IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2023] EWHC 1482 (Fam)

No. FD22P00737

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 4 April 2023

Before:

MRS JUSTICE THEIS

(In Private)

B E T W E E N :

C — Applicant

- and -

(1) M
(2) X (by their Children's Guardian) — Respondents

MR T GUPTA KC and MS A CAMERON-DOUGLAS (instructed by The International Family Law Group LLP) appeared on behalf of the Applicant.

MR M JARMAN KC and MR M BASI (instructed by DHM Stallard) appeared on behalf of the First Respondent.

MR C HAMES KC and MS C BAKER (instructed by Goodman Ray) appeared on behalf of the Second Respondent.

J U D G M E N T

MRS JUSTICE THEIS:

Introduction

1 I am giving this ex tempore oral judgment this afternoon in the context of an application made on behalf of X (now aged 12) to set aside an order that I made on 3 February 2023 for both X and her younger brother Y (aged 5) to return to Mauritius on Friday, 10 March 2023. I am giving this oral judgment because I am very conscious that everybody involved in this application would want to reduce the uncertainty of any further delay in any decision being made.

2 The order I made on 3 February for the return of the children to Mauritius was made on the application by their father under the Hague Convention 1980. That order provided for them to return back on 10 March. The reason for the delay between 3 February until 10 March was to enable the detailed protective measures that had been provided by the court to be implemented and in place before any return took place.

3 The application that I am considering today was made on 15 March by X, who was made a party to these proceedings on that day; her application is supported by her mother but opposed by her father.

4 This hearing and that application came about as a consequence of an urgent application made on X's behalf on 8 March with limited or no notice to anybody. From memory, it was made by way of a communication to the court at 2.40 p.m. that afternoon. Fortunately, I was able to convene a hearing at 4.00 p.m. that afternoon but it was without any notice to the mother, she was not represented at that hearing. The father only had the opportunity to be represented because his solicitor happened to be in the next door court.

5 I was critical of that hearing being at such short notice and without proper notice to either of the parents. The urgency of the situation was created by the giving of insufficient notice to make that application. However, I had to deal with the situation the court was confronted with because it was less than 48 hours before the order I had made for the children's return on 10 March to take effect. I acceded to the application on 8 March, which was limited to disclosure of the papers to X's legal team and, from memory, also sought a stay of the order. I did not grant the stay but listed the matter before me the following day.

6 On the following day, everyone was able to attend at court. I directed there should be reconsideration granted a time limited stay of the return order until 4 April 2023 and made directions for any application on behalf of X to be joined as a party to the proceedings and for the order to be set aside to be filed, with any evidence in support, by 15 March 2023. The matter was next listed before me the following day, 16 March.

7 On 16 March, the application had been made on behalf of X, she was joined as a party to these proceedings and was represented by Ms Broadley as her children's guardian. Directions were made for the filing of further evidence and the set aside application was listed for a one day hearing today.

8 The evidence filed in relation to the set aside application consists of two statements from Ms Broadley, the statement of Mrs H (the head teacher at X's school) and from each of the parents. In addition, the court has the benefit of extremely experienced counsel and legal representatives for each party, reading the three very full and helpful skeleton arguments, as well as the bundle of documents and the authorities bundle.

Relevant background

9 The background to this matter is set out in my earlier judgment dated 3 February 2023 and I do not propose to repeat what is set out in some detail in that judgment, although the relevant background just needs to be summarised.

10 The father was born and brought up in London. Both parents are dual Mauritian and British citizens and the mother was born in Mauritius and came to the United Kingdom in 2000. The parents married in 2003. Both children were born here. The family lived here until 2019. The family went to Mauritius in 2019. There is an issue between the parents as to whether that was enroute to Singapore, or for a longer stay in Mauritius. In any event, it is agreed one of the main reasons for the stay in Mauritius was to renew the mother's passport, which could only be done in person. That took longer than expected and events overtook when the travel restrictions were imposed as a result of the COVID-19 pandemic.

11 Sadly, the parents separated in November 2020, with the father moving to live with his mother. Arrangements were put in place for contact, which took place weekly with Y. X saw her father initially, as I understand it, via video contact, which then ceased in about November 2021. In June 2022, the father instigated proceedings in Mauritius, which resulted in arrangements for X to see her father for a short period of time at the start of weekly contact with Y.

12 That arrangement did not progress as planned and, according to the father, he was about to make a further application to the court in Mauritius, where the previous proceedings had been dealt with, when he received a letter from the mother's English solicitors dated 7 October 2022, stating she had left the jurisdiction with the children. By definition, the children would have known about those plans somewhat in advance of that and, no doubt, been informed that they should not reveal that information to the father. Within a matter of days, the mother issued divorce proceedings here and the father, similarly, has issued divorce proceedings in Mauritius. There remains an issue in relation to which is the appropriate jurisdiction.

13 The father promptly contacted the central authority in Mauritius on 13 October and the Hague application was issued in this jurisdiction in November 2022. Directions were made on 29 November 2022 and the matter listed for two days on 24 and 25 January 2023.

14 The mother's defence was based on child objections, in particular focusing on X, and grave risk of harm, both defences being under Article 13 of the Hague Convention.

15 In accordance with the directions made in November a report prepared by Ms Callaghan from the CAFCASS High Court Team regarding the wishes and feelings of the children. The focus of Ms Callaghan's report before the court at the last hearing was on Z, who saw Ms Callaghan on 10 January 2023. They had a detailed discussion which is recorded in Ms Callaghan's report. Y, as I understand it, was present during that interview and, apart from a couple of short interjections, was not able to communicate his wishes and feelings independently. Ms Callaghan gave oral evidence at the hearing in January.

16 The mother's case under Article 13 b defence focused on two aspects; the financial history and the allegations of domestic abuse which she said happened between her and the father during their relationship. Those were summarised in para.33 of the February judgment.

17 In the written judgment dated 3 February I did not consider the Article 13 b defence was established when looking at them together with the range of protective measures that were

summarised at para.31 of the judgment and my reasons for reaching that conclusion are set out at para.38. They included, at para.38(2) the following:

> "Whilst denying many of the allegations, the father accepts there has been occasions when the parents have argued and X has been present. Recognising these allegations are serious and are likely to have had an impact on X, the range of protective measures will ameliorate that risk as they will mean X will remain in the care of her mother in separate accommodation and will not be required to have any contact with the father without the agreement of the mother or the order of the court in Mauritius. In addition, these protective measures will be in a form that is enforceable if required."

18 Turning to the defence of child objections, I dealt with that at para.39 of the judgment. I accepted that X was of an age, understanding and maturity that the court should consider her views. I considered she did object to a return to Mauritius, albeit it was in the context of her clear preference to remain here for the reasons she gave. I noted that even though X objected she was able to convey some positive things about Mauritius, although connected her return in the context of her negative views about seeing her father, which she did not wish to do. I concluded that it was finely balanced, but I was just satisfied that the threshold had just been crossed and X did object to a return in the form of the Convention under Article 13, recognising, as I did, that her wishes were closely aligned to the views about her father.

19 In exercising my discretion to order the return I took into account a number of factors listed at para.40 of my judgment, which included the detailed package of protective measures, Y's position and the policy considerations that underpin the Convention. I said as follows in relation to that:

> "The policy considerations that underpin the Convention need to be considered. This was a unilateral removal of children by one parent from their jurisdiction of habitual residence without the knowledge of the other parent. The mother may well be right in the longer term the children's welfare needs are met by them living in this jurisdiction, which both the children and their parents have a strong connection to, but such a step should not be imposed on the other parent by such action. It is this type of situation which the Convention was designed to prevent. The question of future arrangements for the children is a matter for the Mauritian court if the parents are unable to agree."

It is against that background that the court is considering this application.

Relevant legal framework

20 The legal framework is not in issue between the parties. The application is made under Family Procedure Rule 12.5(2)(a), where it says under subpara.2:

> "A party may apply under this rule to set aside a return order where no error of the court is alleged."

21 Practice Direction 12F para.4.1(a) sets out some circumstances and guidance in relation to how that rule should be implemented. That paragraph sets out that in rare circumstances the court may also set aside its own order where it has not made an error but where new information comes to light which fundamentally changes the basis upon which the order was made. The threshold for the court to set aside its decision is high and evidence will be required, not just assertions or allegations. In essence, there should be a fundamental change in circumstances which undermines the basis on which the order was made.

22 That Practice Direction provision reflects the relevant case law. The leading case to consider this issue is the case of *Re B (A Child Abduction Article 13B)* [2020] EWCA Civ 1057 at para.79 to 91. In those passage, Moylan LJ identified the four-stage process for an application to set aside, namely, firstly, whether to permit any reconsideration; secondly, if the court does, it will decide the extent of any further evidence; thirdly, the court will next decide whether to set aside the existing order and then, fourthly, if the order is set aside the court will redetermine the substantive application.

23 In addition, Moylan LJ, in emphasising the high bar that the court needs to consider, said at para.91:

> "I would further emphasise that, because of the high threshold, the number of cases which merit any application to set aside are likely to be few in number. The court will clearly be astute to prevent what, in essence, are attempts to re-argue a case which has already been determined or attempts to frustrate the court's previous determination by taking steps designed to support or create an alleged change of circumstances."

The facts in *Re B* involved a 15-year-old young person who had agreed to return to Canada and, as a consequence, all parties made agreed a consent order for the child to be returned to Canada. The child then changed his mind in relation to that and that is what constituted the basis upon which it was said the original return order should be set aside.

24 A second case that provides important guidance in relation to these applications is the case of Re A (A Child Hague Convention 1980 Set Aside) [2021] EWCA Civ 194, where Hayden J delivered the lead judgment in the Court of Appeal. At para.48 of that judgment he emphasised the importance of the policy instructor that underpins the Hague Convention, saying as follows:

> "The 1980 Hague Child Abduction Convention is predicated on the principles of international comity and confidence. As such, it has created a summary jurisdiction intended to ensure that applications made pursuant to it are determined expeditiously. Intrinsic to the Convention is a recognition that delay in the legal process is likely to be inimical to the child's welfare. Underpinning the philosophy of the Convention, is an understanding that a speedy return of the

> child to his home country will, in principle, enable the child's future to be determined more effectively."

He then went on at the end of that paragraph to refer to the well-trodden path of para.8 of what Baroness Hale said in Re M, namely:

> "'The Convention itself contains a simple, sensible and carefully thought out balance between various considerations, all aimed at serving the interests of children by deterring and where appropriate remedying international child abduction. Further elaboration with additional tests and checklists is not required.'"

25 It is important to perhaps pause and reflect on the facts in Re A, which involved a young person aged 12 who the court below ordered should be returned back to Italy against the wishes of the mother, in that case. The matter went to the Court of Appeal and there was an application for the child to be joined as a party. That application was refused in the Court of Appeal but in the circumstances of that case there was very clear evidence, firstly, that the mother, in that case, was encouraging the young person in relation to the participation within the proceedings and equally there was very clear evidence, as set out at para.39 of the judgment, of the child's wishes not to be involved in the ongoing conflict between the parents and not be indrawn into that conflict as was being sought in that case by one of the parents. So, each of Re B and Re A are at opposite ends of the spectrum in relation to the type of situations that may prompt an application such as this.

Submissions

26 It is against that legal framework that the court is considering the submissions that are made by the parties, having reviewed the evidence that the court has from Ms Broadley, in her two statements, not only both of the parents but also Ms H.

27 Mr Hames KC accepts the burden of proof is on him to establish that there has been the fundamental change, as required by Re B and the other cases. He submits that the decision made by the court on 3 April 2023 was based on X's objections on a fine balance and, as a consequence, having determined X's objections were not strong, consequently, those views carried less weight in the exercise of the court's discretion, as set out at para.40 of the earlier judgment.

28 Mr Hames submits the statements filed by Ms Broadley and Ms H provide a stark contrast to the position before the court in January and February in the sense that that demonstrates and evidences that X has articulated a quiet determination not to return to Mauritius, she has taken steps to ensure her voice is heard by taking her own steps to seek support in school. Mr Hames highlights how this situation is different than the circumstances often seen where the contact with legal representatives for the child is often at the instigation of one of the parents. That does not appear to be the case here. The fact that X has taken this route appears to be founded on the basis that she feels she cannot trust or rely on either of her parents.

29 Mr Hames also submits X's position and the strength of her objections is relevant, not just to the discrete defensive objections, but also possibly to the question of intolerability and grave

harm in the event of a return. The Article 13 b defence was not considered in the previous hearing in the context of X returning to Mauritius contrary to her wishes and feelings. The Article 13 b defence then focused on domestic abuse and financial mismanagement.

30 Mr Hames submits that would involve the Article 13 b defence being considered on X's behalf possibly in two ways; one, the impact on her of an attempt to force her to return to Mauritius contrary to her wishes and feelings, including her views being based on her direct experience of what she says she experienced of the father's behaviour and, secondly, what awaits her in Mauritius in the event that she is compelled to return. This latter point would include inquiries in relation to such matters as her participation in any proceedings in Mauritius.

31 X's position is supported by her mother. Mr Jarman KC submits the evidence from Ms Broadley sets out a strength of feeling expressed by X that was not present in the previous hearing. The court would need to consider the impact of a return on X in such different circumstances. There is evidence to suggest that this is not driven by her mother. X has independently made the inquiries through the school by the NSPCC and been able to provide clear instructions to Ms Broadley in the way that Ms Broadley sets out in her statement. X has expressed the view she cannot be protected by her mother and X's behaviour has changed and she has required extra support at school and that this change and changes are not driven by her mother.

32 Mr Gupta KC, on behalf of the father, submits much of the information relied upon was known by the court prior to 3 February. He sets out that X is mature, articulate and capable of expressing her views. That was known in the February judgment. X felt England was her home – again, that was known. X did not want to return to Mauritius and her main reason for that view as connected to her father, he said that was known. X repeated allegations of domestic abuse when the parents were together – again, that was known and referred to. X did not want any contact with her father – again, that was known and referred to.

33 Mr Gupta submits that the events since 3 February appear to be partly driven by the school and X not properly being informed about the background, including the mother's original abduction of the children, the summary nature of the proceedings under the Hague Convention. As Mr Gupta observes in para.34 of his skeleton:

> "The lack of clarity and understanding, and poor management will have inevitably had a negative impact on X, causing her unnecessary distress and damage to her relationships. That much is clear from the evidence of Mrs H, the mother and Ms Broadley:"

34 Mr Gupta relies on the observations made by Hayden J in *Re A* and Moylan LJ in *Re B* stressing the importance of the structure that underpins the Convention and the high threshold that has been repeatedly set out in both *Re B* and *Re A* and other cases is simply not met. He submits that the preparation, or lack of preparation by X for the order that had been made should have been undertaken by the mother and so whilst she has not, it may be said, deliberately encouraged X to secure legal advice, she is the person with full-time care of X and has the *de facto* responsibility to have done that. By not having done that she has created a situation that is now present to the court today.

Discussion and decision

35 The court is very conscious of the high bar the court needs to be satisfied about in dealing with these applications, namely, whether the court has information that results in fundamentally changing the basis upon which the order that made on 3 February was founded upon. The court also needs to bear in mind the purpose of the Hague Convention and the very strong policy considerations that underpin the wrongful removal of children from their jurisdiction of habitual residence.

36 I agree with Mr Gupta that para.7 and para.8 neatly encapsulate a situation for which the Hague Convention was made to deal with; namely, a situation where one parent removed the children covertly without the knowledge of the other parent from a jurisdiction where it is accepted they were habitually resident, there had been previous legal proceedings and to engage the children, in particular X, in the way that the mother did in the removal.

37 The points made by Mr Gupta are powerful, including that the court did find that X's objections were made out, albeit finely balanced. A lot of the information in the NSPCC letter was largely material the court already knew of and the situation X has found herself in is the responsibility of the mother on the ground. As I have said, she should have engaged with X, explaining to her what was going on. Whilst this is not a *Re A* situation where there is evidence of a parent encouraging a child to take a position, Mr Gupta submits this situation is nearer to a *Re A* situation than to the *Re B* situation, where the young person had changed their mind completely out of the blue.

38 Having carefully balanced these points, in particular, those made by Mr Gupta, I have reached the conclusion that, in fact, Mr Hames has discharged the burden on him that arises in this application and that there has been a fundamental change in the circumstances of this case that is more than just a variation than what had been known at the time. I have reached that conclusion for the following reasons. Firstly, X's objections and the information the court has are of a different quality and nature than the court was considering at the earlier hearing. On one view of the evidence, they are not finely balanced, which was the conclusion that the court reached. The court was considering the situation in the context of para.22 of Ms Callaghan's report, which does not appear to be the situation now when Ms Callaghan discussed with X what she would do if the court did order a return.

39 In addition, in relation to her objections what is different are what X says about not feeling protected by the orders, or by her parents, to enable her or her brother to be safe from her own experience, again, that information, whilst possibly hinted at, was not in such a clear and coherent way as has been articulated in the evidence that the court now has.

40 Thirdly, in considering the reasons for the court's conclusion I have been very careful to weigh in the balance whether this situation has been engineered or orchestrated to achieve an end that others, or even X, may want and the court needs to be alive to the historical context of this consideration where a mother has removed the children from Mauritius in the way that she did in October 2022. However, when looking at the information the court has, it does appear from the chronology that this is a step that X has taken in her own way, as described in the statements of Ms H and Ms Broadley. X went to see Ms H in the way that she described, having written the letter to the NSPCC. It was Ms H who was able to locate Ms Broadley via the Head Teachers Forum that she made inquiries through and this was all done at a time when X lacked real understanding about what the orders were that the court had made.

41 Fourthly, I do consider there has been, to some extent, an abdication of responsibility by the mother in not informing X properly and effectively about the court's decision on 3 February which has, in part, contributed to the situation X is in, as are her parents and Y.

42 Fifthly, there is evidence of the level of distress that X has suffered since being informed of the order and what it involved, the increased level of support she has required and the impact that this has had on her relationship with her mother. That was not information the court had before and I consider, on the information the court has, it is more than just the unsettlement there would be in relation to implementation of an order that was something that was not wanted by a person who was the subject of that order.

43 The changed situation regarding X's wishes, as well as making a difference to the child objection defence, may also have impacted on the way the court exercised its discretion in the way the court may have considered the protective measures, such as the information about the involvement of the child and also in the way that the court may have balanced the various considerations set out in undertaking the ultimate discretion.

44 Having drawn all those threads together, I consider that there has been a fundamental change in the information the court has that enables this court to set aside the order in the circumstances that it has. I am reminded in the circumstances the court is presented with of what was said by Baroness Hale in Re D, albeit in the context of an Article 13 b defence, that no-one intended that an instrument designed to secure the protection of children from the harmful effects of international child abduction should, itself, be turned into an instrument of harm. The court does not know whether the ultimate decision will, in fact, be the same. X should be under no doubt that the return order is an option to the court when it does consider all the information it has and reconsiders the balancing exercise that it has to undertake.

45 Having set aside the order in relation to X, by definition, as has been suggested by Mr Hames, that results in a fundamental change in relation to Y and that order will need to be set aside. Mr Gupta, having taking instructions, set out very clearly that it is no part of the father's case that the children should be separated.

46 In relation to the wider issues that have been set out by Mr Gupta about any guidance about how to inform the children in the circumstances of these children, particularly a young person of X's age, that is something that perhaps I can look at and consider if the parties want me to at the next hearing.

47 I have also borne in mind the point that Mr Gupta raised, namely the care the court needs to take in relation to these applications to ensure that they are entirely fact-specific, that need to be looked at in the circumstances of each particular case. As I had indicated in relation to *Re B* and *Re A*, they demonstrated circumstances that were at either end of the spectrum.

48 Having considered this case, I have reached the conclusion that it is within the spectrum of cases where the court should set aside the order. For those very brief reasons, that is what I am going to do.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

This transcript has been approved by the Judge