009. Part of the contact arrangements were that B would return to England to see his father during the summer holidays once he had reached the age of six. B came to the UK in 2016. He was retained by his father at the end of the agreed period and as a result the mother did not agree to him coming in 2017. The father rang the mother in February 2018 and it was agreed that B would come to England at the end of his school term in March. B arrived in England on 9 March. The mother

remarried shortly after B came to England.

The child's departure from Sudan to the UK

6. The circumstances of how B came from Sudan to England are disputed between the parents. The father and mother both gave short evidence on this point and I have considered that evidence, the written evidence filed, together with the submissions of counsel and the father in considering their two versions of events, and in respect of their credibility on this issue.

The Father's Version

7. The father's case is that he had bought a one-way ticket and he had told the mother who had not asked about when B would return. He had telephoned her in February 2018 to say he would like B to come and stay and she had said he needed to wait until the end of the school term. He said that the mother had said she didn't mind whether B was educated in Sudan or England. They had not had much time to discuss things and he had not said he was taking B "for ever". B had brought a small suitcase of clothes with him but had not brought any personal possessions. The father showed me a photo of B at the airport on the way to England which he said demonstrated that he was 'poorly dressed'. He had put his new wife down as 'mother' on the enrolment form because there was no place for him to put 'step mother' rather than with any intention to deceive. His cousin had called him to say that there had been a party at the mother's house and he had found out that she had remarried. He rang the mother the next day to congratulate her and she told him that she had not told B about the wedding. She had wanted to speak with B and tell him about the marriage but the father had refused and said he would tell him.
8. Asked about a text message which he had sent to her which said that she had 'left' B and was his mother but nothing more because "your care for him has been dropped" and saying that B was upset, the father agreed that the message had been sent. He said he had blocked calls from the mother because she harassed him and threatened him. It was suggested to him that when the mother rang she asked for B to return but he said he didn't hear her say that. He denied trying to disrupt B's relationship with his mother. He agreed that he had sent a text saying that he and his wife were going to work with B so that he would forget what had happened but said that this meant in relation to B being upset rather than trying to make B forget his mother.
9. The father said that he had no particular intention to keep B here until he asked him what he wanted to do. He gave B the option of staying here and getting a better education and

healthcare when they got the court papers in September B had said that he wanted to stay here.

The Mother's Version

10. The mother said that B came in 2016 for the school holidays. In February 2018 the father telephoned her and said he was taking B to England for the school holidays again from the end of March to 3 July, two days after the date on which B was due to start school again in Sudan. She works at the school. As far as she was concerned he was going back and she did not tell the school otherwise. She would have been told if the father had given notice.
11. The mother said that the father telephoned her in April 2018 and told her he was not going to return B to Sudan and that she could take him to court if she wanted. She did not want to go to court and she tried to get the father to agree to return B through members of the family. She approached B's paternal grandmother who told her that she had not heard anything.
12. The father suggested to the mother that she had asked him when he was returning B and he had said "dunno" to which she had replied that it didn't matter. The mother denied this. She said that she had gone to the airport and she was crying. B had told her not to worry as he would be back at the end of the holiday. The mother had had some limited telephone contact. This was terminated by the father after 11 July. She had not seen the flight tickets, but the father had reassured her that he would purchase one. She said that she had not expected B to go to school in England and had not been asked about that. She had thought that B would have English language lessons whilst he was here.
13. M seeks the following findings of fact:
 - a. There was an agreement between the parents that B would travel to Sudan in his 2018 school summer holiday and return at its conclusion or, more specifically, on 3 July 2018, two days after the start of the new school term;
 - b. M was aware that F bought a one way ticket, but that he told M that he would purchase the return single ticket in due course to ensure he returned on time;
 - c. Without telling M, F had formulated a plan to unlawfully retain B in England;

- d. F formulated this plan either prior to B's departure for England, or within days of arrival on 9 March 2018;
- e. Following B's arrival in England, F attempted to make B stay in England more permanent both through deceiving the English authorities and without consulting M, let alone seeking her consent;
- f. At no point did M agree to B travelling to England to live with F permanently or for any length of time beyond the 2018 school summer holiday;
- g. At no point did F seek M's consent or approval to B's remaining in England on a more permanent basis;
- h. F used the fact of M's re-marriage a convenient excuse to undermine her parenting of B and justify his actions;
- i. Following B not being returned to Sudan, F cut off all contact with M;
- j. In taking the actions that he did, F acted in breach of the Order of Hogg J from 2009, still in force; and
- k. In taking the actions that he did, F unlawfully retained B in this jurisdiction.

The child, B

14. B said that he wanted to meet me. He wanted to meet a judge and was interested in the court and the judicial wig. He is an absolutely delightful child. He spoke mainly in Arabic and clearly enjoyed looking round the court and sitting in my chair. He smiled at my basic Arabic. He was inquisitive and wanted to know about how judges make decisions. He was very keen on football and told me about the next game he is playing. He seemed a little immature for his age but was confident and eager to engage with me. He is polite and very chatty.

Legal Principles

15. I have to make a decision on the factual dispute between the parents. Their versions of events differ in several material aspects and it is clear that one of them is lying. I have born in mind the provisions of *R v Lucas* and the principle that people lie for many reasons, including shame and to bolster their cases. The fact that they lie about one matter does not mean that they are lying about everything.

16. In addition to *Re J (A child: custody rights jurisdiction)* [2005] UKHL 40, I have read and considered *A v B (Wardship: summary return: non convention country)* [2015] EWHC 176;

17. The summary of the *Re J* key themes, given by Pauffley J in *A v B*, provide an excellent exposition of the law:

“The principles which guide the court when considering applications for summary return in non Convention cases are well known. They derive from the judgment of House of Lords in *Re J* (supra). I mention the key themes.

- The welfare of the children is paramount. If a decision is made to return the child it must be because it is in his best interests to do so not because the welfare principle has been superseded by some other consideration.
- The specialist rules and concepts of the Hague Convention are not to be applied by analogy in a non Convention case.
- The court has the power, in accordance with the welfare principle, to order the immediate return of a child to a foreign jurisdiction without conducting a full investigation of the merits.
- 'Kidnapping' or abduction, in common with other forms of unilateral action in relation to children is to be strongly discouraged, but the discouragement must take the form of a "swift, realistic and unsentimental assessment of the best interests of the child, leading in proper cases to the return of the child to his or her own country, but not the sacrifice of the child's welfare to some other principle of law".
- There is no presumption that it is likely to accord with the child's welfare needs to be returned. The most one can say... is that the judge may find it convenient to start from the proposition that it is likely to be better for the child to return to his home country for disputes about his future to be decided there. A case against his doing so has to be made. But the weight to be given to that proposition will vary enormously from case to case. What may be best for him in the long run may be different from what may be best for him in the

short run. It should not be assumed that allowing a child to remain here while his future is decided here inevitably means he will stay here for ever.

- One important variable is the degree of connection of the child with each country. Factors such as his nationality, where he has lived for most of his life, his race, ethnicity, religion, culture and education thus far will all come into this. Another closely related factor will be the length of time he has spent in each country.
- The extent to which it is relevant that the legal system of the other country is different from our own depends upon the facts of the particular case. It would be wrong to say that the future of every child who is within the jurisdiction of our courts should be decided according to a conception of child welfare which exactly corresponds to that which is current here. In a world which values difference, one culture is not necessarily inevitably to be preferred to another ... We are not so arrogant as to think that we (in England and Wales) know best.
- If there is a genuine issue between the parents as to whether it is in the best interests of the child to live in this country or elsewhere, it must be relevant whether that issue is capable of being tried in the courts of the country to which he is to be returned. If those courts have no choice but to do as the father wishes... then our courts must ask themselves whether it will be in the interests of the child to enable that dispute to be heard. The absence of a relocation jurisdiction must do more than give a judge pause for thought... it may be a decisive factor... There are also bound to be many cases where the connection of the child and all the family with the other country is so strong that any difference between the legal systems here and there should carry little weight.
- These considerations should not stand in the way of a swift and unsentimental decision to return the child to his home country even if that country is very different from our own. But they may result in a decision that immediate return would not be appropriate, because the child's interests will be better served by allowing the dispute to be litigated here. Our concept of child welfare is quite capable of taking religious and cultural factors into account in deciding how a child should be brought up.

I have also considered the case of *Re B (A Minor)(Habitual Residence)* [2016] 4 WLR 156; [2016] EWHC 2174 (Fam) where Hayden J summarised the key propositions to be considered when addressing a child's habitual residence [para 17]:

i) The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (A v A, adopting the European test).

ii) The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual enquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (A v A, Re KL).

iii) In common with the other rules of jurisdiction in Brussels IIR its meaning is 'shaped in the light of the best interests of the child, in particular on the criterion of proximity'. Proximity in this context means 'the practical connection between the child and the country concerned': A v A (para 80(ii)); Re B (para 42) applying Mercredi v Chaffe at para 46).

iv) It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (Re R);

v) A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (Re LC). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration.

vi) Parental intention is relevant to the assessment, but not determinative (Re KL, Re R and Re B);

vii) It will be highly unusual for a child to have no habitual residence. Usually a child lose a pre-existing habitual residence at the same time as gaining a new one (Re B); (emphasis added);

viii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move (Re B – see in particular the guidance at para 46);

ix) It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there (Re R and earlier in Re KL and Mercredi);

x) The relevant question is whether a child has achieved some degree of integration in social and family environment; it is not necessary for a child to be fully integrated before becoming habitually resident (Re R) (emphasis added);

xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (Art 9 of BIIR envisages within 3 months). It is possible to acquire a new habitual residence in a single day (A v A; Re B). In the latter case Lord Wilson referred (para 45) those 'first roots' which represent the requisite degree of integration and which a child will 'probably' put down 'quite quickly' following a move;

xii) Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (Re R).

Discussion and Findings

18. When I analyse the written and oral evidence I am satisfied that the father had no intention at all of returning B to Sudan when he collected him at the end of March. He enrolled him in an English school and misled both B and the mother into thinking that he would return him at the end of the holidays.
19. I am satisfied that although the father had access to the Sudanese court, as demonstrated by his application earlier this month, he chose not to seek custody of the child there or to seek permission to remove the child to live here. I do not accept that he didn't make a decision until July or September, and I am satisfied that he is hiding behind what he says are the wishes and feelings of his son.
20. The father lied about several things in respect of the events as was demonstrated by the evidence. He did not tell the Sudanese school that B would not return. B took clothing and

possessions suitable for a holiday, not for a permanent move. The father concealed the very fact of the mother from the English school when he enrolled him. I do not accept his explanation for putting his wife's name on the form rather than the mother. The fact is that there was plenty of space where he could have recorded her details. The fact that there was no box for step-parent was irrelevant. His intention was to deceive and he lied again about it to me. His evidence was evasive on all the difficult points in great contrast to the mother who was measured, thoughtful and above all in my assessment, truthful. I find all the factual matters she alleged proved on the balance of probabilities.

21. Habitual residence is a question of fact for me. B has started to integrate, has attended school here and is involved in playing football. He has had a stable family life for six months and has made friends. Equally he still has strong Sudanese roots and he is very limited in speaking English which naturally restricts his integration. In October he was still missing his Sudanese friends. On the evidence and applying the principles summarised in *Re B* I find that at the time his father brought him to the UK -with a clear intention of keeping him here- he was habitually resident in the Sudan. At the time of the father's refusal to return at the end of the holiday on 3 July he was similarly habitually resident in Sudan.

Welfare Assessment

22. Having carefully weighed the written and oral submissions, the written and oral evidence, and the legal authorities, I turn now to my welfare assessment of this ten year old Sudanese boy.
23. I am satisfied that this child needs a 'swift, unsentimental and realistic assessment' of his needs, as part of the summary process which is listed before me. I state at the outset that the evidential balance falls firmly in favour of him being returned to the Sudan as soon as possible to his mother's care. She can only remain in this country for a limited period having been granted a visa for the purposes of entering the UK to attend and participate at this hearing and therefore it is B's best interests to return with her. I expect the father to cooperate with this decision even though he disagrees with it. I also expect him to continue to pay for B's education in the Sudan, as he said he would.
24. The court there can then make a decision about his long term future 'custody' if the father pursues his application.
25. The welfare of B is paramount. If a decision is made to return a child it must be because it

is in his best interests to do so not because the welfare principle has been superseded by some other consideration. There are no other principles applicable in this case. I have carefully balanced the relevant considerations in respect of his welfare and considered his wishes and feelings, the provision for him in each of the two countries, the changes that will occur if I return him and any harm he may suffer as a result of returning or staying here.

26. There is no presumption that it is best for B to return. In this case there are ongoing court proceedings in Sudan. The father is confident that he will win custody because the mother has remarried. His confidence is misplaced and infers that the judges in Sudan have no discretion. It is clear from the expert evidence that the court in Sudan has discretion to make a decision that B should remain with his mother on the basis that it is in best interests. They may well decide that – I do not know. I am not making a decision about B’s long term future, just about whether it is in his best interests to return now.
27. It is important to look at B’s connection with both countries. He has a British passport and has now attended school here for some weeks and has enjoyed the summer here playing football and visiting attractions. He has a step brother and sister here who he describes as “sweet”. His father is here. His connection with Sudan is much stronger. He has lived there all his life, he speaks Arabic and is immersed in Sudanese culture. He wore traditional clothes when he was there. If asked where his home was in February he would undoubtedly have said “Sudan”. He has lived in Sudan for the vast majority of his life. His maternal family is in Sudan and his extended paternal family.
28. I have considered whether it would be appropriate to refuse the application so that the English court could determine B’s long term needs, including taking into account his religious and cultural needs. It seems to me that either state could decide the issue and there is no factor which weighs heavier in that respect to the question of stay or return.
29. B met with the Cafcass officer in early October. He said that he wanted to remain in the UK. He missed his friends and said “I miss mummy”, explaining that he speaks to her on the telephone. He was aware his mother had remarried and he knew the man she had married. He wanted me to know that he wants to stay at school here and go on holiday to visit his mother. He wants to be an airline Pilot and he supports Chelsea football team.
30. The Cafcass officer reported that B was ‘trying to square the circle’ by saying he would visit his mother. He described B as having “bought in” to his father’s vision, saying “Whilst B is mature enough to know which side his bread is buttered one cannot absolve

his father of influencing what B wants and feels”. It was clear to me when I met B that he is a ‘young’ ten year old child. I know he will be disappointed that I am returning him to Sudan but he was clearly too immature for me to give very significant weight to his views. He likes English football and he has a preference to be here but not a strongly held view. He asked me how I would make my decision and I was clear that I would listen to his views expressed via the Cafcass report. I have done so and weighed them carefully into the balance of his welfare needs. I am satisfied that his views have been significantly affected by his father and he is saying what his father wants him to say. He knows that his father thinks that he will get a better education here and that the health system is better. That is what the Cafcass officer meant by saying he knows which side his bread is buttered.

31. It is clear to me that the father would like B to effectively forget about his mother. I do not believe the father would promote contact with the mother at all if he remains in this country. The father has lied to the Sudanese court in saying that the mother agreed to the removal. She most clearly did not and has been very worried about her son. The text messages demonstrate that the father told her to stay away from their son and that B would contact her at some point in the future. He does not recognise her value as a mother. He does not see at all the emotional harm that will inevitably have been caused by keeping him from his mother. He brought B to court at 9.50 am this morning despite knowing that I had ordered contact from 9.30 to 11.30. He then refused to allow B to see his mother anywhere other than in the chairs outside court, taking B from his mother at one point. He eventually relented but his behaviour demonstrates his complete lack of insight into his son’s needs. B is clearly very close to his “mummy” and he had not seen her since February. It was hurtful not to allow them some private time this morning to see each other. Until February B had lived the vast majority of his life in Sudan. His home and school were there and he had friends and had considerable ties to Sudan. He did not speak English and had only visited England twice – once as a small baby. His culture was Sudanese.
32. He was brought to an English-speaking country, with no family ties other than his father, step mother and half siblings who he had met only once before in 2016 when he stayed with them. Any further separation from his own country and most importantly from his mother, would in my view be contrary to his welfare needs. The father says that B will be affected mentally if he is returned to Sudan. I’m sure he will be initially sad to leave the UK but I do not find that there is any evidence that he will be seriously affected. He has a slight preference for England but misses his friends in Sudan and will be happy to be with

his mother.

33. In my assessment this child will have suffered emotional damage by his father's unilateral actions because this was not a planned consensual move. The way he was told about his mother's remarriage and the blocking of her contact were damaging.
34. I am satisfied that the mother is able to meet all of the child's physical, emotional and health needs. He is a tribute to her care in bringing him up. The father told me that B is at risk of sexual abuse in Sudan, and said that the Sudanese government are aware of the issue. Sadly, it has been my experience that children are at risk of sexual abuse almost everywhere in the world. I am unaware of any evidence that Sudan is particularly dangerous for B in this respect. There is certainly no evidence that any family member is a risk to him nor that his mother is anything other than a very protective mother.
35. This father seems absolutely unable to comprehend his son's emotional needs, and therefore cannot meet them. He is wrong to believe that B's views about which country he should live in should prevail. B is ten years old and is simply too young to have his views as determinative. I'm sure he says what he thinks his father wants him to say.
36. I have taken into account that things have changed in Sudan in that his mother has remarried. The husband is known to B so he will not be a stranger in his family. There will no doubt be a difference to his family life. He is a sociable boy and I'm sure he will adapt quickly to the new circumstances. On balance I find that B's welfare needs will best be met by his immediate return.
37. That is my judgment.

End of Judgment

19 October 2018

Transcript from a recording by Ubiquis
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