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Case No: FD20P00191

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/07/2020

Before :

MRS JUSTICE LIEVEN

Between :

FATHER

and

MOTHER

Applicant

Respondent

Mr Edward Devereux QC (instructed by **Vardags**) for the **Applicant**
Mr Teertha Gupta QC (instructed by **JMW Solicitors**) for the **Respondent**

Hearing dates: **11 – 12 June 2020**

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This matter came before me as an application under the inherent jurisdiction for the summary return of two girls A (aged 14) and D (aged 11) to Dubai. The application was made by the Father and resisted by the Mother. As I explain further below, at lunchtime of the first day the Father conceded that his application for summary return should not be granted and instead asked me to make an order for direct contact with the children including contact outside the jurisdiction. The issue in the case thus became the degree of risk that the Father would retain the girls in Dubai if allowed to take them outside England.
2. The Father was represented before me by Mr Devereux QC and the Mother by Mr Gupta QC. The hearing was conducted remotely. Both parties consented to this and the remote nature of the hearing did not impede the fairness of the proceedings. I heard both parents give evidence remotely and this worked smoothly. I also heard evidence from Ms Doyle of Cafcass and Ms Hamade, an expert in UAE law.

Background

3. The Mother is from the UK and the Father from South Africa. Both have lived in Dubai for many years. They were married in 2001 and the children were both born in Dubai. The girls have spent their childhood in Dubai, subject to many trips overseas, and were both at school there. The parents separated in 2013 and divorced in 2017. The Father is now remarried with a 9 month old baby (C). There is no issue that the girls were habitually resident in Dubai until they came to the UK in mid March 2020.
4. Since the parents' separation and subsequent divorce, the girls have lived with the Mother and had extensive contact with the Father. This included staying with him every second weekend and during holidays. He has regularly travelled with them outside Dubai. It is of some relevance that he and his wife are both pilots although he now works in a managerial role and thus have access to cheap and easy flights.
5. The Mother says that she had for many years told the Father that at some point she and the girls wanted to relocate to England primarily for their education. I have seen texts starting in 2018 discussing this proposed relocation although the Mother told me in oral evidence that there had been earlier discussions dating back to 2016.
6. I have only seen selected parts of the various text messages that passed between the parties and it is easy to get a distorted picture from such texts. My understanding of the position is that the Father never unequivocally agreed to the girls moving to England and going to school here. However, he also seems to have been amenable to the proposal so long as he had appropriate levels of contact with them. There were two sticking points between the parties: contact and financial arrangements. The Mother says that the Father always made moving conditional on her agreeing certain financial matters and that is why he was not prepared to sign an agreement. I am not in a position to make any finding on this save to say that the financial issues do seem to have become unfortunately tied up in questions of the children's best interests.
7. In June 2019 the Father took up a new job in Europe. Apparently, he usually travels back to Dubai twice a month and for holidays. There is a text that suggests he took this job in some part because he was aware that the Mother and girls were going to move to

England. The girls have been to visit him in Europe on at least one occasion last summer.

8. Discussions continued through 2019 about relocation, the girls' potential schools in England, money and contact arrangements. In February 2020 the parents undertook a form of informal mediation. This ended with a document that set out terms for the Mother and children coming to the UK and financial arrangements. However, the Father decided not to sign it. His reasons for not doing so are, in my view, not relevant. The fact is the agreement was never entered into and its wider terms have not been met. The girls sat the entrance exam for K College and both were offered places and the Mother accepted those places. The Father did not formally accept them.
9. In March 2020 the Mother and the girls went on an agreed holiday to Switzerland. However, in the light of Covid-19 the Mother decided to come to England instead. She emailed the Father on 19 March saying that they were coming to England, at that stage it must have appeared to the Father, for a holiday. On 21 March she emailed the Father saying that she and the girls had decided to stay in England and bring forward their places at K College with immediate effect. Wholly unsurprisingly, the Father was furious. The Mother had sold her car in Dubai and told her employer she was not returning to Dubai on 19 March so she had plainly decided by that date not to return to Dubai but only told the Father two days later.
10. The Father launched proceedings in the High Court in England for the summary return of the children on 7 April 2020.
11. This unfortunate sequence of events explains why all agree that there has now been a total breakdown in trust between these parents. The Father feels that the Mother has wrongly retained the children in England and breached his undoubted rights as their father. The Mother is extremely worried that if the Father is allowed to take the children out of the jurisdiction he will take them to Dubai and it will be difficult, if not impossible, to have them returned.
12. The Father's application to the High Court was for summary return of the children to Dubai. Dubai (and the UAE) is not a signatory to the Hague Convention and therefore the application was made pursuant to the Court's inherent jurisdiction. In Mr Devereux's skeleton argument there is very brief mention of the Father's secondary case being that he should have contact with the girls, including in Dubai. There is correspondence between the parties the week before this hearing when both put forward proposals for contact if the girls remained in England. It was only at lunchtime of the first day, after hearing the evidence of Ms Doyle from Cafcass, that the Father changed his position and said he was no longer pursuing summary return.
13. The Mother does not resist and indeed would encourage direct contact in the UK. However, the Father is concerned both about the costs of him having to come to the UK on a regular basis to see his daughters and also because he takes the view that it is in their interests for them to be able to travel to see him whether in Europe or Dubai where they can also see their half-sister, stepmother and their friends.
14. Therefore, the sole issue in this case is whether I should allow the children to leave the jurisdiction in order to have contact with their Father inter alia in Dubai.

15. A very similar issue was recently considered by the Court of Appeal in *M (Children) Non Hague Convention State* [2020] EWCA Civ 277. The issue in that case was whether the children would be allowed to travel to Dubai and Qatar. Qatar is not part of the UAE so I will focus on the parts of the judgment that relate to Dubai.
16. As Moylan LJ said, guidance has been given in a number of cases concerning the Courts' approach to allowing a child to travel outside the jurisdiction: *Re K (Removal from Jurisdiction Practice)* [1999] 2 FLR 1084; *Re A (Prohibited Steps Order)* [2014] 1 FLR 643. The key issues are set out in the following passage from the judgment of LJ Patten in *Re A*;

[23] The overriding consideration for the court in deciding whether to allow a parent to take a child to a non-Hague Convention country is whether the making of that order would be in the best interests of the child. Where (as in most cases) there is some risk of abduction and an obvious detriment to the child if that risk were to materialise, the court has to be positively satisfied that the advantages to the child of her visiting that country outweigh the risks to her welfare which the visit will entail. This will therefore routinely involve the court in investigating what safeguards can be put in place to minimise the risk of retention and to secure the child's return if that transpires. Those safeguards should be capable of having a real and tangible effect in the jurisdiction in which they are to operate and be capable of being easily accessed by the UK based parent.

...

[25] [After referring to what Thorpe LJ had said in Re K] ... applications for temporary removal to a non-Convention country will inevitably involve consideration of three related elements:

(a) the magnitude of the risk of breach of the order if permission is given; (b) the magnitude of the consequences of breach if it occurs; and (c) the level of security that may be achieved by building into the arrangements all of the available safeguards. It is necessary for the judge considering such an application to ensure that all three elements are in focus at all times when making the ultimate welfare determination of whether or not to grant leave."

17. Those three matters are the ones that I need to address. In respect of travel to Dubai the Court of Appeal had the benefit of evidence from an expert on Middle East law, Mr Edge. The *M (Children) Non Hague Convention State* [2020] EWHC Civ 277 judgment sets out his explanation of the basic tenets of the child custody law in the UAE and then importantly says at [22]:

In his written reports, Mr Edge expressed his opinion about the likely efficacy of the "mechanism" of an agreed order being made in Dubai in a number of different ways. In his first report he said that: "The success of the mechanism ultimately lies in the integrity of the parents and the parents' families and the English court's willingness to accept that all the relevant persons will comply with the agreement". If one of the parents later sought to challenge the order "it is not entirely certain how a Middle

East court would react” although he also said that if an agreement had been “confirmed by a local court judgment then it should prove difficult for either party to undo the provisions”. There had been “very few cases in the UAE where breach of such agreements/consent judgments have been challenged or even considered by the courts to my knowledge”.

23. Mr Edge clarified that he has been "involved in many 10s of cases since" the decisions of Re T and Re A (supra) in which "the mechanism has been suggested". Of these, "about 10" related specifically to Qatar. He was aware that this had been "used and accepted" by the courts in the UAE but was "not aware" of whether orders had been made by the court in Qatar. He could only say that he had not "heard that a Qatari court has refused to apply the mechanism" although, because of his more limited experience, he acknowledged that there was "an element of conjecture involved". He also said more generally that, although he had never been "told of a case in which the local court had refused to accept" an agreement, "this does not mean it has never happened". He was, however, aware of cases in the UAE in which the wording had had to be changed before the court would agree to make the order.

24. In his oral evidence, Mr Edge was asked a number of questions concerning the efficacy of agreements. He repeated that he was aware of cases in which the proposed mechanism had been used in the UAE but made clear that he was not aware of any case in which the agreed order had later been challenged. His evidence was similar in respect of Qatar in that he “hasn’t seen a case ... involving such an agreement” which had later been challenged in court.

25. Mr Edge again expressed his opinion as to what would happen in such a situation in a number of different ways but he was clear that he was not saying that they would be effective. There "must be a question mark as to how the local court would" respond to a challenge; it was "difficult to decide what exactly will happen". He also said that if "goodwill dissolves we enter territory of some uncertainty". In a more positive vein, he said that "in normal circumstances [the court] would be expected to enforce it" but he could not "pinpoint a case where such an agreement has been made, challenged, gone to [court] and enforced". In answer to Ms Eaton, he said that, "once the court has accepted it and turned it into a local court order, I think one has quite a certainty that that should then be enforceable". Additionally, in respect of Dubai, Mr Edge said, if contested proceedings took place and the mother was unable to enter Dubai, she would be in a "severely compromised position in defending a case in court".

26. Mr Edge gave more details of his direct experience of agreements and agreed orders in both Qatar and the UAE. He has experience of 12 or “possibly” a few more in Qatar and many more in Dubai. He had given advice in 100/200 cases and had drafted agreements in, “certainly”, 20/30 cases. He repeated that he had never been informed of an agreement and order not being effective but, again, accepted that this did not mean that they had not.

18. In the light of Mr Edge's evidence, the trial judge allowed the children to travel outside England and Wales and the Court of Appeal upheld that decision.
19. In the present case I heard evidence from Ms Hamade, an expert in UAE law who practises in Dubai, to very similar effect to that of Mr Edge. Ms Hamade was plainly very expert in her field, straightforward and honest in her answers to questions and I accord her evidence the maximum weight. Like Mr Edge she placed strong reliance on the parents entering into an agreement that clearly stated that the children would return to England if they travelled to Dubai to see their father. She explained that such agreements can then be lodged with the Dubai court and will normally be upheld by that court. She said that where there was such an agreement then the parties could not seek to vary or discharge it until the passage of one year subject to exceptional circumstances (my terminology but reflecting Ms Hamade's evidence). She said she had been involved in the drafting of three to four such agreements a year and she could point to only one instance when it had been challenged and in that case the Court had upheld the agreement.
20. She said, when asked what the likelihood of the Mother being able to get an order for return of the children from Dubai if the Father retained them, that it was about 70%.
21. The Mother made clear that she would not be prepared to travel to Dubai with the girls, in part because she was worried about being charged with kidnapping the children when she kept them in England in breach of the Father's custody rights. In this regard Mr Gupta relied on the case of *Lachaux v Lachaux*. In that case the Mother had been convicted of kidnapping by the Dubai courts and had been given a suspended prison sentence. It is however important to note that the facts of *Lachaux* were that the Mother had kidnapped the child in Dubai and kept her hidden from the Father there for over a year. This was therefore a domestic kidnapping and tells me little about whether or not there is any realistic prospect of the Dubai authorities pursuing a kidnapping charge against the Mother in respect of her retention of the children in England.
22. In terms of the children's wishes and feelings, they spoke to Ms Doyle of Cafcass pursuant to the order of Francis J. She spoke to the girls together for about an hour and then had a subsequent conversation with D alone. These conversations were undertaken remotely but there was nothing to suggest that the girls had not been able to explain their feelings fully. Ms Doyle described both girls as being articulate and intelligent and well able to express their views clearly. It was Ms Doyle's opinion that both girls were "Gillick" competent in respect of the decision as to where they should live. I expressed some doubt as to whether D, who is only 11, was competent in the legal sense. Ms Doyle said that was her opinion because both girls had developed a level of maturity in part because of the conflict between their parents. I do not need to determine whether or not either girl is legally competent but I will give very close attention to their wishes and feelings. D wrote me a letter in which she set out her feelings about where she and her sister want to live. She was clear that they wanted to remain in the UK and go to school here.
23. Ms Doyle said that there was no doubt that the girls wanted to remain in England and to go to school here. This was in part because they wanted to be with their mother, but also because quite independently they wanted to stay here and go to school here. I was a little surprised by their clearness on this given they had spent their whole lives in Dubai. However, Ms Doyle explained that the girls saw themselves as being

international and that they would see their friends either on holiday in Dubai or in their country of origin, for example France.

24. Unfortunately, at the point that Ms Doyle gave her evidence the focus of the case was still on a summary return. In the light of the Father's change of position, at the end of the hearing I asked the parties to request Ms Doyle to talk to the girls again about their views on travelling outside the UK with their father. Whatever the position of their legal competence I took the view that it was of great importance that they felt comfortable with whatever I decided. I therefore indicated at the end of the hearing that I was minded to make an order allowing the Father to take the girls out of England whether to Europe, Dubai or elsewhere, but I would delay giving judgment for a short period to give Ms Doyle the opportunity to speak to A and D and ascertain their views on this proposal.
25. Ms Doyle had a further conversation with the girls on 16 June. She sent me a letter on 22 June setting out their views on travelling with their Father. She reported as follows. A said she enjoyed visiting Europe and she would like to travel with her Father again. She said she would like to visit Dubai to see her friends but she was worried about her Father being "weird" and she would like to travel with him a few times and return to England before she would feel confident going to Dubai with him.
26. D's views were very similar. She is happy to travel to Europe with him and to go to South Africa. But she does not at the moment want to go to Dubai yet.
27. The other matter which changed after the hearing was that the Father's counsel sent an email saying that the stepmother, had been made redundant by Emirates Airline in Dubai and therefore she and C were intending to move to Europe with the Father. It was suggested that this removed the concern that the Father might take the children to Dubai. I am not convinced that this is correct. The family plainly have very strong ties with Dubai and it is perfectly possible that when the current pandemic is over and airlines are in a stronger position, the stepmother will be re-employed and the family move back to Dubai.

Conclusions

28. It is clear in this case that there has been a breakdown in trust between the parents and both are now finding it hard to focus on the children's needs and best interests. The Mother took the children to England and then retained them here without the agreement of the Father, albeit that the Father was very close to having given agreement to them coming to live in England later in the year. Equally, the Father's application for summary return and pursuit of that application at a point where Ms Doyle's report had made it very obvious that that was not what the children wanted has made the Mother deeply suspicious of his motivations and intentions.
29. However, the Father has now conceded that the girls should not return to live in Dubai and that it is in their interests to remain in England and go to school here. Having heard the Father, I believe that that is his true position, albeit one reluctantly reached.
30. Having heard Ms Doyle and the Mother I have no doubt that it is in the girls' best interests for them to remain in England and I would not have ordered a summary return if the application had been pursued. It is also in the girls' best interests to have a close relationship with their Father and to be able to see him in as natural and unforced a

situation as possible. That necessarily means being able to see him in Europe and possibly in the future in Dubai as well as going with him in the future to see his extended family in South Africa. The girls themselves may well want to go to Dubai at some point in the future to see friends. I do not think forcing the Father to only see his daughters in the UK, where he would necessarily have limited time, and incur additional expense from being here, is a reasonable or fair outcome.

31. Applying the tests in *Re A*, in my view there is a risk, albeit a relatively small one, that the Father would seek to retain the girls in Dubai. I take into account the evidence that the stepmother and C are now intending to move to Europe but, as I have said, there is little guarantee they will not go back to Dubai if the employment situation changes. I accept that it is not the Father's current intention to take the children to Dubai and I accept that he gave his evidence in good faith. However, the evidence does show that he has changed his mind in the past. The relationship between the parents since their separation does not appear to have been a good one and there is some evidence of the Father using the Mother's desire to relocate as a bargaining chip in wider financial negotiations. I draw no conclusions about this and I certainly express no opinion about the rights and wrongs of those financial negotiations. However, there is some risk that if the girls were in Dubai and there was a falling out between the parents, the Father would be tempted to try to retain the girls. I therefore take the view that the magnitude of that risk is real but low.
32. The magnitude of the consequences of that risk is, both parents accept, high. These children want to be in England, their home is now here, and they want to be with their Mother. It would be exceptionally harmful to their emotional state for them to be retained in Dubai. The Mother is plainly concerned that they might go to Dubai on holiday and the Father might then persuade them to say that they wanted to stay, perhaps by putting emotional pressure upon them. If this were to happen it is of the utmost importance that they are returned to England where the court can then decide what to do next. If I am to allow them to travel to Dubai then the Mother must have as much confidence as is possible that she will be able to ensure their return to England.
33. It is accepted by both parents that the children are now habitually resident in England. Although they were born in Dubai and have spent their childhood there, they are as the parents described them "international children". The parents were, and the Father remains, an expatriate in Dubai rather than a national of the UAE. Although it is unusual for someone to move their habitual residence within the space of weeks, in my view that is what has now happened here. The parents have both decided that it is in the children's best interests to stay in England and be educated here. That was the unequivocal intention of the Mother and the Father has now accepted and agreed to that. The children are now settled in their new home and school. I therefore find that they are now habitually resident in England rather than Dubai. I make this finding in large part so that if the matter is ever considered by the courts in Dubai they can be clear as to the basis of my conclusions.
34. It is necessary to put in place safeguards so as to ensure that if the Father does change his mind and seek to retain the children in Dubai they will be returned to England with relatively little difficulty. The evidence of Ms Hamade, and supported by the evidence of Mr Edge in *Re M*, is that this can best be achieved by putting in place an agreement between the parents setting out their acceptance that the children are habitually resident in England, and that the children should be returned to England, and that agreement

should then be lodged with the appropriate Dubai court. I accept Ms Hamade's evidence that in those circumstances the Dubai courts are likely to accept such an agreement and order the return of the children. I do note Ms Hamade's evidence that there was a 70% chance of such an agreement being upheld and that leaves a significant percentage doubt. However, all the factors in this case point towards this being a case where the courts would enforce the agreement. The parents here are both expatriates and not UAE citizens and neither are Muslims. The parents have litigated the matter in England and the Dubai courts will have this judgment before them. They will therefore see that there is no possible question of the Father having changed his position under coercion or without the fullest and most expert legal advice. Although there may well be cases where the Dubai courts do not uphold such agreements I cannot see that any of the factors which might lead them to do so apply here.

35. Once such an agreement is put in place then the risk of the children being retained in Dubai will be mitigated to a sufficient degree.
36. I am not going to set out the precise detail of the contact order but I would envisage the Father coming to England at least once to see the girls and to show them he accepts and supports them in their new home. They can then visit him once or twice in Europe and he can then take them elsewhere later in the year and this could include Dubai. One of the reasons that I am not going to set out precise detail is that all of this is subject to travel restrictions operative in the current pandemic. However, I hope that these indications are sufficient for the parties to reach an agreed order.