Neutral Citation [2021] EWHC 635 (Fam)

Case No: FD20P00328

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

The Royal Courts of Justice
The Strand, London

Date: 22 January 2021

Before:

MR RICHARD HARRISON QC
Sitting as a Deputy High Court Judge

BETWEEN:

XF Applicant

and

YM Respondent

M (Children) (Abduction: Joinder of Children)

Ms Cliona Papazian (instructed by **Access Law**) appeared on behalf of the **Applicant**
Mr William Tyzack (instructed by **Goodman Ray**) appeared on behalf of the **Respondent**
Ms Anita Guha (instructed by **International Family Law Group**) appeared on behalf of the **Older Children**

Hearing date: 22 January 2021

Covid-19 Protocol: This judgment was handed down by the judge remotely by email. The date and time for hand-down will be deemed to be on 22 January 2021

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Approved Judgment

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 RICHARD HARRISON QC:

Introduction

1. On 12 January 2021 I joined the two children as parties to these proceedings and directed that their solicitor, Mr James Netto of the International Family Law Group, should represent them as both solicitor and guardian. I gave brief reasons for my decision at the time and indicated that a written judgment would follow. This is that written judgment.

2. The application was made in the context of proceedings under the 1980 Hague Convention which concern four children: A (a boy aged 15 ½), YG (a girl aged 14), YB (a boy aged 11 ½) and S (a boy aged 8 ½). I shall refer to the four children collectively as 'the children' and to the two older children on whose behalf the joinder application was advanced as 'the older children'. The children's father ('F') seeks their summary return to Canada. The mother ('M') resists the application. As a consequence of my decision on joinder, I adjourned the final hearing which had been listed before me to 27 and 28 January 2021.

3. I will not be dealing with the final hearing and make it clear that nothing I say in this judgment for the purposes of what is an interlocutory decision is intended to be a finding which binds the judge before whom the matter is to be listed.

4. I considered the material in the court bundle as well as a statement prepared by Mr Netto. I heard oral submissions from counsel: Ms Cliona Papazian for the father, Mr William Tyzack for the mother and Ms Anita Guha for the older children. I also heard briefly from Ms Lilian Odze, an officer of the Cafcass High Court team who interviewed the children in person (not remotely) on 21 December 2020 and prepared a report dated 6 January 2021 (the parties all agreed that Ms Odze could address the court for the purposes of giving her views on joinder without being sworn).

Context of the application

5. It is common ground that the children were wrongfully retained away from the jurisdiction of Canada by M in either August or September 2020. Accordingly, under Article 12 of the Convention the court is obliged to order their return to Canada

'forthwith' unless M can establish an exception under Article 13. M relies upon two exceptions: grave risk (Article 13(b)) and the children's objections (Article 13(2)). If she establishes either one, the court will have a discretion as to whether the children should return (although if Article 13(b) is established it is '*inconceivable*' that the court would nevertheless order a return: *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55 at paragraph 45).

6. A crucial aspect of each of the two defences raised is the position of M herself; specifically, whether she will accompany the children to Canada in the event that a return is ordered.

7. M has accommodation in Canada. If she returns, F agrees to the children living with her until the matter can be considered by the Canadian courts. Subject to an issue as to the adequacy of the protective measures proposed by F, it seems to be that it would be very difficult for M to establish an Article 13(b) exception in such circumstances. On the other hand, if M refuses to return, the children will either have to live with F or be accommodated in foster care. None of the children wishes to live with F; during the course of their interviews with Ms Odze, all of them alleged that he has been physically abusive to the older three children by hitting them as a form of punishment. The older children have also made allegations of abusive conduct against the paternal grandmother.

8. As to the child objections exception, M's position is also highly relevant. Ms Odze made it clear in her report that she did not consider that any of the children have expressed *objections* to returning to Canada. A told her that he did not want to go back because of his paternal family but also said '*If I was to live with my Mum, I would feel fine*'. YG stated '*I want to stay here… all my family is here and I really really like it here. I love Canada but I think we are all better off here*'. YB expressed a positive wish to return to Canada: '*I kind of want to live with my Mum but live in Canada*'. S stated that he wanted to live with M, not F, but was neutral as to the choice between England and Canada ('*wherever*'). Based upon what the children said to her, in my view, Ms Odze was undoubtedly correct to conclude that none of boys expressed an objection to returning *to Canada* provided they lived with their mother in that jurisdiction. It is debatable whether what YG told Ms Odze amounted to an objection or '*a mere preference*' to remaining in England, but this is not an issue I need to resolve.

9. So far as M is concerned, as Ms Papazian emphasised, her position has evolved over the course of the proceedings. In her first statement dated 16 December 2020 she stated that '*I cannot countenance returning to Canada*'. She referred to her '*real fear'* of doing so and had no doubt that returning would cause her depression to return, which in turn – she asserted - would have an impact upon the children. She did not, however, go so far as to say that she would refuse to accompany the children in the event that the court were to order their return.

10. On 16 December 2020 M filed a further statement setting out the protective measures she would seek in the event that the court were to order a return. These are all predicted on the basis that she would, in that event, go back with the children.

11. During the course of preparing her report, Ms Odze clearly considered that there was some ambivalence about M's position. On 23 December 2020 she emailed M's solicitors asking for clarification. M's solicitors replied that same day stating that they were taking instructions. They complained that the undertakings offered by F were unsatisfactory, but did not assert that M would not return.

12. In their email of 23 December 2020, M's solicitors also asked for Ms Odze's views as to the children being separately represented. Ms Odze responded (a few minutes later) that this was not something she would be recommending as, so far as she was able to ascertain, the children '*did not form an objection to returning to Canada as long* ***as they lived with the mother and not the father***' (emphasis in original text). She added that this was the reason she had sought information as to M's position and went on to explain that in the event that the mother refused to return she would need to consider what proposal to make given her safeguarding duties and in the light of the allegations of physical harm which the children had made against F.

13. As far as I am aware, thereafter there was no response by M's solicitors to Ms Odze's second email of 23 December 2020. On 6 January 2021, Ms Odze filed her report.

14. Following the receipt of the report, M did two things. First, she communicated through her solicitors that she would *not* accompany the children in the event of a return.

Secondly, she provided the older children with contact details for Mr Netto. I was informed that the older children then contacted Mr Netto and spoke to him on 8 January 2021; they instructed him to apply for their joinder and to seek an adjournment of the final hearing.

Submissions

15. The application for joinder was advanced by Ms Guha on behalf of the older children. In essence, she contended that they are mature teenagers who have expressed strong objections to returning to Canada; these are set out in both the Cafcass report and Mr Netto's statement. The Court of Appeal decision in *Mabon v Mabon* [2005] EWCA Civ 634 (§§ 26, 28, 29 & 32) emphasises the importance of older children having autonomy and a consequential right to participate in a decision-making process that fundamentally affects them. She referred me to the summary of the relevant principles set out by MacDonald J in *Ciccone v Richie (no1)* [2016] EWHC 608 (Fam) at paragraphs 25 to 43. She submitted that this is a case in which it is in the best interests of the children to have a role as active participants as opposed to their voice being communicated to the court through Cafcass.

16. Ms Guha was strongly critical of Ms Odze's report, in particular her failure to identify that the older children objected to returning to Canada. She described Ms Odze's conclusions on this issue as '*a distortion and oversimplification of their views, [which] glosses over the fact that both [YG] and [A] stated in unequivocal terms that they opposed a return to Canada for a number of reasons…*' She suggested that Ms Odze had failed to grasp '*the principles of the relevant case law*' and apply them to the facts of this case. She was critical of paragraph 43 of Mr Odze's report where she expressed the view that A '*came with a script*', providing her with accounts which '*flowed non-stop*' and appearing to be '*taken aback*' whenever she tried to steer him back to the question she had posed. Ms Guha submitted that it was to be inferred that Ms Odze had thus regarded most of what had been reported to her by A as '*irrelevant to her analysis'*.

17. Ms Guha therefore submitted that it was in the children's best interests to be joined (see Family Procedure Rules 2010 ('FPR'), r 16.2). She directed me to Practice Direction 16A of the FPR and submitted that this was a case of '*significant difficulty'* (per paragraph 7.1) arising from: (a) M's recent communication that she is not prepared to

return to Canada; (b) the obtaining by F of an interim custody order which remains in force; and (c) the prospect of the separation of the sibling unit. She contended that the case fell within several of the sub-paragraphs of paragraph 7.2, which are examples of the circumstances in which the court *may* (I emphasise 'may') consider joinder of a child to be appropriate.

18. Ms Guha's application was supported by Mr Tyzack on behalf of M.

19. The application was opposed by Ms Papazian on behalf of F. She emphasised what she described as the evolution of M's case. She was strongly critical of M's eleventh hour change of position, whereby following receipt of the Cafcass report she had communicated that she would not return to Canada. She submitted that before the children were wrongfully retained in this jurisdiction F had enjoyed a '*close and loving'* relationship with them, something approaching joint care. By contrast, over the past six months he has been denied a meaningful relationship; indirect contact has become increasingly difficult. Ms Papazian stressed that despite F holding parental responsibility for the children, M has excluded him from important decisions and events in their lives; examples included the children's enrolment in school and M's failure to keep F informed when YB broke his finger and needed medical treatment or in relation to welfare visits that were made by the police. Ms Papazian submitted (and I paraphrase) that M's conduct since receiving the Cafcass report was a form of tactical manoeuvring driven by a realisation, upon reading the report, that her opposition to F's application was likely to be unsuccessful.

20. Ms Papazian submitted that it would be contrary to the children's best interests to be joined as this would cause them to become directly embroiled in the parental dispute and risk further harming their relationship with F. She reminded me that joining children in a Hague case is an exceptional course; the mere fact that older children raise objections is insufficient to justify doing so (a point made by Lord Wilson in *Re LC (Children)* [2014] UKSC 1). She emphasised that joinder would lead to delay, whereas there is an imperative for Hague proceedings to be determined expeditiously. Her case was that the children's views were sufficiently represented by Ms Odze via her report.

21. Ms Papzian also drew my attention to the report (dated 14 December 2020) of Dr Eldad Farhy, Consultant Counselling and Psychotherapeutic Psychologist, who conducted an assessment of M. She submitted that the report casts doubt upon M's credibility and suggests that the court may need to approach her asserted fears about a return with caution.

22. Ms Odze addressed the court briefly. She maintained her view that this was not a case in which joinder was appropriate as she had sufficiently represented the children's views. Matters were complicated by M's recent change of position, but – in Ms Odze's view – the court would not normally allow itself to be '*held to ransom'* as M was attempting to do. I canvassed with Ms Odze the possibility of joining the children on the basis that she would act as their guardian and Mr Netto would be their solicitor (as opposed to the normal course whereby they would be represented by Cafcass Legal). Ms Odze considered that it would be very difficult for her to work with the children's legal team in circumstances where they had been highly critical of her report.

Analysis and conclusions

23. Having listened carefully to the submissions made by each of the parties and by Ms Odze I came to the clear conclusion that it was in the best interests of the older children to be joined.

24. I have considerable sympathy for the submissions advanced by Ms Papazian as to the evolution of the mother's position and her tactical manoeuvring. These are matters which will need to be considered by the trial judge. The court will need to evaluate the issues raised as to M's credibility and consider whether, as a loving parent, M is indeed likely to allow the children to return to Canada without her in circumstances where she contends that this would not only be contrary to their interests but '*intolerable*' for them. The court will also need to consider whether, if that is her stance, it is entitled to infer that the circumstances for the children upon any return fall short of the high threshold in Article 13(b): see in this regard the decision of MacDonald J in *AT v SS (Abduction: Art 13(b): Separation from carer)* [2016] 2 FLR 1102.

25. Ultimately, whatever criticisms may be made against M, the court must not lose sight of the fact that it is the children who find themselves at the heart of this dispute and whose interests are a primary consideration for the court.

26. For the purposes of this interlocutory decision, it seems to me that I must proceed on the basis that the mother is genuine in the stance that she has now adopted. This creates an invidious position for the children in which, potentially, they face being separated from their mother and having to live with their father or in foster care upon a return to Canada. The older children also face the possibility of having to be separated from their younger siblings (an outcome to which all of the children would have strong objections).

27. I do not accept the criticisms which Ms Guha has levelled at Ms Odze. At the time Ms Odze prepared her report, in the absence of a clear response to her specific enquiries and in view of the content of M's second statement, she was entirely justified to prepare her report on the assumption that if the court were to order the children's return, M would go back to Canada with them. I reject the suggestion that Ms Odze failed to grasp the relevant legal principles. On the contrary, it seems to me that she was entirely correct to draw a distinction between the children's opposition to living with F and an objection to returning to Canada. When she was preparing her report, this was not an example of a case in which it is 'artificial' to distinguish between those two notions, as M had not stated that she would not return. As well as reciting the children's views, part of Ms Odze's role was to subject them to scrutiny and analysis. It will be a matter for the court to consider her analysis and decide whether or not to accept it.

28. However, as a result of M's changed stance, the position is now different. It does seem to me (at least for the purposes of the decision I need to make) that the older children are clearly expressing objections to returning to Canada. The primary reason for this is that a return would mean becoming separated from M and, as matters stand, having to live with F. In circumstances where that is a real prospect, the children have described in some detail to Mr Netto why this is unpalatable for them. They have provided him with a greater level of detail than they gave to Ms Odze.

29. It is relevant, in my view, that the older children's objections are rooted in their own experiences of F; the matters they have raised are not ones about which M has first-hand

knowledge. I note that A spent a period of approximately a year living with F (without his siblings), an arrangement about which he has expressed unhappiness. He has made clear to Mr Netto his opposition to retuning to Canada in trenchant terms, stating in effect that he would not comply with any order requiring him to do so.

30. I have considered the guidance in paragraph 7.2 of PD16A and it seems to me that this case falls within the examples identified in the following sub-paragraphs:

(b) *Where the child has a standpoint or interest which is inconsistent with or incapable of being represented by any of the adult parties*. M will inevitably be subject to serious criticism by F for her changed position and alleged manipulation of the children. I do not think she will be able adequately to represent the older children's standpoint or interests; moreover, she does not have first-hand knowledge of the matters upon which they rely as to the basis of their objections. Self-evidently, F cannot represent the older children's standpoint as he desires an outcome to the proceedings which they oppose.

(d) *Where the views and wishes of the children cannot be adequately met by a report to the court*. I have rejected the criticism directed at Ms Odze's report, but in view of M's changed position I consider that her report is no longer adequate for the purposes of representing the older children's current views. Returning without M is now a real prospect for them and, in the light of that, they have provided Mr Netto with considerably more detail which is relevant to an understanding of their position and to an assessment of the circumstances they would face in Canada upon a return.

(e) *Where an older child is opposing a course of action*. Although this is a factor of relevance, it is not decisive as was made clear by Lord Wilson in *Re LC*. Otherwise this could lead to all teenagers being joined in Hague proceedings when they raise objections to a return. I do consider that the strength of opposition expressed by the children and in particular the suggestion by A that he would not comply with an order distinguishes this from the majority of child objection cases.

(i) *Where the proceedings concern more than one child and the welfare of the children is in conflict*. A complicating feature of the case is that it is clear from Ms

Odze's report that the younger children described Canada in positive terms and YB has expressed a wish to return there.

31. As I made clear during the course of submissions, the matters listed in paragraph 7.2 provide guidance for the court but are not binding upon me; those matters I have identified above are strong indictors, however, that this is a case in which making the children parties is likely to be appropriate. Ultimately the court must determine whether joinder is in the children's best interests. Although FPR r16.2 confers a discretion on the court in relation to joinder if the best interests test is met, as Lord Wilson said in *Re LC (Children)* at paragraph 45:

> 'No doubt it is the sort of discretion, occasionally found in procedural rules, which is more theoretical than real: the nature of the threshold conclusion will almost always drive the exercise of the resultant discretion.'

32. I accept the submission of Ms Guha that this is a case in which the children should be active participants. They are having to deal with a developing situation which may develop further still. They are the people, above all, who will have to live with the consequences of a return to Canada if that is what the court decides to order. It seems to me that as mature, articulate teenagers (A is less than 6 months away from his sixteenth birthday) who wish to participate in the proceedings and communicate their strongly held position to the court, it would be wrong in the circumstances I have described above to deny them the ability to do so.

33. Delay is a very important consideration which militates against joinder. Fortunately, the Clerk of the Rules has been able to list the matter on 27 and 28 January 2021, which is just over two weeks away. Joinder will not therefore lead to significant delay.

34. I accept the general proposition that joinder can cause children to become embroiled in the dispute and that it may have the detrimental effect of placing them in direct opposition to one of their parents. This is especially relevant in a case such as this where it is apparent that the children's relationship with that parent has already been substantially harmed. I consider that this factor is outweighed in this case by the matters to which I have referred above which point in favour of joinder.

35. I gave careful thought to whether, instead of appointing Mr Netto as the children's solicitor *and* guardian (the FPR do not permit a child to be a party to Hague proceedings without a guardian), I should appoint Ms Odze as their guardian. I accept Ms Odze's position that it would be very difficult for her to work with the older children's legal team in circumstances where they have been strongly critical of her; if she were to become the children's guardian she would reasonably wish to instruct Cafcass Legal to act on their behalf. In my view this would be the right course in the vast majority of cases in which a child is joined as a party. I do not think it is appropriate in this case for the following reasons:

    (a) The adjourned final hearing is to be listed in just over two weeks' time. The children's legal team wish to adduce further evidence and this will need to be done within a very tight timescale. I consider that it would be very difficult for Cafcass Legal to take on a new case from a standing start on the basis of such a tight timetable.

    (b) The children have only recently met Mr Netto (albeit remotely) and have spent some time describing their experiences to him and giving him instructions. I consider it would be difficult for them to comprehend why they were not permitted to continue to instruct the lawyer they had chosen. It would not be in their interests to have to instruct a new lawyer and potentially relay the same account for a third time to a new person.

36. The requirement in the rules for children who are made parties to Hague proceedings to have a guardian has been described is a lacuna. There is no logical reason why this should be so given that, for example, the same rule does not apply when a child's return is sought under the inherent jurisdiction to a non-Hague state. In response to this lacuna, a practice has developed whereby the solicitor who is to act for a child is also appointed as their guardian; this was given approval in *Re LC (Children)* at paragraph 46.

37. Where a solicitor is appointed as a guardian, this should not be regarded as a mere tick box exercise. Although solicitors do not have the same training as Cafcass Officers, where they are appointed as guardian for a child they assume the responsibilities of a

guardian. In my view, their role is not confined to communicating the children's standpoint to the court; they must also bring to the court's attention matters of potential relevance to the children's welfare (including indicators that the children may have been subject to manipulation).

38. In *S v S (Relocation)* [2017] EWHC 2345 (Fam) Peter Jackson J (as he then was) at paragraphs 31 to 32 set out the duties of solicitors who are instructed by children *without a guardian* in the context of private law proceedings (where the instruction occurs without the knowledge of one of their parents). Among the matters recited at paragraph 31 was the following: '*The SRA Practice Note Acting in the absence of a children's guardian suggests that the solicitor is mindful of a guardian's PD16A duties*'. Solicitors who assume the role of guardian become *subject to* those duties which goes beyond a requirement merely to be *mindful* of them. As paragraph 7.6 of PD16A makes clear, a guardian has a responsibility to act not simply on the child's instructions; rather, all steps and decisions which they take in the proceedings '*must be taken for the benefit of the child*.'

39. Mr James Netto is a solicitor of great experience who specialises in international child abduction proceedings. I am confident that he will properly discharge his duties as guardian to the older children and conduct proceedings on their behalf in accordance with their interests. As I have said, I consider that it is in their best interests that he be appointed to fulfil that role.