SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT STIRLING

[2020] SC STI 07

STI F96/18

JUDGMENT OF SHERIFF SG COLLINS QC

in the cause

X

Pursuer

against

Y

Defender

Act: Murphy, Bell & Craig, Solicitors
Alt: Berrill, Hill & Robb, Solicitors

Stirling, 15 April 2019

The Sheriff, having resumed consideration of the cause, (i) on the unopposed motion of the pursuer allows his first crave to proceed as undefended by way of affidavit evidence; (ii) repels the third plea in law for the pursuer and refuses interdict as third craved; (iii) repels the third plea in law for the defender and refuses the specific issue orders first and second craved by her; (iv) finds the pursuer entitled to interim contact with the child A each Monday from 11am to Tuesday at 5pm, the pursuer to collect the child from nursery and return him to the defender care of the Family Mediation Centre; (v) assigns a child welfare hearing for 21 June 2019 in order to monitor said contact arrangements; (vi) reserves all questions of expenses arising from the hearing on 22 and 29 March 2019; *quoad ultra* repels all pleas for both parties.

FINDINGS IN FACT

1. The pursuer is a British citizen. The defender is a citizen of India. They were married in India in 2012.
2. Following the parties' marriage the pursuer returned to Scotland. The defender continued to reside in India with the pursuer's parents. She applied for a visa in order to join the pursuer in Scotland. This application was initially refused, and not granted until the end of 2015. During this period the pursuer returned to India only once, for around a month.
3. In around January 2016, having obtained her visa, the defender travelled to Scotland and began cohabiting with the pursuer. Shortly afterwards she became pregnant with the parties' child.
4. Unbeknown to the pursuer, throughout most of the period when the defender was residing in India following the marriage she was having a sexual relationship with B. Following her move to Scotland, the defender continued to have regular telephone contact with B.
5. In around April 2016 the parties returned to India for a month in order to attend the wedding of the pursuer's sister. The defender had further contact with B during this visit.
6. The parties returned to Scotland. The pursuer had become suspicious of the defender's relationship with B. He asked her about it. She told him that B was "just a friend". She denied any greater involvement with him.
7. The pursuer did not believe the defender's account of her relationship with B. He checked her mobile phone on a daily basis. He also put a hidden camera in the parties' house, and used it to film the defender in his absence, without her knowledge or

consent, over several days. By this means he obtained video footage of the defender engaging in sexual activity while speaking on the phone to B.

8. The pursuer confronted the defender with this video footage and she then admitted her affair with B. She apologised. She asked the pursuer to forgive her. She told him that she would break off her relationship with B. Accordingly the parties continued to reside together. However the pursuer continued to be suspicious and the parties' relationship was poor. The pursuer also continued to check the defender's phone and film her in their home, now with her knowledge although not her consent.
9. The pursuer showed the covertly taken video footage to both his family and the defender's family in India. He also showed it to others in the Asian community in their local area. He also denigrated the defender, referring to her as a "prostitute" and a "whore", both when speaking to her, and when speaking to others about her.
10. The parties' child, A, was born in late 2016. He is a British citizen.
11. The parties' relationship deteriorated still further in the first half of 2017. The pursuer continued to tell others in the local community about the defender's adultery, to denigrate her to them on account of it, and to distribute to them copies of the video footage which he had obtained. The defender became very lonely, isolated and depressed. She spoke to the pursuer about leaving him. On at least one occasion she threatened to take A to India to live, as her family was well settled there.
12. In July 2017, with the assistance of Shakti Women's Aid, the defender left the matrimonial home with A and went to live in temporary accommodation. The parties have not lived together nor had marital relations since then.
13. Following the separation, the pursuer had no contact from the defender for about a week. He was then contacted on her behalf by a woman's aid worker. Arrangements

were later made for him to have contact with A. The pursuer began having periods of non-residential contact at the local family mediation centre from around September 2017.

14. The pursuer and defender were intermittently in telephone and text contact in the months following the separation, in particular in relation to the arrangements for the pursuer to see A. However this telephone and text contact led to arguments between the parties, and has now ceased.

15. On 1 May 2018, for example, the parties spoke on the phone and then exchanged a large number of texts. In the course of these exchanges they argued at length. Among other derogatory comments the pursuer again criticised the defender's infidelity. He suggested that her only interest in marrying him and having A was to get a visa to remain in the United Kingdom. He threatened to tell A about her infidelity when he was older. He again referred to her as a whore or a prostitute. The defender responded in particular that she was going to take A to India "forever", that the "child will go to India" as she was "not willing to stay here". She also suggested that the pursuer could visit A in India whenever he wished.

16. The pursuer brought the present action in June 2018. Following a child welfare hearing on 31 August 2018, it was agreed that he would be entitled to non-residential contact every Tuesday, on a four week cycle, alternately from 10 am until 1 pm and from 10 am until 3 pm. On 9 November 2018 contact was increased to include non-residential contact every Monday. A subsequent motion by the pursuer for overnight contact was refused on 11 December 2018.

17. The parties avoid contact with each other when the pursuer exercises contact with A. Handovers have generally been arranged via the family contact centre or by the pursuer collecting A direct from his nursery.

18. Since the separation the defender has continued to be socially and culturally isolated. She has no family living in the United Kingdom. She has few friends in Scotland. She feels shunned by much of her local Asian community. She has a large extended family who all live in India and with whom she has regular contact via telephone and Skype.

19. The defender does however attend a Home Start mother and toddlers group with A once per week. This gives her the chance to get lunch and to meet and chat with other mothers. She has started taking driving lessons and is hoping to pass her test, but has not yet done so. She goes to a local church on Sundays.

20. Shortly after the defender arrived in Scotland the pursuer arranged for her to obtain employment with C, who runs a beautician business. The defender gave up this employment shortly before A's birth. Since around December 2018 she has returned to work for C one day per week. Her hours are restricted because she cannot afford childcare for A and has no-one else who can help her with this.

21. Prior to her marriage the defender achieved a degree in computing from an Indian college. She then obtained employment in this area with the intention of making it her career, but gave this up when she married the pursuer. She now hopes to return to work in this area. She has made inquiries in relation to a college course in the hope of updating her skills and obtaining a United Kingdom qualification. However she has not yet made any application.

22. When the defender obtained leave to enter the United Kingdom in January 2016 it was on the basis that she was the spouse of the pursuer. This leave was of limited duration and was subject to renewal. Following the parties' separation, in around October 2017, the defender sought and obtained indefinite leave to remain in the United Kingdom in her own right.

23. The defender has asked the pursuer to provide her with his passport details and to cooperate in completing any paperwork necessary in order that she can obtain a United Kingdom passport for A. She has told the pursuer that she wants a passport for A because she wishes to take him to India for a holiday. She wants to see her family again. She wants A to meet them and they him. The defender also wants to have laser eye surgery which is cheaper in India.
24. The defender says that the proposed holiday would be for a month, but has not yet made specific travel arrangements. She says that she will return to the United Kingdom with A at the end of the holiday. She says that she will exhibit the tickets for return flights to the pursuer prior to travelling.
25. The pursuer has refused to provide his passport details or to co-operate with the defender in obtaining a passport for A. Accordingly the defender is currently unable to obtain a passport for A nor to lawfully remove him from the United Kingdom.

FINDS IN FACT AND LAW

1. It is not in the best interests of the child A that an order be made allowing the defender to take him outwith the United Kingdom;
2. It is not in the best interest of the said child that the pursuer be ordered to provide his passport details to the defender, or to co-operate in completing the paperwork necessary to enable her to obtain a passport for the said child;
3. The defender being unable to obtain a passport for the said child, the pursuer has at present no reasonable apprehension that the defender will remove the child from the United Kingdom, and it is not in the best interests of the child that an order be made interdicting the defender from removing the child from the United Kingdom.

NOTE

Introduction

[1] This case called before me for proof on 22 March 2019. The pursuer craves (i) divorce on the basis of the defender's unreasonable conduct, (ii) an order for contact with the parties' two year old child A, and (iii) an order interdicting the defender from taking him outwith the United Kingdom. For her part the defender seeks two specific issue orders: (i) that the pursuer be ordained to provide to the defender his passport number and to provide all other information and complete all paperwork required to enable her to obtain a United Kingdom passport for A; and (ii) that she be allowed to take A to India for the purposes of a holiday.

[2] The parties separated in July 2017. The pursuer had some non-residential contact with A thereafter but this was hampered due to the poor relationship between the parties. The present action was brought in June 2018 and orders for non-residential contact were made in the pursuer's favour at child welfare hearings on 31 August 2018 and 9 November 2018. At the outset of the proof parties agreed that residential contact should now commence and that an order to that effect should be made. Their joint motion was that the pursuer should be found entitled to interim contact with A each week from 11.30am on Monday until 5pm on Tuesday, with the pursuer collecting A from nursery and returning him to the defender at the family contact centre. Further, the joint position was that the court should fix a further child welfare hearing, around eight weeks hence, in order to monitor this contact.

[3] As regards the pursuer's crave for divorce, the defender's position on record was that the marriage had not broken down irretrievably on the grounds of her unreasonable behaviour. Her plea was accordingly that divorce should not be granted. Consideration

was given as to whether or not the pursuer's crave might be amended to seek divorce on the grounds of one year's non-cohabitation with consent. However the parties had not been separated for a year by the time the action was brought. They therefore accepted, in the light of the decisions in *McNulty* v *McNulty* [2016] Fam LR 145 and *Douglas* v *Douglas* [2019] SC PER 4, that the suggested amendment would not be competent. Accordingly parties' joint position came to be that the pursuer's crave for divorce should proceed as undefended, and that affidavit evidence would be lodged in due course.

[4] Following discussion of these matters, parties were further agreed that I should hear evidence for the purpose of determining the pursuer's crave for interdict and the defender's craves for specific issues orders. I therefore heard oral evidence from the pursuer and the defender, and from a friend of the pursuer's (who spoke only to his informal translation of certain text messages written in Punjabi). The diet was then adjourned to 29 March 2019 in order that the defender could lead evidence from her employer, C. As it turned out, further productions were lodged by the defender in the intervening period, and when the case called again on 29 March 2019 additional evidence was led from her in relation to these, this all being done without objection. Having then heard evidence from C, and submissions, I reserved judgment.

The issue

[5] The defender says that she wishes to take A to India for a holiday, in order that he can meet his extended family, and they him. The pursuer says that in principle he has no objection to A being taken to India for a holiday. He agrees that it would be a good thing for him to have contact with his extended family on both sides. However he fears that if the defender is permitted to do this she will not bring A back to the United Kingdom, but will

seek to stay in India with him. He argues that this would wrongfully deny or restrict his exercise of his parental rights and responsibilities. In particular, it would defeat his ability to have contact with A pursuant to the orders of this court. The pursuer has therefore refused to provide his passport details and otherwise provide the co-operation necessary in order for the defender to obtain a passport for A. He also refuses to consent to the defender taking A out of the United Kingdom, and seeks interdict against her from doing so.

The law

[6] The starting point is subsection 2(3) of the Children (Scotland) Act 1995. This provides that:

> "Without prejudice to any court order, no person shall be entitled to remove a child habitually resident in Scotland from, or to retain any such child out with, the United Kingdom, without the consent of a person prescribed..."

To understand this it is necessary to look to subsection 2(6):

> "The description of a person referred to in subsection (3) above is a person (whether or not a parent of the child) who for the time being has and is exercising in relation to him a right mentioned in paragraph (a) or (c) of subsection (1) above; except that, where both the child's parents are persons so described, the consent for his removal or retention shall be that of them both."

And to understand this, in turn, it is necessary to look back to subsection 2(1). The rights mentioned in paragraphs (a) and (c) of that subsection are, respectively, the right

> "to have the child living with him or otherwise to regulate the child's residence"

and the right

> "if the child is not living with him, to maintain personal relations and direct contact with the child or a regular basis".

A is not living with the pursuer. But the pursuer has a right, as parent, to maintain personal relations and direct contact with A on a regular basis. That has been confirmed by this court

in its orders of 31 August and 9 November 2018, and indeed the order for residential contact which has now been made. He is therefore a person exercising a right mentioned in subsection 2(c). A is living with the defender. She is therefore a person exercising a right mentioned in subsection 2(a). Accordingly, by this rather convoluted statutory process, it is apparent that the consent for removal of A from the United Kingdom referred to in subsection 2(3) must, by operation of subsection 2(6), be the consent of both parties. As the pursuer has refused his consent to the defender taking A out of the United Kingdom the effect of this provision is that she can only lawfully do so if she is first granted a court order permitting this. On the other hand, if there is a reasonable apprehension that the defender might remove A from the United Kingdom without such an order, the pursuer is himself entitled to an order interdicting her from doing so.

[7] The power to make such orders is found in section 11 of the 1995 Act, which provides that:

> "(1) In the relevant circumstances in proceedings in the … sheriff court … an order may be made under this subsection in relation to –
>
> (a) parental responsibilities;
>
> (b) parental rights…
>
> (2) The court may make such order under subsection (1) above as it thinks fit; and without prejudice to the generality of that subsection may in particular so make any of the following orders –
>
> …
>
> (e) an order regulating any specific question which has arisen, or may arise in connection with any of the matters mentioned in paragraphs (a) to (d) of subsection (1) of this section (any such order being known as 'specific issue order');
>
> (f) an interdict prohibiting the taking of any step of a kind specified in the interdict in the fulfilment of parental responsibilities or the exercise of parental rights relating to a child…"

Removal by a parent of a child from the United Kingdom, or an attempt by a parent to prevent unlawful removal of a child, are matters which relate to parental rights and responsibilities within the terms of subsection 11(1). Accordingly the orders which the defender seeks in this action are specific issue orders falling within subsection 11(2)(e), and the interdict sought by the pursuer falls within subsection 11(2)(f). The particular importance of this is that because both parties are seeking section 11(1) orders, section 11(7) is engaged. This provides that:

> "…in considering whether or not to make an order… and what order to make, the court… shall regard the welfare of the child concerned as its paramount consideration and shall not make any order unless it considers that it would be better for the child that the order be made than that none should be made at all…"

Subsection 11(7)(b) requires the court to take account of the child's views, but in this case, given his young age, this is clearly impracticable.

[8] What this all means, in the present case, is that the court must consider whether or not it would be in A's best interests for the court to make the orders sought by the defender, without which she would not be able, for both legal and practical reasons, to take him to India. It is necessary to keep this clearly in mind. The interests that others may have in the defender taking A to India, if not entirely irrelevant, are clearly subsidiary. These would include the defender's own interest in seeing her family again, or the possibility of her having cheaper laser eye surgery in India, a matter which she sought to pray in aid, and also the interests of A's extended family in seeing him for the first time. None of these are directly in A's best interests. It might be said, in general terms, that it would be in his interests to travel to a foreign country for a holiday and to meet his grandparents and extended family. But he is a two year old boy, and his capacity for social and cultural

engagement is therefore likely to be somewhat limited. Accordingly the extent of the benefit to him of the proposed holiday at this time cannot simply be assumed.

[9] A's best interests are also paramount in deciding whether or not to grant the interdict sought by the pursuer. However it seems to me that in the circumstances of this case this order is superfluous. If it is in A's best interests for the specific issue orders sought by the defender to be made, then it cannot be in his best interests to make the order for interdict sought by the pursuer. That is obvious. But on the other hand, if it is not in A's best interests for the specific issue orders to be made, then the defender will not be able to obtain a passport for A, and so will not be able to take him out of the United Kingdom. In these circumstances the pursuer will not have good grounds for interdict, as there will not be a reasonable apprehension that the defender will be able to remove A from the United Kingdom. And in any event it will not be better for A that an order for interdict be made rather than that no such order is made. Any such interdict would be, on the face of it, permanent, yet even if it is not in A's best interests for the defender to take him to India now, that may perhaps change in the future. So the real focus in this case, in my view, is whether the specific issue orders being sought by the defender should or should not be made.

[10] In Scotland, although much judicial consideration has been given to the question of parents seeking orders for the permanent relocation of children outwith the United Kingdom (see for example Norrie, *The Law relating to Parent and Child in Scotland*, 3rd Edition, paragraphs 9.24 – 9.29 and cases cited there), there seem to be few reported cases in relation to disputes over temporary relocation of a child for the purposes of a holiday. In England and Wales, by contrast, the family courts appear to be not infrequently seized of

such matters, and the Court of Appeal has been called on several times to consider the issues which arise.

[11] The starting point in the English case law is *Re K (Removal from Jurisdiction: Practice)* [1999] 2 FLR 1084. In this case the father applied for permission to take his child to Bangladesh for a holiday. The mother objected. The judge granted the application after reading the documents and hearing from counsel. The mother's appeal was allowed, and the Court of Appeal took the opportunity to give direction and guidance on the approach to be taken in such cases. In particular it was submitted on the mother's behalf (at page 1086) that given the significance of the application the consideration of it had been "too hasty and too superficial". It had been heard without any oral evidence and in particular without any expert evidence of the law of Bangladesh or putting into place any safeguards beyond the word of the father, expressed in undertakings to the court. Accepting the submissions on the mother's behalf, Thorpe LJ noted that:

> "An application of this character is one that requires careful and thorough preparation. This application did not receive care of that standard."

It was appropriate

> "…for oral evidence to be led so that the judge has an opportunity of assessing credibility and reliability from exposure in the witness box."

Furthermore

> "…the conventional disposal is, at the least, to require all practicable safeguards to be first put in place."

The judge had accepted that the father had an "impeccable record" as a parent, but she should have assessed (at page 1087)

> "…not only the magnitude of the risk of breach of the contact order but also the magnitude of the consequence of breach…"

given that if the father breached his undertaking it would in reality be impossible to secure the return of the child to the United Kingdom. The father's

> "record as a carer was highly relevant to an assessment of the risk of breach. But it was irrelevant to an assessment of the magnitude of the consequences of breach."

If the breach would lead to the "irretrievable separation of the child" then

> "it is for the court to achieve what security it can for the child by building in all practical safeguards."

As Bangladesh was not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"), this involved consideration of the relevant domestic law in that country, the possibility of "notarised agreements", "mirror orders", or "monetary bonds". There

> "…should have been an exploration of these practicalities in this case through expert evidence and there was not. That should have been seen by the judge as a fundamental deficiency that was not to be cured by an evaluation of the father's responsibility, drawn from the history, nor [of the] probabilities in relation to the performance of the contact order."

In allowing the appeal the Court sought to emphasise that it was not intending to prevent the child from visiting its father's homeland in the future, or meeting his extended family. Rather it was seeking (at page 1088) to place an

> "…emphasis on the need for careful preparation before such an important development"

given that the mother's fears were

> "on an objective view, reasonably well founded and reasonably expressed."

[12] The Court of Appeal returned to the issue in *Re M (A Child: Removal from Jurisdiction: Adjournment)* [2010] EWCA Civ 888. In this case the judge had granted the father permission to take the child on holiday to France or Cameroon. The father had family in Cameroon, including his parents. He had a contact order in his favour in the United Kingdom in

respect of the child. By the time of the appeal he said that he wanted only to go to Paris, for financial reasons, and produced details of this proposed holiday. The mother was concerned that as there were flights to Cameroon from Paris, the father could use an authorised trip to France as a route to an authorised departure to Cameroon, which was not a signatory to the Hague Convention. However the judge had refused to adjourn in order that the mother might adduce expert evidence in relation to the relevant law in Cameroon. Criticising this, Black LJ (as she then was) stated that it was her view (paragraph 24) that even if it could not be said that no application of this type could ever proceed without expert evidence on the foreign legal system

> "…it is… incumbent on a judge to approach the matter in accordance with *Re K* with an inclination that such expert evidence will be necessary and, if he or she concludes it is not necessary, to explain very clearly why…"

The judge had failed to do this, which was a "fundamental problem" (paragraph 30). The case of *Re K* demonstrated

> "…the importance, even in a case where the judge feels able to repose trust in the parent who will be taking the child on holiday, of considering what can be done if the child is not actually returned. It is only with that information that the court can decide on the magnitude of the risk of the child being kept irretrievably away from its other parent and from this country and determine whether it is in the child's best interests to take that risk."

Accordingly, the mother's appeal was allowed.

[13] In *Re R (a Child)* [2013] EWCA 1115 the judge granted the mother permission to take the child to Kenya for a holiday. She had an order for residence and the father had an order for generous contact. He opposed the application on the grounds that there was a real risk that the child would be retained in Kenya, which was not a signatory to the Hague Convention. Evidence was heard over three days. The judge was impressed with the mother's evidence that she was a British citizen who wanted to continue to reside in the

United Kingdom and accordingly that the risk of her not returning with the child was not great. He appeared to recognise that the consequences of the mother not returning the child were great, given her lack of connection with Kenya, and the likely destruction of her relationship with her father. He thought that some more "reassurance" for the father should be put in place. The mother was not financially able to provide a deposit against not returning the child. Accordingly the judge ordered her and the child's passports to be lodged with the British High Commission in Nairobi, and required the mother to lodge a notarised agreement to the effect that the child's best interests lay in her continuing to reside in the United Kingdom. The father appealed. Patten LJ considered that the principles in *Re K* and *Re M* were determinative. He said (at paragraph 23) that:

> "The overriding consideration for the Court in deciding whether to allow a parent to take a child to a non-Hague Convention country is whether the making of that order would be in the best interests of the child. Where (as in most cases) there is some risk of abduction and an obvious detriment to the child if that risk were to materialise, the Court has to be positively satisfied that the advantages to the child of her visiting that country outweigh the risks to her welfare which the visit will entail. This will therefore routinely involve the Court in investigating what safeguards can be put in place to minimise the risk of retention and to secure the child's return if that transpires. These safeguards should be capable of having a real and tangible effect in the jurisdiction in which they are to operate and be capable of being easily accessed by the United Kingdom based parent. Although, in common with Black LJ in *Re M*, we do not say that no application of this category can proceed in the absence of expert evidence, we consider that there is a need in most cases for the effectiveness of any suggested safeguard to be established by competent and expert evidence which deals specifically and in detail with that issue. If in doubt the court should err on the side of caution and refuse to make the order. If the judge decides to proceed in the absence of expert evidence, then very clear reasons are required to justify such a course."

The judge had no such evidence that the notarised agreement would provide an effective mechanism for returning the child to the United Kingdom if required. And he failed to give clear reasons to justify his reliance on it the agreement in the absence of expert evidence.

The dicta in *Re K* confirmed that applications for temporary removal to a non-Hague Convention country will inevitably involve consideration of

> "…three related elements: (a) the magnitude of the risk of the breach of the order if permission is given; (b) the magnitude of the consequence of the breach if it occurs; and (c) the level of safeguards that may be achieved by building in the arrangements all of the available safeguards."

All three had to be kept in focus when considering whether the welfare of the child lay in granting permission or not. In the case in point, the judge had assessed the consequence of breach as great, but evaluated the safeguards only in the context of ameliorating the risk of breach occurring, not the consequences of breach. Further (at paragraph 26):

> "If the highly adverse consequences for the child of the breach had been kept in focus… the judge would have been bound to conclude that those consequences far outweigh any possible benefits to the child from the holiday and do not justify the making of the order absent security for her return."

The father's appeal was accordingly allowed.

[14] These three cases, together with the decision of the English High Court in *C* v *K (Children: Application for Temporary Removal to Algeria)* [2015 2 FLR 791, were considered by Sheriff Holligan in *A* v *B* 2016 SLT 389, an unreported copy of which was made available to me by the defender's agent. In this case the father sought a specific issue order allowing him to regularly take the parties' children to Algeria. Algeria is not a signatory to the Hague Convention. The mother therefore led unchallenged expert evidence on relevant Algerian law. In summary, it appears that this was to the effect that were the father not to return the children to the United Kingdom she would have little if any real prospect of securing their return through the Algerian court. Noting the absence of Scottish authority, and drawing on the English authorities, the sheriff approached the issues as follows (at paragraph 51):

> "(a) If the crave (or motion) for temporary relocation is opposed then the starting point is an analysis of the current arrangements for the child… In my opinion, one does not necessarily need an order of the court. For example, as in the present case,

up to now there has been no residence order but, as a matter of fact, the children currently reside with the pursuer and have always done so. Extended relocation would defeat that status quo.

(b) There may also be an issue as to whether the proposed temporary relocation and its duration constitutes a major departure from the contact the visiting parent currently enjoys to the extent that it may be an issue for the child.

(c) …There needs to be a careful analysis as to how the child will benefit from the temporary relocation. I do not consider there is an assumption or presumption that there will be such a benefit. It is for the visiting parent to establish the benefit. The welfare test is, at this stage, significant…

(d) There should be full disclosure to the resident parent by the visiting parent of all travel plans and documents so that the resident parent is aware of what is intended. There may also be issues as to the release and holding of passports before and after the visit.

(e) Is there a risk that the child will not be returned by the visiting parent?

(f) If there is such a risk, can it be addressed by real and adequate safeguards, easily and affordably accessible to the absent parent? When assessing the adequacy of these safeguards, regard has to be paid to their likely effectiveness in the jurisdiction to be visited. If there is any doubt, then expert evidence may be required. The English authorities make reference to mirror orders and notarised agreements. As I understand it, a mirror order is an order from a court in the jurisdiction to be visited which recognises and protects the interests of the absent parent already enshrined in an order of a court in this jurisdiction. A notarised agreement is an agreement whereby the visiting parent agrees in advance certain matters relating to the child. It is essential that the notarised agreement is capable of enforcement in the jurisdiction to be visited. I have to say that I have not come across mirror orders or notarised agreements in this jurisdiction but I suspect that is because the issue has never been raised rather than because of any fundamental difference from procedure in England. I do not say that mirror orders and notarised agreements are required in every case but if there is a risk they are mechanisms which may address the issue.

(g) In deciding overall risk, evaluation of the intentions of the visiting parent is not sufficient in itself. I note that the English courts require evidence to be given by the visiting parent so the court can include an assessment of the witness in its decision making process. All relevant material needs to be considered. If it is in doubt, the court should refuse the order."

Applying this analysis to the evidence before him, the sheriff refused to make the orders sought by the father. He was satisfied, in summary, that there was a risk that the father

might not return the children from Algeria, that were he to do so this would interfere with the mother's parental rights and responsibilities, and that this risk could not, in particular standing the evidence about the relevant Algerian law, be addressed by real and adequate safeguards.

[15] I would also mention the case of *A* v *A* 2007 Fam LR 43. In this case the pursuer and defender were married in Pakistan and thereafter lived in Scotland where their child was born. The mother subsequently took the child to Pakistan with the consent of the pursuer but then, without his consent, did not return. The pursuer raised an action for shared residence in the Court of Session, arguing that the defender's retention of the child in Pakistan was contrary to section 2(3) of the 1995 Act. Interim orders were pronounced, and service was effected on the defender. She then raised guardianship proceedings in Pakistan, obtained interim orders restraining the father from removing the child from the mother's care and, in the Scottish proceedings, sought a sist to await the outcome of Pakistani proceedings. Lord Glennie refused to grant a sist. The child was habitually resident in Scotland and therefore section 2(3) of the 1995 Act made it unlawful for the mother to retain the child outwith the United Kingdom without the father's consent. Pakistan is not a signatory to the Hague Convention, but reference was made to the 2003 United Kingdom-Pakistan Judicial Protocol on Children Matters. This protocol did not have the force of law, but represented an attempt by the judiciaries of the United Kingdom and Pakistan to protect children from the harmful effects of wrongful removal from one country to the other. In particular, it provided that "in normal circumstances the welfare of a child is best determined by the courts of the country of the child's habitual/ordinary residence." It is not clear from the report whether the Scottish court's assertion of jurisdiction was accepted in the Pakistan courts, or led to the return of the child. However in the present context, it can

at least be said that the existence of the Protocol, in the absence of Hague Convention rights, might be regarded as a form of safeguard such as is referred to in the English authorities.

[16] All of these authorities are helpful but none is binding on me. Without suggesting that there are any great differences in approach, I would express the matter as follows:

a. The fundamental and overriding question is whether to grant orders permitting and/or enabling the temporary relocation of the child outwith the United Kingdom would be in the child's best interests.

b. Answering this question involves a comparative assessment of the likely benefits and dis-benefits to the child if the order is, or is not, granted.

c. This comparative assessment requires, firstly, consideration of the child's present circumstances in the United Kingdom, including in particular, the nature and extent of its contact with the parent whose refusal to consent to the relocation has led to the court being seized of the matter.

d. Next, there must be an assessment of why and how it is said that the child will likely benefit from the temporary relocation. This is not simply to be assumed. It requires the applicant parent to lead evidence as to what is being proposed, for example, where exactly the child is to be taken, by what means, when, for how long, for what purposes, and for what possible benefit.

e. Next, there must be an assessment of the nature and extent of the dis-benefits to the child from the relocation. That first involves consideration of those dis-benefits which would likely occur even assuming the child is returned to the United Kingdom in accordance with the proposal before the court, for example, that the child will cease to enjoy the contact which it would otherwise have had

with the objecting parent for the duration of the proposed relocation. But there may be other dis-benefits in some cases, for example, disruption of its schooling.

f. Next, there must be an assessment of the risk that the applicant parent will not return the child to the United Kingdom in accordance with the proposal, but will try to retain the child in the country of relocation. All the evidence relevant to this matter should be considered. This may involve both historical and dynamic factors. It will necessarily involve an assessment of the credibility and reliability of the applicant parent's assertion that the child will be returned as proposed.

g. Next, there must be an assessment as to whether any risk that the applicant parent will try to retain the child in the country of relocation can be met by real and adequate safeguards. The starting point is whether the proposed country of relocation (or any other country to which the child might reasonably be further relocated) is or is not a signatory to the Hague Convention. If not, then expert evidence on the law of the country will likely be required before the court could be satisfied that any comparable safeguards are available.

h. Finally, there must be consideration of the dis-benefits to the child which would likely occur if the child is not returned to the United Kingdom in accordance with the proposal, but retained in the country of relocation. This is likely to include the restriction or termination of contact with the objecting parent, but there may be other dis-benefits as well, for example, that the child may have a relatively poorer standard of living or education in the country of relocation.

It should be apparent that applications such as the present call for careful and thorough preparation by practitioners, and for careful and thorough consideration by the courts. The onus is on the applicant parent to lead evidence sufficient to establish that the proposed

temporary relocation is in the child's best interests. If the court is in doubt, it should refuse to make the order or orders sought.

Decision

[17] Applying this approach to the evidence in this case leaves me in no doubt that it would not be in A's best interests to grant the specific issue orders sought by the defender.

[18] A is two years old. He is a British citizen by descent from the pursuer, and therefore has an entitlement to grow up in the United Kingdom with all the educational, social and health benefits that this entails. Since the separation in July 2017 he has lived with the defender. The pursuer had periodic but erratic contact with A in the year following the separation, but his entitlement to non-residential contact one day per week was then confirmed by the court in August 2018, and extended in November 2018. As noted, parties were agreed that the pursuer should now have residential contact with A one day per week, and this is confirmed by the interlocutor to which this opinion is attached. Little was said about A's personal circumstances. Nothing was said to suggest that he is not healthy nor reaching appropriate developmental milestones. He attends nursery, and a weekly mother and toddler group. I have no reason to doubt that both his parents love him and strongly wish to take an active role in his life.

[19] The defender's proposal is to take A to India for a holiday, of a month's duration, later this year, at a precise time yet to be decided. As far as I could tell the intention was that they would stay with the defender's parents when in India, although this was implied rather than clearly stated. I do not recall being told where exactly in India the defender's parents live. I took it that there was no dispute between the parties but that the defender's family could and would provide secure and appropriate accommodation for A during his stay.

Very little was said in evidence directly addressed to the benefits to A of the proposed holiday. It was simply implied - and in fairness not disputed by the pursuer - that it would be in A's interests to meet with his extended family in India. As I have already pointed out, however, his very young age suggests that his capacity to socially and culturally engage is likely to be limited. Therefore the likely direct benefit to him of the proposed holiday at this stage of his life will be similarly limited. I have no doubt that the defender would benefit, in particular by seeing her family again, and no doubt they would benefit from both seeing the defender and A. If they are all happier, as a result, there may be some indirect benefit to A from that. However I do not see that the defender's proposed laser eye surgery would be of any appreciable benefit to A and I leave it out of account.

[20] If the defender were permitted to take A to India as proposed this would of course mean that for a period of a month he would not have the residential contact with the pursuer which has now been agreed. It was again rather assumed in the absence of any dispute that this contact with his father is of benefit to A and in his interests. In any event I was given no reason to think otherwise. To lose such contact for a month, particularly as it is just starting, therefore seems to me to be an appreciable dis-benefit to A. It was not suggested that there would be any others.

[21] On the evidence which I have heard I am satisfied that there is at present a significant risk that the defender would try to retain A in India if she were permitted to take him there. I take that view for three main reasons.

[22] Firstly, the defender has expressly threatened to take A to India and not bring him back. There is no dispute that she made this threat by text message to the pursuer in May 2018, and I am satisfied that she also made it verbally to the pursuer on other occasions prior to that. I can well understand that such threats may have been made by the defender

in the heat of the moment, as was submitted on her behalf, and as a reaction to the abusive and controlling behaviour being exhibited by the pursuer in denigrating her both to her face and to the local Asian community. However this does not mean that the defender's threat was not truly meant when she made it, nor that it can now simply be disregarded. Indeed the very fact that the defender has been subject to abusive behaviour at the hands of the pursuer over the period since 2016 might suggest that she would indeed have good cause to want to leave the United Kingdom, and thereby to seek to remove herself and A from the pursuer.

[23] Secondly, the defender has clearly been guilty of deception and dishonesty in her relationship with the pursuer. She accepted that she engaged in an adulterous relationship with B over the first three years of her marriage, unbeknown to the pursuer. When challenged by the pursuer about her relationship with B following her move to the United Kingdom, she lied to him about this, and persisted in her deception until confronted with video footage of her telephone conversations with him. I in no way condone the pursuer's actions in covertly filming the defender, less still his use of the video footage to abuse and denigrate her. But the present point is that the question of whether the defender would or would not seek to retain A in India is in reality entirely dependent on accepting as credible and reliable her evidence about this. But by the defender's own admitted past dishonesty she has at least put a significant question mark over her credibility and reliability.

[24] Thirdly, the defender's ties to the United Kingdom, and thus the likelihood that she would wish to continue to live here with A, are presently somewhat tenuous. The defender has no family in the United Kingdom. She appears to have few friends here. She is socially and culturally isolated, in part due to the pursuer's actions. She has not formed any new

romantic relationship in the United Kingdom since separating from the pursuer. She does not own property in the United Kingdom. She has employment, but only for one day per week, because she cannot access more child care. Her employment is as a beautician, but this is not her preferred choice of career and she hopes to work in web design. She has no United Kingdom qualifications relevant to this. She has made inquiries about undertaking a college course, but has not yet applied for it. I was told that she was learning to drive, attends a mother and toddler group once a week, and also attends church. But none of this ties her to the United Kingdom.

[25] By contrast, the defender's parents and extended family are in India. They appear to be supportive of her, as evidenced by the frequent phone contact which she says she has with them. She would not be isolated living there, and would likely be able to draw on family support with child care. Furthermore, the defender has a web design related degree from an Indian college, and but for her marriage would have been able to pursue a career armed with this qualification. The defender's marriage is of course all but over, but I was not entirely convinced by her assertion that she has ceased to want to resume her relationship with B, who as I understand it still lives in India.

[26] All this suggests to me that there is on the one hand little to keep the defender in the United Kingdom and, on the other, a number of reasons why she might not wish to return from India, should she be given permission to take A there with her.

[27] I am not satisfied that there are any real and adequate safeguards to address the risk that the defender might seek to retain A in India. In the first place, although India is a member state of the Hague Conference, it is not a signatory to the Hague Convention: see https://assets.hcch.net/docs/62b28229-4cec-4a93-a7d0-241b9ef3507e.pdf and https://www.hcch.net/en/states/hcch-members/details1/?sid=101. I suspect that the

defender's agent may have mistakenly thought that the Convention rights would have been available to the pursuer as a safeguard in this case, and that for this reason no attempt was made to lead expert evidence as to relevant Indian law. Accordingly I do not know whether there is any scope for anything akin to a mirror order in this case, nor what if any legal force might be attached to a notarised agreement if one were made, nor whether there is in relation to India anything akin to the Protocol referred to in *A* v *A*, above. The defender did not offer caution, and as far as I could tell she is not in a financial position to do so. Accordingly, on the evidence which I have been given, and in the absence of rights under the Hague Convention, the position is that the defender has not established that there are *any* safeguards, let alone real and adequate safeguards, to address the risk that she may seek to retain A in India if given permission to take him there. I have not forgotten that the defender offered to exhibit return air tickets to the pursuer prior to departure, but in my view this is no safeguard at all.

[28] If the defender were to retain A in India there would likely be significant dis-benefits to him. Most obviously there would be, at the very least, major disruption to his contact with his father. My impression was that the defender's family and the pursuer's family live relatively close to each other in India, around 20 minutes' drive away. It is therefore perhaps unlikely that the defender would be able in practical terms to remove A entirely from the pursuer, even if she wished to, but in the absence of any means to require him to be returned to the United Kingdom it is obvious that there would be a serious interference with their relationship. Furthermore, how A's life growing up in India might develop as against him doing so in the United Kingdom, or how residence there might affect his immigration status or citizenship, I do not know. What can be said is that the educational, social and

health benefits to him of living in the United Kingdom would be lost and I do not know to what extent they would be replicated were he to live in India.

Conclusion

[29] For all these reasons I will refuse the defender's craves for the specific issue orders which she seeks. I will also refuse the pursuer's crave for interdict. As discussed above, in circumstances where the defender cannot get a passport for A without the cooperation of the pursuer, where he has refused to cooperate, and where I am not satisfied that he should be ordered to do so, there is no practical prospect as far as I can see that the defender will be able to remove A from the United Kingdom. Therefore there can be no reasonable apprehension that the defender will seek to wrongfully remove A from the United Kingdom and thus no good grounds for the interdict sought. In any event, however, I do not consider that it would be in A's best interests to grant an order which would, on the face of it, permanently interdict the defender from taking him to India for a holiday. I do not discount the possibility that it may at some point be in his interests to make such a trip.

[30] In the first place the risk that the defender might seek to retain A in India might diminish. She cannot alter history, and thus erase her dishonesty to the pursuer as regards her infidelity during their marriage, but time will provide plenty of opportunities for her to show, if she can, that she is essentially an honest person who can be trusted in the present context. Nor can the defender take back her threats to remove A to India, in particular those in her texts in May 2018. But if these were indeed empty threats as she says, issued in the heat of the moment, she should be able to demonstrate this by taking steps to commit and entrench both her and A's life in the United Kingdom. As noted, the defender's present links to the United Kingdom are rather tenuous. Although she has made efforts to try and

show that she is trying to put down roots here post separation, little has in reality yet been achieved. But this will likely change. A year or so from now, for example, she may have completed a college course in web design, and found a career job in this preferred area. She may acquire property and/or start a new relationship with someone living in the United Kingdom. She may find closer friendships and develop more demonstrably entrenched social and cultural interests. Overall, the more invested in living in the United Kingdom the defender becomes, the less the risk that she would leave it all behind by taking A to India and not returning.

[31] In the second place, it may be that India in the future does ratify the Hague Convention, or that expert evidence might be made available to show that there are real and effective safeguards against any remaining risk that the defender would seek to keep A in India and not return him. I repeat, on the evidence in this case I have not been satisfied that there are any safeguards at all. This may bear revisiting in a later application.

Postscript

[32] Generally, and for what it is worth, my sympathies in this case lay with the defender. I can well understand that the pursuer was angry and upset at her infidelity and dishonesty. But his subsequent behaviour towards her, in covertly filming her, and more particularly in then distributing the video and denigrating her to family and friends, was in my view abusive and reprehensible. The pursuer tried to suggest that he was doing this only to defend himself from criticism from others in the family and local Asian community who did not believe him when he told them that the defender had been unfaithful, but I did not accept this. The evidence of the defender's employer C, which I thought credible and

reliable, suggested that the pursuer had been proactive in giving her a copy of the video and denigrating the defender to her.

[33] In terms of section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 the distribution of the video by the pursuer is behaviour which (at least since this provision came into force in July 2017) is very arguably criminal. That being so I did consider whether I should refer the pursuer's conduct to the Procurator Fiscal. But in the first place the balance of the evidence which I heard suggested that the distribution of the video by the pursuer took place prior to section 2 coming into force. And in the second place I also heard some evidence that the defender did complain to the police about the matter around the time of the separation, but that no action was taken against the pursuer. I will therefore not now refer this matter to the Procurator Fiscal. However that does not preclude the defender from making a further complaint to the police, given that the 2016 Act is now clearly in force, should she have reason to think that the pursuer is again distributing or threatening to distribute the video. And in any event the defender may have civil remedies against the pursuer, whether by way of interdict or indeed for recovery of the video.