IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2019] EWHC 3791 (Fam)

No. FD19P00297

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 13 December 2019

Before:

MR JUSTICE HOLMAN

(sitting in public)

B E T W E E N :

EF

Applicant

- and -

(1) LC
(2) CHILD
(3) CHILD

Respondents

MR A. G. PERKINS (instructed by Brethertons LLP) appeared on behalf of the applicant

MR M. TWOMEY QC and DR R. GEORGE. (instructed by Dawson Cornwell) appeared on behalf of the first respondent.

MR M JARMAN (instructed by Cafcass Legal) appeared on behalf of the second and third respondents.

J U D G M E N T

(A s a p p r o v e d b y t h e j u d g e)

MR JUSTICE HOLMAN:

1 This is an application, after a summary hearing, for the summary return to Zambia of two children who were abducted to England by their mother about seven months ago. Although Zambia has signed the Hague Convention on the civil aspects of international child abduction, that state has not been accepted by the United Kingdom as a reciprocating party to it. Accordingly, the present application cannot be made under the Hague Convention and has been made under the inherent jurisdiction of the High Court. All the directions stages of this case took place before the judgment of the Supreme Court in *In Re NY (A child)* [2019] UKSC 49 was handed down on 30 October 2019. In the light of that judgment, it might have been more appropriate for the application to have been formulated as an application for a specific issue order under the Children Act 1989. But, in either case, I must, as I do, make the welfare of the two children the paramount consideration and must, and do, have regard to the checklist in section 1 of the Children Act 1989.

2 It is important to stress that there is a significant difference according to whether an application is made under the Hague Convention, on the one hand, or under the inherent jurisdiction of the court or the 1989 Act, on the other hand. In the case of applications under the Hague Convention, the convention itself, and the jurisprudence in relation to it, applies a very specific approach which requires the return of abducted children to whom the convention applies, unless the limited so-called defences under Article 13 apply.

3 In non-Convention cases, however, the court must consider the welfare of the individual children concerned and make that paramount. It has, nevertheless, been very well established for many years, since at least the 1960s, that the court does possess - and in appropriate cases should exercise - a power to order a summary return after a summary hearing.

4 In some cases, that power will, nevertheless, be exercised only after hearing some evidence; and in the very recent case of *In Re NY*, Lord Wilson of Culworth described, at paragraph 30, that in the classic case of *In Re L* "before ordering the return of the child to Germany the High Court judge had conducted a full merits-based inquiry into what the child's welfare required."

5 In the present case, I have not conducted a full merits-based inquiry. Apart from the Cafcass officer, Ms Jacqueline Roddy, who is the children's guardian, I have not heard any oral evidence at all from either parent or from anyone else. This hearing was not set up as a hearing at which oral evidence would be heard, and there was no time allowed in the listing slot to enable me to do so. So, apart from that evidence of the guardian, which is essentially based on her recent observations of the children during the last month or so, I have not heard a word of oral evidence. I cannot make any reliable assessments of any of the highly disputed facts. I cannot make any assessment of the personalities, motivation or integrity of either parent, although they are both personally present.

6 I have, frankly, found this an increasingly unsatisfactory procedure or process as the hearing has progressed. I am being asked to make a welfare judgment on the basis of very partial evidence and a relatively perfunctory inquiry.

7 I define the overall question which I have to decide as follows: is it more in the interests of these two children that they return rapidly to Zambia, or more in their interests that, for the time being, they are permitted to remain in England? If it is more in their interests that they should return rapidly to Zambia, I should so order it. If it is not, then I should not.

8 As this has been a summary hearing and the time available is short, I do not believe that profound or detailed analysis is called for or required. The essence of a summary

application and procedure is just that: summary. If the answer is clear without hearing oral evidence, I should give effect to it. If it is not, I should not.

9 Although the case concerns two siblings, whose welfare requires to be considered discretely and separately, both parents and the guardian are all agreed that any outcome which differs for each child should not even be contemplated. They are well bonded to each other and they must return to Zambia, or remain here as a unit.

10 The essential facts are as follows. The father is aged 54. He is British and was brought up in England, but has lived in Zambia for many years. He has two elder children from a previous marriage, who currently attend boarding schools in England and whose mother currently lives in England. The mother of the children with whom I am concerned is aged 40. She is South African and was brought up there. The parents lived together in Zambia from about 2009, and married in May 2012. Their elder child, a son, T, was born in June 2012 and is now aged seven and a half. Their younger child, a daughter, A, was born in July 2014 and is now aged about five and a half. Both children (but not their mother) are British citizens. It is beyond argument that until late May 2019 the children's home all their lives was in Zambia. They lived there and went to school there and had circles of friends there. Sadly, the parents separated in September 2015, and the mother and children moved from the rented matrimonial home to another home, also rented, very nearby. The parents have since been divorced in Zambia.

11 There have been proceedings in relation to the children before the High Court of Zambia since January 2016, all of which (apart from certain hearings in relation to financial matters) have been heard by the Honourable Mr Justice Bowa. There is no doubt that the High Court in Zambia has been, and remains, seized in relation to these children. There is, if I may very respectfully say so, a thorough and well-reasoned interim judgment by Bowa J dated 31 August 2016 in which he awarded (on an interim basis) custody, care and control of the

children to the mother and "reasonable and liberal access" to the father for, broadly, alternate weekends and periods during the school holidays. Although made on an interim basis, the order of 31 August 2016 remained the governing order as to custody and access right up to the date of the abduction of the children in late May 2019.

12 During 2018, the daughter, A, had frequent soreness and redness in the area of her vagina. This led the mother to seek a number of physical medical examinations of A's genital area and also to talk to A about what might have caused the soreness. The mother recorded parts of some of her conversations with A, the earliest of which dates from 17 May 2018.

13 The first relevant medical report is dated 10 July 2018 in which a consultant gynaecologist, Dr Z Muparrakh, diagnosed vulvovaginitis and urinary-tract infection and prescribed medication.

14 On 23 July 2018, another doctor, Dr Sampa, reported that the hymen was intact, but there was hyperemium of the vestibule. The note records that the child did not say anything, but the mother clearly referred to suspecting the child to have been sexually abused by the father over time. Dr Sampa recorded as her diagnosis "possible defilement". On the same date, a more senior doctor, Dr Musonda, who did not himself examine the child, made a report on an official Zambian Police form, headed "Report of medical examination for rape/defilement case". This states that the "hymen was not severed" but there was "hyperemic vestibule", and continues on the second page "suspected defilement" and "acute genital injury elicited by trauma to internal genitalia, despite not severing hymen". That report is date stamped by the Zambian Police Service on 23 July 2018.

15 On 29 July 2018, a further doctor, Dr Goma, examined A again. Dr Goma's notes record "vagina exam. Introitus looks normal. Hymen is intact. Hyperemic - healing bruise on left labia minora. Some dry white discharge noted on labia majora. In my opinion: findings are consistent with defilement". Swabs were taken to test for the presence of semen.

16 The next day, 30 July 2018, the mother saw a different doctor, Dr Chirma. The child was not present nor examined. The swabs had not revealed the presence of any spermatozoa. Dr Chirma advised counselling on hygiene in young girls to prevent recurrence, and psychosocial counselling. Dr Chirma's formal report to the Zambian Police, which is date stamped 2 August 2018 by the police, reports, in summary, a normal genital examination, hyperemic vestibule, uninjured hymen and no spermatozoa on the swab. It concludes

> "My findings are not consistent with the circumstances alleged [viz. some abusive act] for the following reasons: finding of hyperemia is consistent with vulvovaginitis, a medical condition."

The upshot seems to have been that, although the earlier reports from Drs Musonda, Sampa and Goma all raised at least a concern or suspicion that A had been the victim of some abusive act, that of Dr Chirma (although he did not personally examine the child) did not.

17 The mother herself was badgering the police with her concerns about her child, but the police took no action and did not attempt at that stage to interview the child in any way.

18 On 5 October 2018, A was difficult about being dropped off at school by her mother. The mother then had a conversation with A in her car which she also recorded. It is not appropriate that I comment upon that conversation in this summary judgment. It does include A making statements [which appear to describe her father's penis being erect and ejaculating.]

19 The mother then took A to the police, where she was spoken to by a police officer, Miriam Shabukali. The officer then wrote out a statement, which purports to recall what the child had said, and the officer then asked the child (then aged four and a quarter) to sign it, which A did in spidery childish writing. Again, it is not appropriate that I comment upon that

statement or the manner in which it came to be made. It includes that the child narrated that she "did not feel comfortable when [she then appears to describe her father erect and ejaculating], which has been happening on many times …" when the children stay with their father. The child is reported as saying "… I don't feel okay and comfortable and I want it to stop."

20 A few days later, on 9 October 2018, A had one of many regular therapy sessions with a child psychotherapist, Angela Koni. Angela Koni recorded the following,

> "A stated that [she then appears to describe contact between his penis and her vulval area, and him ejaculating.] This was during play therapy session. A was agitated, restless, tearful and anxious."

The record continues:

> [She appears to describe contact between her father's penis and her body, and him ejaculating.] I don't want to talk about it anymore."

On 10 October 2018, Angela Koni reported these facts to the police.

21 On 7 November 2018, there was a hearing before Bowa J of an application issued by the father to change the custody arrangements. The mother says, at paragraph 65 of her first statement in these proceedings, that her lawyer informed the judge of the above facts and of the involvement of the police, but:

> "the judge however dismissed our suggestions that protective measures were required, and told me that I had no right to impose supervised contact. I was therefore obliged to follow the September 2016 custody ruling, even if [the father] was under criminal investigation."

The mother continued at paragraph 66:

> "I was completely taken aback by this. I raised the question of an appeal with my legal team, but it was the vacation period and we did not know if the court would be able to accommodate this urgently. I was left feeling that this was hugely unjust, and struggled to see how this was in the children's best interests when such a serious allegation was in issue."

22 On 17 November 2018, the father was arrested by the police and charged with a criminal offence, or offences, upon A and released on bail. No bail conditions were imposed restricting his contact with the alleged victim, and unsupervised contact continued. The father remained subject to the charges until on or about 14 May 2019 when the criminal case was closed, but unsupervised contact continued throughout that period pursuant to the 2016 order.

23 There was a further hearing before Bowa J on 22 February 2019 of the father's application to vary the custody order. This was further adjourned until June 2019. The court had before it a detailed statement by the mother dated 14 November 2018 describing the above facts, but the judge ruled that, in the interim, the 2016 order, including the provisions as to contact or access, must remain in force. By now the mother was feeling desperate that the medical services, the social services, the police and the court were doing nothing to protect her daughter. She had also solicited help from the South African High Commission (she being South African) and the British High Commission (the children being British).

24 On 10 April 2019, the mother made another application to restrict contact, *ex parte,* to Bowa J, who, however, said that any application must be made on notice to the father.

25 On 16 May 2019, the mother, herself, was summoned to attend before the police the following day. She was fearful that this was a device which might lead to her own arrest at the instigation of the father. She says that, being fearful for her own safety and liberty, and feeling at her wits' end that nothing was being done to protect her children, she flew with

the children on 18 May 2019 to England. She did so without any forewarning to the father, and without his consent and in breach of the order made in August 2016. She says that she came to England because the children are British citizens and, therefore, would be admitted as of right. She could not fly to South Africa, although she is South African, because she understood that South Africa would not admit the children without the written consent of their father.

26 The mother and children have remained in England continuously since about 19 May 2019, now some seven months. The children, of course, are entitled to remain here permanently, being British. The mother has recently been granted leave to remain for 30 months.

27 By his witness statements in these proceedings, the father emphatically denies that he has touched either of his children in any way sexually or inappropriately. He denies that he has sexually interfered in any way with A. He denies that he has ejaculated or behaved in any other sexual way in the presence or sight of either of his children. Since the father so strongly denies doing so, he inevitably and understandably conjectures that the mother has herself influenced A to say the things that she is reported to have said, and he expresses concern, to put it no higher, that the mother has engaged, and is engaging, for reasons of her own, in a process of alienating the children from their father. He thus suggests that there are now two fundamental aspects to the fact-finding process which must inevitably now take place, whether here or in Zambia. The first is whether A has been sexually abused in any way at all and, if so, whether he is the abuser. The second is whether it is the mother, herself, who has influenced A to say the things that she is reported to have said and, if so, what her motivation was and whether, if she has done so, the welfare of the children requires that they now be removed from her primary care to live with him.

28 I wish to stress very clearly indeed that I do not, by this summary judgment, after hearing no evidence and after only relatively superficial consideration of the already voluminous

documents in this case, make any findings of fact at all. Nor do I comment at all upon the quality or reliability of the available written evidence which I have summarised. But I do observe that if, in this country, doctors had made reports in the terms of those made by Doctors Sampa, Musonda and Goma in July 2018, they would - or should - have triggered an immediate multidisciplinary investigation into whether the child had been in some way sexually abused or interfered with, and if so, by whom. Very early consideration (within days) would - or should - have been given to whether the child should be ABE interviewed, not in October, but in late July or very early August. I do not say that a child as young as just four would necessarily have been ABE interviewed, but consideration would clearly have been given to it. If there was a decision to attempt an ABE interview, it would have been conducted by a specially-trained police officer and/or social worker. It would have been attempted with the absence of the mother in the room or, at any rate, with no verbal involvement by her, and it would certainly have been video recorded. None of this was done at that time in Zambia. Further, it is virtually inconceivable here that unsupervised contact could have been permitted to continue until a thorough investigation and a judicial inquiry had taken place. The previous unsupervised overnight contact would have been restricted by one or more of the intervention of the social services, and/or a court order, and/or bail conditions if the father had been charged with any offence.

29 The statements reported to have been made by A in the presence of the police officer on 5 October 2018 and in the presence of Angela Koni would - or should - have triggered a very strong protective response.

30 When the mother and children first arrived here in May 2019, the mother had no leave to remain and was without recourse to public funds. For several months, they lived at several different addresses. The children did not attend school and their lives were clearly not at all settled. The mother does now have a leave to remain for 30 months and recourse to public

funds. The children have been regularly attending a school since September, and they are currently living in local authority emergency accommodation provided under section 17 of the Children Act 1989. Currently, that accommodation is about one hour's journey by public transport (the mother does not possess a car) from the children's school. She has been told that she will be provided by the local authority with accommodation nearer the school when it is available. The mother, herself, is trained as a teacher and has obtained teaching work starting in January 2020.

31 There has been extensive assessment of the children and their situation by two Cafcass officers (the first having retired, or left her position part way through these proceedings). Their reports satisfy me, for the purposes of this hearing, first, that the children are very well attached to each other and both very well attached and bonded to their mother as primary carer. The current Carcass officer and guardian, Ms Roddy, regards it as unthinkable that the children should, or could, be separated from living with their mother.

32 Second, that, within the limitations of her means and current circumstances (i.e. in particular being dependent upon state housing) the mother cares for the children well. They are well looked after, well turned out, well behaved and well adjusted children. Each presents at or about their chronological age.

33 Third, the children are already integrating well in their new school and achieving at least adequately.

34 Fourth, the children speak quite positively about Zambia and their life there, although (see paragraph 2 of Ms Roddy's report) they do now compare their life in England, generally, more favourably than life in Zambia. They do miss their dog in Zambia, but there is no indication that either child is particularly pining, or even now wishing, to return to live in Zambia.

35 Fifth, and very importantly, the children do retain a very positive relationship with their father, despite not having seen him for many months until very recently. There have now been two occasions of supervised face-to-face contact. The first was supervised and observed by Ms Roddy on 6 December 2019, and the second was supervised and observed by a family support worker on 10 December 2019. Both have been positive. The father engaged well with his children and they related comfortably with him and appeared well attached to him, although A did tell Ms Roddy, after the first contact, that she thought that seeing her father was great, but she would not want to see him alone without someone like her mother or Ms Roddy being there.

36 There is a strong welfare-based case for the early return of these children to Zambia, which, in part, echoes the famous passage of Buckley LJ in *Re L* [1974] 1WLR 250 at page 264, quoted with obvious approbation by Baroness Hale of Richmond in *In Re J* [2005] UKHL 40 at paragraph 26. Zambia was clearly the country of the children's home and upbringing until May 2019. They were abruptly abducted from it. Although their language in both countries is English, there are obviously cultural, environmental and other differences between their home and way of life there and in England. The rented home in which they were living in Zambia remains available to them and their mother. Their dog remains there. They could resume their education there (although T would by now have moved to another school) and reconnect with their friends there. Most importantly, if the children and their mother were once again all living in Zambia, appropriate arrangements could be made for regular contact between them and their father, even if initially supervised. Further, the Zambian court, and specifically Bowa J, has been - and is - seized of this case and involved with it since 2016. The evidence of the instructed expert, Mandy Manda, indicates that Zambia applies a welfare-based jurisdiction in which the welfare of the child concerned is paramount.

37 Ms Roddy argues that it is in the overall best interests of these children to return now to Zambia, and prominent amongst her reasons is her view (with which I agree) that there must be a reliable judicial determination of the true facts with regard to any sexual abuse and/or any parental alienation. She suggests, and Mr Mark Jarman on her behalf submits, that the only place where fact finding can realistically and proportionately take place is in Zambia, where all the relevant events took place and all the doctors, police, Angela Koni, the father's maid, Janet, and any other relevant witnesses are located.

38 Despite that powerful case, it is my firm view and state of mind, at the end of this summary and somewhat perfunctory hearing, that I am not satisfied that it is in the overall best interests of these children to be returned to Zambia now, without much fuller inquiry and fact finding here. I consider that for the following reasons, individually and cumulatively, which I address in no order of priority.

39 First, I share the mother's concern that over a period of ten months, between July 2018 and May 2019, the overall "system" in Zambia appears to have failed adequately or promptly to investigate the emerging evidence of possible sexual abuse, or to protect the children. It is not for me, after this short hearing, to make targeted criticism of any individual part of that system. The bottom line is that for months and months, after evidence was clearly emerging that A may have been the victim of some abusive act or acts by her father, his unsupervised overnight contact was permitted - or even required - to continue, despite strenuous efforts on the part of the mother to engage the authorities and to prevent it. Despite the raft of undertakings offered by the father, and the proposal that there should be some form of mirror order in Zambia before the children actually return, I currently lack confidence in the robustness of the system there adequately to protect these children.

40 Second, there is concerning material that tends to suggest that the father has a determined and vindictive desire to penalise the mother. I stress that I have not heard a word of oral evidence and I make no findings of fact. Threats were made which precede the abduction. As relatively long ago as his statement in Zambia dated 23 October 2018, the father was asserting that the mother "is not a fit and proper person" to care for the children and that, in preference to their own mother, they should live with his former wife. It is a hard-hitting statement. In an email to the mother dated 10 November 2018, the father threatened that, should she continue with any breaches of any court rulings, he would start proceedings for contempt. On 8 May 2019, the father's lawyers in Zambia wrote a very threatening letter to the mother's lawyers implying that, unless she unreservedly withdrew her allegations and strictly adhered to the court's interim ruling, he would make a formal complaint to the police for offences committed by her and would issue proceedings against her for defamation. On 24 May 2019, after the abduction, the father clearly caused a Facebook post to the effect that the Zambian police were preparing "numerous criminal charges" against the mother relating to her false allegations and mistreatment of her children. Without making any express findings of fact, I share the mother's concern that, if she were now to return to Zambia, she might face an onslaught from the father, both in court and via the police or other authorities, from which the proffered undertakings might not protect her and which she, with no assured availability of legal aid, might find it very hard to contest.

41 Third, the mother's Queen's Counsel, Mr Mark Twomey, told me very solemnly yesterday afternoon that his express instructions are that, if the children are ordered to return, the mother herself is highly unlikely, personally, to return to Zambia. That is not a new position. It was, in fact, stated at paragraph 44(iv) of counsel's skeleton argument for this hearing dated 9 December 2019, and also their skeleton argument dated 13 September 2019 for the hearing that month.

42 I rose for a time yesterday afternoon and required Mr Twomey to take express up-to-date instructions, stressing the gravity of this whole situation. After that pause, Mr Twomey repeated the instructions. The guardian, Ms Roddy, doubts that the mother would, in fact, refuse herself to return, and suggests, therefore, that it is no more than a bluff or a threat to manipulate the court. But Ms Roddy did not specifically discuss these aspects of the case with the mother. Of course, a court must be very circumspect indeed about assertions of this kind and, in the field of the Hague Convention, it is well established that a parent cannot shield behind their own asserted refusal to return. But this is not a case pursuant to the Hague Convention. The mother puts forward clear objective reasons why she considers that the risk to her safety and liberty, if she returns, is just too great. She points to the failure of the police to protect her children. She points to the many threats made by the father. She points to the fact that one of the triggering reasons why she fled, when she did, was the summons or invitation to attend the police station later that week, and the advice which was given to her that that may have been a trap and she should not attend.

43 At this summary hearing, I cannot be dismissive of this stated position of the mother, and I cannot risk the potentially disastrous outcome of the children being forced to return to a wholly uncertain and unprotected situation in Zambia without her. I appreciate that it will be far, far less easy, and certainly more expensive, to conduct a fact-finding hearing here, but in modern times video links are available. Both parents could, of course, personally attend here and, in my view, the obvious advantages of a fact-finding hearing taking place in Zambia do not begin to outweigh the above concerns.

44 For these reasons, I am not persuaded that it is more in the interests of the children to return now to Zambia than to remain here, where they are now relatively settled and where I know them to be safe. I propose, therefore, to dismiss the application for their summary return.

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