IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Nos. FD23P00010; FD23P00011

[2024] EWHC 2016 (Fam)

Royal Courts of Justice
Strand
London, WC2A 2LL

Monday, 19 February 2024

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF THE SENIOR COURTS ACT 1981

Before:

MR RICHARD HARRISON KC

(Sitting as a Deputy High Court Judge)

(**In Private)**

Re A (A Child) (Removal to non-Hague country) (No 2)

J U D G M E N T

A P P E A R A N C E S

MR T BARWELL O'CONNOR (instructed by The International Family Law Group LLP) appeared on behalf of the Applicant Father.

MS M GRAY (instructed by Goodman Ray Solicitors LLP) appeared on behalf of the Respondent Mother.

MR J NIVEN-PHILLIPS (Solicitor of Cafcass Legal) appeared on behalf of the Guardian.

THE DEPUTY JUDGE:

1 I remain concerned with a little girl who I have called A solely for the purposes of anonymisation. She is now aged seven. In September 2023 I dealt with an application made by the father for A to be summarily returned from country X to the jurisdiction of England and Wales, and gave a judgment at the conclusion of the hearing whereby I indicated that I would refuse to make the order sought by the father on the summary basis for which he contended. At the end of the hearing, I contacted specialist child abduction solicitors under the Duty Advocate Scheme operated by the Child Abduction Lawyers' Association, as a result of which highly specialist solicitors, namely IFLG and Goodman Ray, attended court to represent the parties. Following that hearing, each of those firms of solicitors was able to secure legal aid for their respective clients. As a consequence, since that time the court has been enormously assisted by the fact that each of the parties has been represented by expert solicitors and counsel. The court has been particularly assisted by the ongoing input of Mr Lill, who now acts as A's guardian in the proceedings, and by Mr Niven-Phillips who represents A.

2 Although the factual circumstances which give rise to this application are not unprecedented, they are, nevertheless, highly unusual. I set out some of the background in my previous judgment and I do not need to repeat it. As I recorded, in August 2021 the mother took A to country X without the knowledge or consent of the father, in circumstances where A had had no contact with the father for the best part of two years after the mother and A had left the father's home in which the family had been living in what are contentious circumstances. A has remained living in country X since August 2021 and has had no contact with her father since that time, apart from a relatively recent introductory contact which took place remotely and which was arranged by Mr Lill, following his input. From the information I have received, that period of contact went well.

3 As a result of the input of specialist lawyers and the guardian, the issues between the parties have narrowed considerably since the matter was substantively before me last September. It is common ground between the parties that A should remain living in country X with her maternal grandmother until at least the summer of 2025. Until relatively recently it was also common ground that she should return from country X to this jurisdiction some time towards the end of the summer 2025, at which point the mother will have completed the nursing course which she is presently undertaking.

4 The parties have, moreover, been able to reach either complete or substantial agreement as to the child arrangements that should be in place for A between now and the point in time when she returns to this jurisdiction. It is agreed that there should be a "lives with" order in favour of the mother, subject to a provision, presumably to be incorporated by way of recital, making it plain that for the time being the day-to-day care for A is to be delegated to the maternal grandmother in country X where A is to remain living. There is also substantial agreement as to the indirect contact which is to take place between A and her father by video between now and the date of her return, and in relation to direct contact which is to be facilitated by A returning for a period of time to this jurisdiction over the summer holidays and having contact with her father, supported by a third party.

5 There may be some disagreement as to the potential for there to be further trips by A to England, over which she could have direct contact with her father, a major obstacle in this case being the availability of financial resources sufficient to fund A's trips to this country, particularly in circumstances where, given her age and the logistics of travel, it will almost inevitably be necessary for her to be accompanied on any flight by an adult third party.

6 The most substantive issue now concerns the date of A's return to this jurisdiction, and indeed the mechanism by which that should be achieved. As I indicated, until relatively recently it was common ground that the return should take place towards the end of the summer 2025. The mother, however, has changed her position. She says that, notwithstanding the fact that she will have completed her nursing course by September 2025, there will be a period of approximately two months thereafter before she receives what is known as a PIN, which, I am informed, will enable her to be formally registered as a nurse and obtain a full-time nursing position with enhanced pay and, she hopes, working hours more conducive to her role as primary carer of A.

7 On the mother's case, once she has obtained that PIN, which she expects to be in approximately November 2025, there is likely to be a further period in which she is looking for employment with the object of finding a nursing position as compatible as possible with her obligations and responsibilities towards A. At this stage, she has identified that working in A&E comes with shift patterns more likely to tick that particular box, so as to minimise her need to fund additional childcare. But, inevitably, positions of that type are likely to be in demand and there is no guarantee that she would walk into such a job. The mother further says that having obtained a nursing position, the initial few months – I think she estimates six months – are likely to amount to a probationary period, which will entail some degree of instability before she is able to settle down and feel, with a degree of confidence, that she can look to the future knowing that she holds a particular job which will be subject to particular shift patterns.

8 It is for that combination of reasons that the mother now says that, contrary to her previous position, she does not realistically envisage that it will be practically possible for her to make arrangements for A's return to this jurisdiction before the summer of 2026. In terms of mechanics, the mother argues that it would be wrong in principle for the court at this juncture to make what is characterised as a deferred return order to take effect in two and a half years' time. Ms Gray makes the point that in *Re NY* the Supreme Court emphasised the need, before a court makes a return order, to undertake a comprehensive welfare assessment, having regard in particular to the matters set out in the welfare checklist, and that it is difficult conceptually for a court to undertake that task in relation to an event which is not to take place for another two and a half years. The mother, nevertheless, is prepared to offer an undertaking to the court that she will cause A to return to this jurisdiction by no later than the summer of 2026. She invites the court to dismiss the father's application, making the point that this will not shut the door on the father, but will allow him jurisdictionally to issue a further application for a return order at any stage should he consider it appropriate to do so. The mother's case is that it is very much in A's interests and consistent with the scheme of the rules and the practice directions that underpin the rules, to achieve finality and not leave the shadow of litigation hanging over everybody – litigation which the mother says, and I accept, she has found to be stressful.

9 The father's case at the start of this hearing was that the court should, as had until recently been common ground between the parties, make an order for A to return to this jurisdiction by no later than the summer of 2025. He had previously sought a return much sooner than that. He would point in particular to the fact that finances or, rather, the lack of finances has a real impact in this case on A's ability to travel freely between this jurisdiction and country X; A is living in a country where neither of her parents are living and this will inevitably have a material impact on her relationship with both of them, and in particular is likely to have an impact on her relationship with her father, with whom, as I have said, she has not had direct contact for over four years, or indeed any form of contact, direct or indirect, save for that one recent period to which I have referred.

10 Since the start of the hearing today, the father has altered his primary position and he now (save perhaps in relation to the question of the timing of any review or other hearing) aligns himself with the position articulated today on behalf of the guardian. Before the commencement of the hearing today, the guardian's position as to the date of a return was that, on balance, A should not return to this jurisdiction until 2026, essentially for the reasons articulated by the mother. During the course of today he has modified his position and, after careful consideration, has come to the conclusion that it is difficult for the court today to make a clear welfare determination as to the date upon which A should return to England and Wales.

11 In these highly unusual circumstances, whether to order A's return to this jurisdiction or allow her to remain living in country X away from each of her parents and with limited direct contact with both of them, involves a difficult welfare balance. On the one hand, A is at present in a relatively stable situation. She appears to be doing well at school in country X, and to be enjoying life living with her grandmother. On the other hand, by common consent, country X is only a temporary home for a time-limited period, and remaining there not only means that she is not developing friendships and ties in the jurisdiction which is ultimately to be her home but, more significantly, is resulting in her spending very little time with either of her parents when she is a young child who remains at a very important stage of her development, particularly her emotional development. This absence is likely to be affecting her relationship with her mother and may well have long-term consequences for that relationship. But, more significantly in this context, it is also likely to have enduring consequences for her relationship with her father, which has become severed as a result of her absence.

12 So it seems to me that, as submitted by the guardian, in deciding whether it is appropriate for A to be returned to England and Wales in 2025 or in 2026, an important consideration to which the court is likely to have regard is the extent to which over the period between now and the time at which the issue falls to be considered, A has been able to restore her relationship with her father, notwithstanding her physical absence from this jurisdiction. Counter-intuitively perhaps, the greater the extent to which that relationship has been repaired and promoted (as to which the mother and the maternal family have a significant role to play) the more that may militate in favour of allowing A to remain living in country X for a further period of time, whereas, conversely, the opposite is also the case.

13 The other very significant consideration about which the court at this juncture has limited information relates to the precise practicalities of any return in 2025. Although I have very helpfully today been provided by Ms Gray with a degree of information about the mother's anticipated circumstances following the completion of her course, inevitably there is a considerable degree of uncertainty as to the likely position, and there are various potential permutations as to how matters may unfold. One thing that is known from the mother's timetable is that a final week of written assessments falls in the week of 12 May 2025. Thereafter she has a week of annual leave, followed by what is described as a 12-week management placement which, despite its name, I am informed in fact constitutes a nursing placement at a hospital, the last week of which will be subject to some form of observational assessment. That is due to be completed by the end of the week commencing 11 August. There may be a need to take up a further two weeks in September, described on the timetable as "consolidation weeks" which have been set aside in case any periods of the course have been missed or there is a need to re-sit any of the assessments. Subject to that, the mother's course is likely, to all intents and purposes, to have reached a conclusion by the middle of August 2025, following which it is difficult for her to say with any certainty what the nature of her temporary pre-PIN employment in likely to be between August and

November 2025, or where she is likely to be in terms of having secured a nursing placement in the longer term for the period after she has obtained that PIN.

14 So, given the extent of the uncertainty in relation to those two important issues, each of which is directly relevant to A's welfare, it is said on behalf of the guardian that rather than attempt to make a determination as to the date for A's return at this juncture, in a climate of uncertainty, in which Mr Lill, whilst able to make recommendations, has only been able to do so on the basis of limited information, it would be preferable for the court to defer making any such decision until much nearer the time at which any determination would become operative. Additionally, it is submitted on behalf of the guardian that adjourning the proceedings in the manner proposed would have the benefit of enabling Mr Lill and Cafcass to have an ongoing role, most crucially allowing for a referral to be made to ICFA, which, as I understand it, is an organisation that operates independently from Cafcass and which specialises in the facilitation of contact between children and parents in difficult cases where, for whatever reason, a child-parent relationship may have become severed. In a situation where neither party has anything other than limited means and where each of them is going to struggle to fund input from an independent social worker or even from an organisation offering specialist contact supervisors, it seems to me that being able to take advantage of the services offered by ICFA is likely to be of benefit not only to the parties themselves but also to A.

15 Having listened very carefully to the competing arguments advanced by each of the parties, I have come to the conclusion that in the unusual circumstances of this case, and notwithstanding the general proposition that finality is desirable in litigation concerning children, I should accede to the position now put forward on behalf of the guardian. Were I to have acceded to the mother's position and simply dismissed the father's application, as Ms Gray acknowledged, it would have been open to the father to issue a further application, perhaps 12 months from now, seeking a return order in the summer of 2025. Had he issued such an application, it would then have been listed for directions and potentially thereafter a substantive hearing. That process would take place without, in the intervening period, Cafcass and, in particular, A's guardian, having had the sort of ongoing and purposeful role that has been described to me by Mr Niven-Phillips, and which adjourning the application will allow for. One further benefit of maintaining Mr Lill's role is that he will be in a position to meet with A over the course of her proposed visit to this jurisdiction in August 2024 in his capacity as her guardian, thus allowing him to have the benefit of seeing her face-to-face as opposed to remotely, which has been the extent of his contact with her thus far.

16 Having acceded to the general proposition that I should adjourn the matter as proposed by the guardian, I need next to consider the date of any proposed review hearing. It was initially suggested by the guardian that there should be a review in the autumn of this year, which would allow the court to take stock of matters following the summer contact. Having considered matters, including in particular the submissions on behalf of the mother as to the desirability of there being, if not no litigation, then at least a more extensive litigation-free period, I have, on balance, decided that this Autumn would be too soon for a review. If something has gone wrong in terms of the arrangements for contact that have been agreed today and/or any gaps which I may be called upon to fill in, then it will of course be open to any of the parties to seek to restore the matter for a hearing sooner than a review, but it does not follow from that, that a review should be directed merely for the purposes of considering how the contact has gone.

17 In my view, the review hearing should take place in 2025. I have given particularly careful consideration as to whether it would be preferable for this to be in the earlier part of 2025,

perhaps in late January or February, or towards the end of May. The mother has an intensive period of study between roughly the middle of March 2025 and the conclusion of her assessment week in the middle of May 2025. I do not think it is desirable to list a hearing in the middle of that intensive period, or indeed immediately thereafter, thereby causing a major distraction to her studies and additional stress, although I do accept the submission that is made by Mr Barwell O'Connor, on behalf of the father, that in circumstances where the mother is not caring for A day to day, the impact of stress on the mother is likely in turn to affect A less than it might do in a case where a child was being cared for full time by the mother. Nevertheless, I do regard it as a relevant consideration.

18 The advantage of listing the matter in the earlier part of the year is that it will make listing the case thereafter easier. It will mean that without any difficulty, if agreement cannot be reached at that stage, the court will be in a position to accommodate a one to two-day hearing later in the year at which a substantive decision could be made to ensure A's return to this jurisdiction in time to start her school term in September 2025, in the event that this was the welfare conclusion reached by the court at that juncture.

19 As against that, however, having a review hearing earlier in the year may well mean that some of the uncertainty about the mother's work situation persists at that stage, although, looking at the timetable and based upon what I have been told by Ms Gray, I cannot see at the moment that the uncertainty is likely to have resolved to any substantial degree by the end of May. Her written assessments will only have taken place in the week of 12 May, and although the mother was unable to tell me when she is likely to have received the results of those assessments, it seems to me optimistic to suppose that any written exams will have been marked within a week or two of their having been undertaken.

20 The other aspect of welfare which I described earlier in this judgment, namely a restoration of the relationship between A and her father, is a matter about which the court is likely to have far more information than it does at present by early 2025; this will assist the parties in their own discussions and deliberations as to the appropriate way forward.

21 On balance, therefore, I have come to the conclusion that it would be better for the review hearing to take place in the earlier part 2025, rather than waiting until after the mother's assessment in the middle of May. As I have said, I consider it likely that there will still be a significant degree of uncertainty as to the mother's work situation in May, and it is likely then to be more difficult for the court to case manage the matter appropriately in the event that it appears to be a realistic possibility that it would be in A's best interests to return to this jurisdiction in time to start school in September 2025.

22 So that is what I propose to direct. I will leave the parties to obtain an appropriate date convenient to all of them, which I suggest should be either at the end of January 2025 or some time in February 2025. I do not propose at this juncture to direct that there should be an addendum report from the guardian. It seems to me that it is desirable to keep the litigation as low key as possible at this juncture, essentially for reasons which have previously been articulated by the guardian and by Ms Gray on behalf of the mother. So, for the same reason, I do not propose to direct further evidence from the parties in advance of that hearing. Instead what I would suggest is that each party should file position statements which perhaps can come in sequentially, with the parents exchanging those, say, a week before the hearing, allowing the guardian to reflect on the positions of each of the parents before he files his position statement.

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23 The parties are to be commended for the progress they have made, thus far, in narrowing the issues and moving matters forward in A's welfare interests. It is very much in my view to A's long term benefit for the parents to do everything possible to restore a relationship of trust between them, and part of the rebuilding of trust, in what has become a fractured relationship, seems to me to ensure that the Father knows where A is living, that he can communicate with A by sending letters and other gifts directly to her at what is her temporary home, and demonstrate that he is to be trusted. As Mr Niven-Phillips says, there is every incentive for him not to abuse his knowledge of where A is living, under the spotlight of the ongoing proceedings, at a time when his relationship is in the process of being rebuilt.

24 I accept the submission that there exists potential for minor logistical difficulties if written communications have to be transmitted to A via a third party or another institution, such as her school. I also accept that there is a potential welfare detriment to A in perceiving that letters to her from her father, by contrast with her peers, are only coming to her via her school, whereas other members of her household receive all of their mail directly to that household. Most significant in my view is the fact that concealing the address potentially puts A in a position whereby the adults with whom she is living, and/or who are entrusted with the role of facilitating contact with her father, are on their guard and/or, however small a risk it may be, feel the need to impress to A the need to ensure that the address is not revealed to the father, and/or that she should potentially not disclose to him information that might indirectly lead to the identification of the address, such as the name of a nearby park, shop or other activity that she enjoys.

25 It seems to me that were A to perceive that where she was living was a secret to be kept from the father, that could have obvious implications for their relationship as it would convey the subliminal message to her that at some level he represented a danger. Moreover, it seems to me that the father's relationship with A is likely to be enhanced if in their limited communications, which are to take place remotely, he is able to speak freely to her about what she has been doing, about the activities she has been enjoying, and if she is able to share with him photographs of where she lives, including the immediate environment outside her home. To place an artificial restriction on that relationship, it seems to me, is contrary to her interests.

26 As against that I have considered carefully the allegations that have been made against the father, but I cannot see that there is anything in those allegations that would justify withholding the address from him when set against the other material welfare considerations which I have identified, all of which militate in favour of disclosure.

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