Neutral Citation Number: [2019] EWHC 3512 (Fam)

Case No: FD18P00747

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/09/2019

Before :

MR JUSTICE HOLMAN
(Sitting throughout in public)
- -

Between :

RURAMAI MATILDA ZARANIKA **Applicant**

- and –

PERCY MUSA **Respondent**

- -
- -

MR GRAHAM GOODWILL (instructed by **Public Direct Access**) for the **applicant**
MR NICHOLAS ELCOMBE (instructed by **Oslers Solicitors**) for the **respondent**

Hearing date: 17 SEPTEMBER 2019
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Approved Judgment
(As approved by the judge)

Mr Justice Holman:

1. I am starting this ex tempore judgment just after 4.30 pm, after a day long hearing. The hearing is in any event essentially summary in nature, and the decision which I reach today is interim in character. The issue today is whether or not, in the circumstances which I will describe, I should order the father to cause the return of the parties' child to England and Wales.

2. I intend to make such an order, but I will make crystal clear in the order, as I will also make clear by this judgment, that once the child has returned to England and Wales all issues, both in the interim and longer term, will be completely at large and in the discretion of the court later dealing with this case. Those issues will include any issue as to whether, after spending some "holiday" period here, the child should return to Zimbabwe in order to resume her current schooling there.

3. So I stress that my only essential decision today - all other aspects of the order are consequential - is that for some period, which may be short, the child must be returned to England. All else is for consideration and decision at a later date, after there can be a more informed appraisal of the wishes and feelings of the child concerned, who will shortly be 13, and all the other relevant matters in the case.

4. In reaching my decision today, I must and do make the welfare of the child concerned the paramount consideration. There is absolutely no scope within that for any consideration of "righting the wrong" which the mother's counsel, Mr Graham Goodwill, so strongly submits has been done to, and suffered by, the mother.

5. The essential facts are these. The background of both parents is Zimbabwe. They are both citizens of Zimbabwe. They both continue to have considerable extended families in Zimbabwe, and indeed the mother has three other elder children who continue to live in Zimbabwe with other members of their family there. The father has, however, lived in England for a long time and is also a British citizen. He says, however, that more recently he has spent the greater part of his time residing in Zimbabwe, and that he now sees his future in Zimbabwe rather than in England. The mother travelled to England in 2005 and has lived

here ever since. For a long time, her immigration status was irregular, although she currently does have discretionary leave to remain.

6. The parents lived together for an appreciable period of time. Within the current documents, each gives different accounts of their marriage and the relationship between them, which are highly contentious and to which I make no further reference today. From their relationship, they have one child, L, who was born in late October 2006. She is currently, therefore, almost 13, and will be 13 at the end of next month.

7. It does seem clear that for the first 11 years of her life L lived in England, and in the general area of Ely. Until October 2017, she was attending a school in Ely. By then, her parents were clearly separated, and the fact is that she was primarily based at the home of her father in Ely, although she also spent time with her mother at her home a few miles away in Soham.

8. On 19 October 2017, the father travelled with L to Zimbabwe. The circumstances in which he did so are highly contentious and disputed between the parents; and indeed, the father now faces a relatively imminent criminal trial for the serious offence of child abduction, contrary to section 1 of the Child Abduction Act 1984. As I understand it, the gist of that offence and charge is that the father removed the child from England without the consent at all of the mother, which indeed she asserts. He, on the other hand, says that he removed the child with the consent of the mother.

9. Those issues will clearly be at the heart of the forthcoming criminal trial, and I say no more about them. I do, however, observe that at paragraph 53 of his own recent statement, dated 29 July 2019, the father himself said that "On the 19th October 2017, I travelled with L to Zimbabwe, initially for a two-week visit and asthma treatment…". So even on his own recent statement within these proceedings, the highest he seemed to put it was that the mother had agreed or consented to a holiday visit of about two weeks' duration.

10. During the course of his oral evidence, I asked the father whether he had then obtained her permission to the child's staying longer in Zimbabwe. His answers were a little unclear,

but the effect of them seemed to be that he had tried to get her permission, but had not been able to establish communication with her by telephone. It seems to follow from that that he did not, on his own account, have her express permission in 2017 to the child remaining in Zimbabwe for longer than about two weeks. However that may be, the fact is that L has remained in Zimbabwe ever since, now for almost two years.

11. It is clear that the mother, relatively rapidly, took some steps to try and obtain the return of L from Zimbabwe. There was a hearing before myself on 23 November 2018. The order made by me on that date records that I spoke personally on the telephone with the case holder at the ICACU, who informed me on that day that the mother's application for a return of the child pursuant to the Hague Convention was first lodged with the ICACU on 12 December 2017, namely, less than two months after L first travelled to Zimbabwe.

12. It does appear that the mother was then very slow in producing all the required documents and information to enable that application to be further processed. The same order records that "it was only on 16 July 2018 that the mother finally submitted all required information and documents", and that the case was then accepted by the ICACU, who submitted it to the central authority in Zimbabwe on 25 July 2018. The same order records that as of that date, namely 23 November 2018, the ICACU had not heard further from the central authority in Zimbabwe.

13. I have not today made a further telephone call to the ICACU, since such calls tend to delay the course of a hearing by 20 minutes or more. But I have been told today that so far as both counsel today are aware and both their clients, who are both in the courtroom, no proceedings have actually been issued by the central authority in Zimbabwe, even now. Certainly, if they have been issued, neither parent has seen any documents about them or been informed of the issue of proceedings.

14. So the upshot is that this child was allegedly wrongfully removed from England and Wales or, alternatively, wrongfully retained in Zimbabwe, now nearly two years ago. The mother promptly attempted to gain the return of the child through the mechanism of the Hague Convention, but so far as we know today, in the 14 months since the application was

submitted to the central authority in Zimbabwe, no further effective steps have been taken to bring about the return of the child.

15. Meantime, L has clearly been living with her father at times when he himself has been in Zimbabwe, and otherwise with members of the paternal family, and attending what appears to be a good boarding school in Harare called Arundel. My attention has been drawn to a recent school report which indicates that L is doing very well at that school. She is achieving well above the average of her peers, save only in mathematics. She is doing exceptionally well in music, and the father has stressed, and I accept, that she, like him, is very keen on music and that L seems to be already developing a name for herself as a composer and performer, and that her work is now publicly available on media such as iTunes, YouTube and Amazon.

16. For a long time now, the mother has striven to obtain the return of L, pursuant to proceedings in this court. There have been numerous interim orders. Most significantly, attempts were made over a protracted period to enable an officer of Cafcass to communicate directly with L so as to ascertain her wishes and feelings. Eventually, on 9 May 2019, a Cafcass officer, Mrs Lynn Magson, was able to speak by telephone to L for about 45 minutes while she was in the office of her headteacher at school. Mrs Magson reports that L confirmed that she was alone and could speak in private. There is now a report dated 14 May 2019 from Mrs Magson which gives an account of that telephone conversation. The whole report is, of course, important and is available to be read by anybody with a proper interest in this matter.

17. In brief summary, L did make clear that she is happy at her school and, in fact, happy in Zimbabwe, but, as paragraph 9 of the report describes, "she stated emphatically she would wish to return permanently to the UK and scored the strength of this wish as 10 out of 10. Exploring why this was the case, L said she missed both her mother and her father, her friends and her old school and 'just being at home in England – it's where I grew up'". When asked how she felt about remaining in Zimbabwe, she said, as Mrs Magson reports at paragraph 12, "There's nothing wrong with Zimbabwe, but I prefer England." She scored living in Zimbabwe as 7 out of 10.

18. During the course of her oral evidence this morning, Mrs Magson remained very clear that the desire of L was to be here in England. Mrs Magson said that L had been very careful not to express any wish or preference as to living with one parent rather than the other. The burden of what she said was that it is in England that she wishes to live. Mrs Magson said, "Her strong preference was to be in England". L also made clear, however, to Mrs Magson that the point at which she would like to return to England is at the end of the current academic year in Zimbabwe, which she said ended in November 2019, but Mrs Magson established this morning actually ends on 4 December 2019, which is the last day of the current school term and year.

19. During the course of his evidence, the father stressed that in his view L was expressing her wishes and feelings on the basis of what the father called an error of fact. He said that her error of fact is a mistaken belief that her father is going to live in the medium if not long term in England, and that therefore she could live with him here, or at any rate see a lot of him here. He says that that is an error of fact. He has already recently spent a lot of time in Zimbabwe, until prevented from leaving England and Wales by a variation of his bail conditions. He says that once the criminal trial is behind him and assuming that he is free to do so, his wish and intention is essentially to relocate to Zimbabwe and live there.

20. So the father says that everything that L expressed to Mrs Magson is based on a false belief or understanding by her in that regard. That may or may not be so. It may or may not ultimately turn out that, if the father does have a settled intention to live permanently or semi-permanently in Zimbabwe, L will then express a preference to be living in Zimbabwe with him. But meantime, the available evidence with regard to her wishes and feelings is, as I have said, that she expresses no preference as between living with her mother or her father, but a very clear and settled preference to live in England rather than Zimbabwe.

21. So against that background, the mother very strongly urges that it is now in the best interests of L to return here to England, either long-term or, at any rate, short-term. On behalf of the father, Mr Nicholas Elcombe has made a number of cogent submissions in opposition. His first submission, as developed in his position statement dated 17 September

2019, is that "Comity between states should be such that the courts of England and Wales should permit the proceedings under the Hague Convention in Zimbabwe to be determined." The difficulty with that particular submission is that, as I have explained, there is currently no evidence that even now there are any actual proceedings under the Hague Convention in Zimbabwe. Even if there are, they appear to be proceeding at a snail's pace, since, as I have said, it was now about 14 months ago that the application was submitted to the authorities in Zimbabwe by the ICACU. I am exercising a welfare-based jurisdiction, and in all the circumstances of this case, including that uncertainty about the state of proceedings in Zimbabwe and their very slow progress, it does not seem to me that I should be deflected from giving effect to the best interests of L by any considerations of comity.

22. The next submission by Mr Elcombe, at paragraph 10(b) of his position statement, is that "the mother gave consent for L to leave the jurisdiction to travel to Zimbabwe". As I have indicated, that is, in fact, a very hotly disputed proposition, which will be the subject of the forthcoming criminal trial. But, as I have also described, even on the father's case at its highest within the present proceedings, the consent which the mother gave was for L to travel to Zimbabwe for a relatively short period of two, or a few, weeks for the purpose of a holiday and some treatment for her asthma. The father himself is not able to claim within these proceedings that the mother gave any permission or consent to L remaining for many months, or now two years, in Zimbabwe.

23. So, the case of the father and Mr Elcombe narrows down to that in paragraph 10(c) of his written position statement, that "L's welfare can be and is properly being met with her remaining in Zimbabwe". In support of that, Mr Elcombe makes a number of undoubtedly very weighty points. There is evidence that L is thriving in Zimbabwe and is doing well at her school there, as I have already described. The thrust of what L told Mrs Magson is clearly that she is not unhappy where she is in Zimbabwe, and indeed that she is happy there. She rated Zimbabwe 7 out of 10. But she has also indicated that she would be much happier if she could now return to England, which she rated 10 out of 10.

24. The father also says, and Mr Elcombe stresses, that L does appear to have very significant musical talents, and that she is at the moment able to nurture and display them in Zimbabwe. It seems to me, however, that if she were to travel, possibly for only a relatively

short period, to England and then return to Zimbabwe, that would be no more than a brief interruption in her musical activities in Zimbabwe. In any event, if she has the talent that is claimed, then there are surely outlets and opportunities for that talent to be nurtured and displayed also here in England.

25. Mr Elcombe makes the important point that if L imagines that in some way she could live with both her parents together here in England, she is mistaken, and there is the point, as the father stressed, that his own desire and intention will be to move to live full-time in Zimbabwe as soon as he is able to do so. It is also said by the father in his written evidence, and stressed by Mr Elcombe, that the mother was not a consistent carer for L, and indeed, putting it bluntly, prioritised her relationships with adult men over caring for L. That raises many issues, which I am quite unable even to begin to investigate today, let alone adjudicate upon, but I stress that the order which I propose to make is for L to return to England and Wales, at which point all issues with regard to future child arrangements will be completely at large. There is no assumption whatsoever in my approach today that it is more appropriate for L to live with her mother than with her father, or that she should end up doing so.

26. Mr Elcombe stresses, too, that on both the paternal and maternal sides of L's family, there are many family members in Zimbabwe and much fewer here in England. That appears to be correct, but in the end, it is proximity to one's parents that is normally the higher priority.

27. I bear fully in mind all that the father has said and all that Mr Elcombe has submitted. It nevertheless seems to me overwhelmingly that it is currently in the best interests of L, after the end of her current school term and year in Zimbabwe, to make at least a return visit here to England. This is the country of her birth and her upbringing throughout the first 11 years of her life. She has clearly rated it 10 out of 10 and expressed a clear, strong preference to be here in England rather than in Zimbabwe. There will be a school break of several weeks, both in Zimbabwe and in England, over the Christmas period. It seems to me wholly beneficial to L and in no way detrimental to her, that she should now travel to this country, at the very least for a few weeks, and I intend by my order to so provide.

28. However, the order will make absolutely clear, as I have already indicated, that these proceedings are now transferred to the local family court at Peterborough or Cambridge. That court must, in advance, list a very urgent interim hearing before a full-time circuit judge in the week immediately after the short window for the return of Lynn to England, namely, the week beginning Monday 9 December 2019. Clearly, either immediately before that hearing or at court on the day of that hearing, L must have a proper face-to-face meeting with sufficient time available with a local Cafcass officer, and everything that L says, both as to her experiences in Zimbabwe and as to her then up-to-date wishes and feelings, is likely to be illuminating of the way forward.

29. I myself am completely open-minded today as to whether L remains here only for a few weeks within the school holiday period and then returns to Zimbabwe, or whether she remains here longer, pending a much fuller, welfare-based hearing, or indeed, whether a decision may be able to be made quite soon after her return that she should remain here into the long-term future. All of that will be at large, but for the reasons I have given, and attaching appropriate, but in no way decisive, weight to her own wishes and feelings, it seems to me high time that this child travelled again to England and Wales, if only for a few weeks.

30. The point has been made that, apparently, it is not possible currently to fly direct from Harare to the United Kingdom, and all air travellers have to pass through Addis Ababa, so that the total trip from Harare to England can take about 19 hours, or even more. It is possible for an unaccompanied minor of the age of 13 to make that trip without any requirement from airlines that the child be accompanied. The father has said that he would prefer L to be accompanied. I understand and respect that point of view. If the father wishes to fund a suitable relative to accompany L, he is completely free to do so.

31. Apparently, there is no suitable relative who currently has British citizenship or a visa to enter the United Kingdom, and I will accordingly add to the order a request - stressing that it is no more than a request - to the British High Commission in Harare to give sympathetic consideration to granting a visa to a suitable adult relative known to L, so that that relative can accompany her on the journey, but need not remain in the United Kingdom after her arrival.

32. I couple that request with making clear, however, that my central order that the father must cause L to travel here remains fully effective whether she is able to be accompanied or not. By December, she will be 13. She is clearly a modern child of the world. She has been attending a boarding school in Zimbabwe, and there is not the slightest reason to suppose that she cannot, if necessary, travel as an unaccompanied minor, even if she has to change planes in Addis Ababa.

33. The other aspects of the proposed order are, I believe, self-explanatory, and indeed, once a decision in principle had been made, have been agreed by both counsel. So that is my decision and order.
