



Neutral Citation Number: [2021] EWHC 908 (Fam)

Case No: ZW20C00450

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/04/2021

Before :

MR JUSTICE KEEHAN

Re O (A Child: The Vienna Convention on Consular Relations 1963)

Between :

A Local Authority

Applicant

- and -

M

1st Respondent

-and-

O

(through her Children’s Guardian)

2nd Respondent

Mr E Lamb (instructed by **Legal Services**) for the **Applicant**
The 1st Respondent was not present nor represented.
Ms T Vindis (instructed by **Osbornes**) for the **2nd Respondent**

Hearing dates: 25th November 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.

.....
MR JUSTICE KEEHAN

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.

The Hon Mr Justice Keehan :

Introduction

1. I am concerned with one young person, O, who was born in late 2007 and is 13 years of age.
2. O is a citizen of the Democratic Republic of the Congo ('DRC'). She arrived in this country on or about 2nd August 2020. On or about 4th August 2020, O was taken to a police station in London and was made the subject of a Police Protection Order. She was placed in the care of the Applicant local authority who placed her with her current foster carers on 26th August 2020. On 12th November 2020 O was made the subject of an interim care order.
3. The discrete issue for me to determine is whether the local authority are under a duty to notify the Congolese authorities that O is the subject of public law proceedings in which a children's guardian has been appointed to represent her interests.
4. The local authority and the children's guardian opposed notification being given to the Congolese authorities and invited the court to make a declaration that it is lawful and proportionate for the local authority not to notify the relevant authorities of O's presence in this jurisdiction or of these care proceedings in which she is represented by a guardian.
5. At a hearing on 25th November 2020 having had the benefit of reading comprehensive skeleton arguments filed by counsel for the local authority and counsel for the children's guardian and having heard oral submissions from both counsel, I came to the following conclusions which are recorded in a preamble to the order:

“Having considered the skeleton arguments served, the Court reserved the delivery of a full judgment until the IRH/EFH listed below but decided that it was (1) satisfied that Article 36 of the Vienna Convention on Consular Relations 1963 was not engaged (ii) that Article 37 of the said convention was engaged (iii) that such Convention given due respect as an International treaty would normally impose a requirement on the Local Authority to inform the relevant Authorities in the Congo given that the child has been appointed a Children's Guardian but that (iv) it was plainly not in her best interests that the authorities be notified of these proceedings or her presence in the UK.”

6. I now give my reasons for reaching these conclusions.

Background

7. O was born in the DRC in 2007. She has two younger brothers and lived with them and her parents. O has spoken with the guardian about her life in the DRC and the circumstances in which she came to this country. It appears that her father was detained in prison in 2018 and never returned to the family home. O's mother had told her that she believed he had died in prison.

8. In mid-July 2020 O's mother and her two younger brothers were arrested by the Congolese authorities. O had managed to escape and evade detention and lived on the streets for one or two nights before she was found by a friend of her mother's, K. She cared for O and eventually brought her to this country where she abandoned her at a bus stop in London. A woman named L took O into her home for two days before taking her to a police station in London.
9. O had described her home in the DRC as a dangerous place. On four occasions she had seen Congolese soldiers shoot people which made her feel very scared. Although O missed her family and worried about them, she did not miss being in the DRC.
10. O has settled exceedingly well into life with her foster carers with whom she feels happy and secure. She attends a local school where she has made friends. Her command of English is improved. The guardian noted her to be a bright and lively young person who has clear ambitions for her future life.
11. O is worried that she would be arrested if she did return to the DRC. She strongly opposed the local authority contacting or giving any details about her to the Congolese authorities.
12. Counsel for the children's guardian summarised O's reasons for her opposition as follows:
 - i) O writes that it is not safe for her to go back to the Congo and she is fearful about what would happen to her if she returned. She has said the same thing to the Guardian, her social worker and her foster carer. She has described her fear of arrest and death if she were returned and she has witnessed brutality including the murder of people by soldiers;
 - ii) the social worker's statement recorded O's evident extreme fear when talking about her experiences in the DRC and of possible notification to the Congolese embassy. The social worker noted that O:

“believes that at any stage she could be sent back to Congo and becomes inconsolable her face changes shape, her bottom lip starts to quiver and tears form in her eyes, she is convinced if she is sent back to Congo then will be killed, she requires a lot of consoling to let her know this will not happen; ”
 - iii) O's clearly expressed position is that the DRC should not be informed of her arrival in the UK because she is fearful of the implications to her and her family of such knowledge. She is fearful of social services attempting to contact her mother in case it alerts officials within the DRC and jeopardises her safety and that of her mother;
 - iv) both her parents were arrested: O understands that for her father this was related to political activism and her mother told O that she believed her father died in prison;

- v) under what must have been terrifying circumstances for a 12-year-old girl, O fled her home without warning when the police attended in the summer of last year and arrested her mother and removed her and her two younger brothers from their home;
 - vi) O has no knowledge of the whereabouts of her immediate or wider family;
 - vii) her mother's Facebook page has highly distressing images of murdered women and children and O herself has described seeing the murdered bodies of children on the ground;
 - viii) notifying the Congolese authorities runs a real risk of putting O's family in the DRC at risk of arrest, detention or worse;
 - ix) she has experienced disrupted sleep in the UK as a result of her past experiences and further anxiety about what may follow after consular notification would not be in her best interests; and
 - x) to all intents and purposes O's position is akin to that of an asylum seeker.
13. On 14th September 2020 the local authority left a message at the Embassy of the DRC in London, in the most general terms, notifying the embassy that one of their citizens had been placed in foster care in this jurisdiction. It would appear the local authority have not received a response from the embassy.
14. The local authority's care plan provided for O to be made the subject of a care order and to remain living with her foster carers. The guardian supported this plan. The parties are agreed that O will require future psychological support and the local authority is committed to ensuring this support is provided to her.

Submissions

15. The relevant provisions of The Vienna Convention on Consular Relations 1963 ('The Vienna Convention') are contained in Articles 36 and 37 of the treaty which provide:

“Article 36

1 With a view to facilitating the exercise of consular functions relating to nationals of the sending States

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison,

custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2 The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.”

“Article 37

If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty:

...

(b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State. The giving of this information shall, however, be without prejudice to the operation of the laws and regulations of the receiving State concerning such appointments; ...”

16. On the facts of this case Article 36 of the treaty is not engaged but Article 37(b) is engaged.
17. In the case of *Re E (A Child) (Care Proceedings: European Dimension)* [2014] EWHC 6 (Fam), the former President, Sir James Munby, made the following observations in relation to these provisions at paragraph 41:

“This is not the occasion for any elaborate discussion of the effect of these provisions as a matter of either public international law or English domestic law (as to which see the Consular Relations Act 1968 and the Diplomatic and Consular Premises Act 1987). I am concerned only with what they suggest

as good practice in care cases. But in that context there are, as it seems to me, three points to be borne in mind:

- i) First, Article 36 enshrines the principle that consular officers of foreign states shall be free to communicate with and have access to their nationals, just as nationals of foreign states shall be free to communicate with and have access to their consular officers.
- ii) Second, the various obligations and rights referred to in paragraphs (b) and (c) of Article 36(1) apply whenever a foreign national is "detained"; and where a foreign national is detained the "competent authorities" in this country have the obligations referred to in paragraph (b).
- iii) Third, Article 37(b) applies whenever a "guardian" is to be appointed for a minor or other foreign national who lacks full capacity. And Article 37(b) imposes a particular "duty" on the "competent authorities" in such a case."

18. He continued at paragraphs 47 to 48 as follows:

"47. Given this, it is highly desirable, and from now on good practice will require, that in any care or other public law case:

- i) The court should not in general impose or permit any obstacle to free communication and access between a party who is a foreign national and the consular authorities of the relevant foreign state. In particular, no injunctive or other order should be made which might interfere with such communication and access, nor should section 12 of the Administration of Justice Act 1960 be permitted to have this effect.
- ii) Whenever the court is sitting in private it should normally accede to any request, whether from the foreign national or from the consular authorities of the relevant foreign state, for
 - a) permission for an accredited consular official to be present at the hearing as an observer in a non-participatory capacity; and/or
 - b) permission for an accredited consular official to obtain a transcript of the hearing, a copy of the order and copies of other relevant documents.
- iii) Whenever a party, whether an adult or the child, who is a foreign national
 - a) is represented in the proceedings by a guardian, guardian ad litem or litigation friend; and/or
 - b) is detained,

the court should ascertain whether that fact has been brought to the attention of the relevant consular officials and, if it has not, the court should normally do so itself without delay.

48. If, in any particular case, the court is minded to adopt a different or more restrictive approach it is vital that the court hears submissions before coming to a decision and that it then sets out quite explicitly, both in its judgment and in its order, the reasons for its decision.”

19. In *Re JL and AO* [2016] EWHC 440, Baker J, as he then was, said at paragraphs 68-70,

“68. First, local authorities must be very careful to ensure that they comply with their statutory obligations and the guidance given by the courts concerning voluntary accommodation in the cases cited above. The President (in *Re N*, supra, at para 171) has warned that the misuse and abuse of s.20

"is not just a matter of bad practice. It is wrong; it is a denial of the fundamental rights of both the parent and the child".

In cases involving children who are foreign nationals, the breach of rights will be compounded if, as a result of the accommodation being under s.20 when it should in reality be under a care order, the local authority avoids the obligations under Article 36 of the Vienna Convention that would arise if the child was in care.

69. Secondly, even where a local authority is under no obligation to notify the embassy because the child is not being detained within the meaning of Article 36, it may conclude, in the exercise of its statutory powers and obligations to carry out assessments of children in need, that it is necessary to contact foreign authorities in order to improve its understanding of those matters to which it must have regard under s.1(4) of the 2002 Act, including the child's background, the effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person, the child's relationship with its relatives, and the ability and willingness of any of the child's relative to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs. Whether or not the local authority needs to make such enquiries of the foreign country will depend on the circumstances of each case.

70. Thirdly, in circumstances where the child is joined as a party to proceedings, as summarised in FPR rule 14.1, a guardian will be appointed under rule 16.3. In practice, this includes all applications for placement orders, all applications for orders under s.84 and certain applications for adoption orders, including cases where a CAFCASS child and family reporter recommends

that the child be a party and the court accepts that recommendation. Following the guidance of the President in Re E reiterated in Re CB, the court is under an obligation under Article 37 to notify the consular authorities when a guardian is appointed even in those cases where no obligation arises under Article 36.

20. In July 2014 advice was given by the Department for Education in a document entitled "Working with foreign authorities: child protection cases and care orders", it includes the following passage at page 5:

"Social workers need to consider working with foreign authorities at a number of stages during child protection cases, including:

when carrying out an assessment under section 47 of the Children Act 1989, where the child has links to a foreign country, in order to understand the child's case history and/or to help them to engage with the family;

when a child with links to a foreign country becomes the subject of a child protection plan, has required immediate protection, or is made subject to care proceedings, the social worker should consider informing the relevant foreign authority; and

when contacting or assessing potential carers abroad (such as extended family members)"

21. At page 6, it adds:

"Social workers should inform the relevant Embassy when a child with links to a foreign country has become the subject of a child protection plan, has required immediate protection or has become the subject of care proceedings, unless doing so is likely to place the child or family in danger and provided any necessary consent to disclose information has been obtained. Decisions should be linked to a robust and thorough risk assessment."

22. Although the United Kingdom has ratified the Vienna Convention, it has not been incorporated into our domestic law by an Act of Parliament. Thus, the question arises, what force does Article 37 have?

23. Mr. Lamb, counsel for the local authority made the following submissions on this issue:

- i) Helpful general guidance is found in *Bennion on Statutory Interpretation*, 7th Edition at Chapter 26.11:

"A treaty is not part of UK law unless and until it has been incorporated by Act of Parliament (This section has been judicially approved: *Saad v Secretary of State for the Home*

Department [2001] EWCA Civ 2008, [2002] Imm AR 471 at [15])

Where an Act incorporates or otherwise implements a treaty it should if possible be given a meaning that conforms to that of the treaty....

Even where an Act does not incorporate a treaty there is a 'strong presumption' in favour of interpreting it in a way that is in conformity with international obligations. Underlying this presumption is the idea that it is an important principle of public policy to respect the comity of nations and obey an instrument binding under public international law.

In *Salomon v Customs and Excise Comrs*,⁴ Diplock LJ said: "... there is a prima facie presumption that Parliament does not intend to act in breach of [public] international law, including therein specific treaty obligations; and if one of the meanings that can reasonably be attributed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is so consonant is to be preferred." ;

ii) See further at Chapter 24.16 of *Bennion*:

"Even where a treaty is left simply to operate on the international plain it may still be referred to in construing domestic legislation so far as called for by the presumption that Parliament intends to comply with public international law..."

iii) It is important to note that the Vienna Convention on Consular Relations 1963 was ratified before the Vienna Convention on the Law of Treaties 1969. The Convention on the Law of Treaties 1969 codified pre-existing international customs in the interpretation and codification of international treaty obligations in domestic law. It did not have retrospective effect but provides at Article 31(1) that:

"a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"

iv) This principle, expressed in slightly different terms in *McNair's The Law of Treaties* (1961) p 365, where it is stated that the task of applying or construing or interpreting a treaty is

"the duty of giving effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances"

v) It is submitted therefore that in circumstances where Article 37 is not enshrined in domestic statute:

- a) Article 31(1) of the Vienna Convention on the Law of Treaties 1967 is persuasive through custom in applying a duty under a convention ratified before it.
- b) If there were any doubt, the customary rule existing before the Vienna Convention on the Law of Treaties 1967 was ratified as expressed in *McNair* must bite.
- c) In these circumstances, the domestic courts are bound to consider Article 37 of the Vienna Convention on Consular Relations 1963, as a necessary but not sufficient consideration in applying domestic legislative duties. In particular to the index case, when making decisions in the child's best interests (s.1(1) of the Children Act 1989).

24. Ms Vindis, counsel for the children's guardian, agreed with and adopted these submissions made on behalf of the local authority.

Analysis

25. I have no reason to doubt the accounts given by O to her guardian, her social worker and to her foster carers about her experience of life in the DRC. She has witnessed horrific events which no young child should have to encounter. Her father was imprisoned and never returned to the family. Her mother and younger brothers were arrested by the authorities and removed from the family home. O was abandoned by the family friend who brought her to this country and was then abandoned by the woman who subsequently took her into her home in this country.
26. O has what appears to be a genuine and sincere fear of being returned to the DRC and of the fate which may await her there if she was to be returned.
27. I note the advice given on the Foreign, Commonwealth and Development Office's website in respect of the DRC, namely
- “The Congolese authorities rarely meet their international obligations to notify Embassies when foreign nationals have been detained. Even if requested, adequate consular access isn't always granted.”
28. I accept the submissions made by Mr. Lamb that the provisions relevant to this application contained in the Vienna Convention are not enshrined in our domestic statute.
29. I recognise that it was accepted in *Re E* (above) and in *Re JL and AO* (above) that whereas the provisions of Article 36 of the Vienna Convention provides a discretion to inform a foreign authority, Article 37 imposes a duty to inform the foreign authority where, as in this case, the court appoints a guardian in proceedings concerning a citizen of that foreign country.
30. I note that Article 37(b) contains the following caveat, namely:

“The giving of this information shall, however, be without prejudice to the operation of the laws and regulations of the receiving State concerning such appointments”

31. In the premises does Article 37(b) impose an absolute and binding duty in all circumstances to notify a foreign authority where a court appoints a guardian in respect of one of its nationals? In my judgment it does not.
32. In the vast majority of cases where Article 37(b) is engaged, the court will have no difficulty or face any impediment in complying with the terms of the Vienna Convention and giving the requisite notification to the foreign authority. There will be rare cases, such as the circumstances of this case, where it would wholly inimical to the welfare best interests of the child to give the requisite notice to the foreign authority.
33. The Vienna Convention is not enshrined in our domestic law. The terms of the Convention should ordinarily be complied with but where to do so would be contrary to the welfare best interests of the child concerned, I am satisfied that the court may conclude it would not be appropriate to give the requisite notification.
34. I am satisfied in this case and on the basis of the cogent evidence before the court that it would be wholly contrary to the welfare best interests of O for the court or for the local authority to notify the Congolese authorities of the fact of these public law proceedings and/or of the appointment of a guardian to represent her interests.

Conclusion

35. In the premises I am entirely satisfied that it is in the welfare best interests that I make a declaration that it is lawful and proportionate for the local authority not to notify the Congolese authorities of:
 - i) O’s presence in this jurisdiction;
 - ii) the fact of these public law proceedings; and
 - iii) the appointment within these proceedings of a children’s guardian to represent O.