Neutral Citation Number: [2023] EWFC 243 (Fam)

Case No: BS23P70946

IN THE FAMILY COURT
SITTING AT BRISTOL

Date of judgment: 12 December 2023

Before :

MR JUSTICE PEEL

- -

Between :

T **App**

- and -

T **Respo**

- -

- -

Ms Nadia Zaman for the **Applicant**

The Respondent in person

Hearing date: 11 December 2023

- -

Approved Judgment

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MR JUSTICE PEEL

Mr Justice Peel :

The application

1.
I am concerned with Z, who is 5 years old. I shall refer to her parents as M (her mother) and F (her father).

2.
M applied on 19 September 2023 for permission to take Z to Pakistan for a holiday over the Christmas period. F opposes the application. Pakistan is a signatory to the 1980 Hague Convention, but the United Kingdom has not yet accepted its accession, so that the provisions contained therein are not applicable as between the two states.

The law

3.

The court's paramount consideration is the welfare of Z. The leading authority on applications such as these, where permission is sought to remove a child for a short time to a country where the Hague Convention is not operative as between the UK and that country, is **Re R (A Child) [2013 EWCA Civ 1115**.

4.
At para 23, Patten LJ said this, having reviewed the jurisprudence:

"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. Those 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 UK-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 complete 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."

5.
He continued at para 25:

"As the quotation from Thorpe LJ´s judgment in Re K (see paragraph 19 above) confirms, applications for temporary removal to a non-Convention country will inevitably involve consideration of three related elements:

i)
the magnitude of the risk of breach of the order if permission is given;

ii)
the magnitude of the consequence of breach if it occurs; and

iii)
the level of security that may be achieved by building in to the arrangements all of the available safeguards.

It is necessary for the judge considering such an application to ensure that all three elements are in focus at all times when making the ultimate welfare determination of whether or not to grant leave".

6.
As noted, the Court of Appeal suggested that "in most cases" expert evidence as to appropriate safeguards will be needed. The court did not say that "in every case" expert evidence will be required. In **K v K [2020] EWDC 96** Mostyn J permitted the mother to take the child on a trip to Nigeria, having concluded that the risk of wrongful retention there was vanishingly small. In that case, no expert evidence had been obtained. That said, in the reported cases it is more customary to obtain expert evidence, and to put in place mirror orders, or written agreements, to underpin the proposed

visit; see, for example, **M (Children) (non-Hague Convention state) [2020] EWCA Civ 277**, **AY v AS [2019] EWHC 3043 (Fam)**, **SR v MA [2019] EWHC 435 (Fam)**.

QLR

7.
In these proceedings, M is represented and F acts in person. Because of previous findings against F of coercive and controlling behaviour, on 5 October 2023 an order was made for a qualified legal representative ("QLR") to be appointed on F's behalf for the purpose of cross-examining M. That order was repeated on 30 October 2023. The latter order further provided that in the event a QLR had not been appointed by 4 December 2023, ahead of this final hearing on 11 December 2023, "the respondent father shall file a list of questions that he intends to ask the applicant mother at the final hearing which shall be sent to the court and not the [applicant mother] by 16.00 on December 8".

8.
In his View from the President's Chambers dated July 2023, the President said this:

"16.
On a less positive note, all who have experienced cases where the circumstances either require, or cause, the court to appoint a Qualified Legal Representative (QLR) under Matrimonial and Family Proceedings Act (MFPA) 1984, s 31W(6) to cross examine a vulnerable witness in the interests of one of the parties, will know that frequent and widespread difficulties are being encountered in finding advocates to act as a QLR. The provision of a statutory alternative to the unsatisfactory remedy of the judge, magistrate or legal adviser questioning the witness in such cases is something that has long been called for. The inclusion of a new Part 4B in the 1984 Act, by the Domestic Abuse Act 2021, s 65, was widely welcomed. It is therefore both dispiriting and very concerning that the QLR scheme established by the Ministry of Justice (MoJ) to implement Part 4B seems unable to attract anything like sufficient numbers of advocates to act as a QLR in individual cases.

17.
Changes to the operation of the QLR scheme are a matter for the MoJ, but the current unwelcome situation requires courts to determine how to proceed where the circumstances are such that, by s 31W(6), 'the court must appoint a qualified legal representative (chosen by the court)', yet none can be found. Where that situation is reached it will be a matter for the individual judge or magistrates to decide how to proceed in each case, but I would suggest that if no QLR is found within 28 days, the court should list the case for directions and direct that some summary information is provided by HMCTS about the difficulties that have been encountered.

18.
Although there is no provision in MFPA 1984, Part 4B for the termination of a QLR appointment, PD3AB, para 8.1(b) permits termination 'when the court so orders'. No guidance is given in PD3AB as to the test to be applied. When a QLR is appointed by the court the focus is on whether it is 'in the interests of justice' to do so. A similar focus may therefore be appropriate when considering discharge. In addition, courts should apply the over-riding objective in FPR 2010, r 1.1 of 'dealing with a case justly, having regard to the welfare issues involved'. The need to do so 'expeditiously and fairly' and to ensure 'parties are on an equal footing' will be of particular importance.

19.

Consideration of terminating the appointment of a QLR provides a further opportunity to canvas with the parties any other options, for example directly instructing an advocate. If a QLR is discharged, short reasons for doing so should be recorded in the court order.

20.
Although courts will be mindful that PD3AB, para 5.3 provides that 'a satisfactory alternative means to cross-examination in person does not include the court itself conducting the cross-examination on behalf of a party, that guidance does not trump the over-riding objective and, where there is no alternative, courts may have to revert to asking the questions where that is the only way to deal with the case justly, expeditiously and fairly in the absence of a QLR."

9.
This passage from the President, although not formal guidance, clearly sets out the problems with the QLR process and the need for the court, where appropriate, to take steps to ensure so far as possible, and notwithstanding the absence of a QLR, that the case can be dealt with justly. Otherwise, multiple adjournments would be required in the (possibly forlorn) hope of securing the services of a QLR, and such delay would in itself usually be contrary to the interests of justice, contrary to the interests of the child, and potentially would renew, perpetuate and/or exacerbate the impact of domestic abuse on the vulnerable party.

10.
In the event, no QLR had been appointed for this hearing before me. F was not aware of this until the morning of the hearing, and thus had not filed his questions. It seemed unlikely that he would be able to draw them up on the spot, and I am not sure it would have been fair to him to require him to do so. However, it seemed to me that the evidence on factual matters was largely agreed and there was a degree of urgency because the application was to take Z to Pakistan in the next few days. Both parties agreed that neither would ask questions of the other, but that I would ask such questions of each of them as I thought fit. I accept that this process meant that neither party was cross examined, but I was able to probe each party in the witness box and by the end I am confident that I had a sufficiently clear picture to make an informed decision. At no stage did either party raise any concerns about the process which I adopted, or the questions which I asked.

The background

11.
M is 29 years old, and F is 42 years old. F moved to the UK from Pakistan in 2004, and is a British citizen. The parties married in 2017 in Pakistan. M moved to the UK to live with F in the West of England. Z was born in 2018. The parties separated in 2021, when M and Z left the family home. They now live in the Home Counties. F continues to live in the West of England.

12.
After separation, there was no contact between F and Z. F accordingly made an application for a Child Arrangements Order, and interim orders were made for supervised contact. It was determined that a fact-finding hearing should take place to determine allegations of domestic abuse made by M against F.

13.
The fact-finding hearing took place on 23 and 24 August 2022 before Recorder Leong. Both parties were represented. The judge made seven findings against F which constituted controlling and coercive behaviour, and which, he concluded, caused M to leave the family home with Z. F has never

accepted these findings of domestic abuse, as they must be categorised pursuant to para 2A of PD12J and s1(3) of the Domestic Abuse Act 2021.

14.
The proceedings then progressed to a final disposal/welfare hearing before HHJ Wildblood KC on 4 and 5 May 2023. Again, both parties were represented, and the court had the benefit of a s7 report. F, M and the s7 reporter all gave oral evidence.

15.
In his judgment, HHJ Wildblood KC reiterated the previous finding that F is dominating and controlling towards M. He referred to F making unfounded allegations that M has undiagnosed psychiatric issues. He said that F is devoted to his daughter, hard-working and intelligent, but does not acknowledge the dynamics of the relationship between himself and M.

16.
The judge concluded that:

i)
Z should live with M.

ii)
Contact between Z and F should build up reasonably swiftly, such that by September 2023 it would be, on a 4-week cycle, alternate weekends and 1 day spent by Z with F.

iii)
There should be holiday contact as to 1 week in the Christmas holidays, 1 week in the Easter holidays, and two separate weeks in the summer holidays. Further arrangements were made for half terms, Christmas Day and Eid.

iv)
The order provided for the Prohibited Steps Order made on 10 November 2021 to remain in place. That prevents either party from taking Z abroad without the permission of the other.

v)
Z's passport is to be held by M.

17.
Pursuant to a direction made by the court after M's application to take Z to Pakistan over Christmas, a UK based lawyer who is also qualified in Pakistan has given a written report as to the applicable law in Pakistan, and protective arrangements to ensure the return of Z should M seek to remain there. The expert says that:

i)
F would be able to make an application in the Pakistan courts for a return order.

ii)
Further, or alternatively, he could apply for an order under the Guardian and Wards Act 1890 for an order which reflects the terms of the English order.

iii)
By the Code of Civil Procedure (Act V of 1908), a certified copy of a foreign judgment is ordinarily regarded as conclusive between the parties. In particular, by s44A, a certified copy of a decree of a

superior court of the United Kingdom “may be executed in [Pakistan] as if it had been passed by the District Court”.

iv)
Mirror orders can be pursued in Pakistan.

v)
The 2003 UK-Pakistan Judicial Protocol on Children Matters can be referred to, although it is not treated as law in either jurisdiction.

18.
It seems to me that there are, or would be, legal routes potentially available to F to pursue in Pakistan a return to this jurisdiction, but the expert does not say in terms that any of these provisions is likely to result in a swift return under Pakistani law. Further, he is silent as to how long it might take to pursue legal avenues, and at what legal cost. Experience of other cases suggests that it could, if resisted by M, take some time with no certainty of outcome. I accept F’s submission that none of these legal routes deprive the Pakistani court of the ability to reach further, or other, decisions. In other words, the expert does not identify a swift means of enforceability.

Analysis

19.
Although there is some lingering mistrust between the parties, I thought they were both essentially focussed, in this application, on Z’s needs. Both were helpful and straightforward in answering questions from me, acknowledging, as I do, that neither were subjected to the rigours of cross examination.

20.
As always, this is a delicate balancing exercise, and a number of factors interact with each other to form a composite picture. F and Z have had a settled regime of contact since September. Both parents told me that it is working very well, and I commend them both for that. It is a testament to their mutual wish to ensure, as far as possible, that their personal differences do not impact negatively on the advantages to Z of a healthy relationship with F. I have no doubt that Z enjoys her time with F and benefits enormously from it. To be deprived of that relationship would, I am satisfied, be devastating for her, and contrary to her wishes and needs. The gravity for this child of being retained in Pakistan is high indeed. Not only would she be deprived of her loving relationship with her father, but she would also be uprooted from the country where she has lived all her life, where she attends school, where she has some extended family, and where, by all accounts, she is thriving and happy. Should she not be returned voluntarily, as Pakistan and the UK do not have reciprocal Hague Convention arrangements, the process of ensuring her return through the Pakistani courts might well be lengthy and uncertain.

21.
I also take into account that if Z is taken to Pakistan this Christmas, even if she were to be returned as promised, she would miss the week of contact over Christmas with F which is provided for under the order of May 2023. Further, because of the delay in this application reaching court, there is little time to prepare Z for the proposed trip, and the lost time with F. This is not the fault of the parties, but it does mean that what M now seeks would necessarily be planned and implemented in very short order. The arrangements would be a little rushed, and must be seen in the context of a contact regime

which, although working well, is still relatively new and, in my judgment, needs a little more time to bed in.

22.
On the other hand, having heard M (and I repeat that I am conscious she was not cross examined), I consider that there is a relatively low (but not negligible) risk of her retaining Z in Pakistan. She tells me that she views Pakistan as a negative place for her (as a single woman) and Z in terms of its relative lack of economic development and its attitudes to women. In the UK, by contrast, she and Z have access to healthcare and, in Z's case, to schooling which she enjoys. They have family here, as they do in Pakistan. M now has a full-time job here. I bear in mind that M has not made any attempt to remove Z unlawfully to Pakistan, even though she holds Z's passport, and she properly applied through the courts for temporary removal to Pakistan It is, I accept, important for Z to stay in touch with her origins and culture, and a visit would promote that core part of her identity. As time goes by, she is likely to find it confusing and unsettling if she cannot travel to the country of her parents' birth and in principle, in my judgment, it is in her interests to see both sides of her family in Pakistan.

23.
In initial communications between the parents in June 2023 (which started relatively cordially but degenerated somewhat), M asked F if he would agree to her taking Z to Pakistan. F responded by suggesting that he take Z to Pakistan, and then a few days after their return, M could take Z there, which indicates that he had no particular concerns at that point about such a trip. M was unenthusiastic about the travelling demands on Z of such an arrangement, and had some reservations given that Recorder Leong had made a finding that when in Pakistan on one occasion during the marriage, F kept Z away from her for 4 days. M counter proposed that they all go to Pakistan for 4 weeks, with Z spending 2 weeks in M's care and 2 weeks in F's care; that seems to me to be a sensible potential blueprint going forward. In the end these various discussions did not result in agreement.

24.
Weighing up the arguments, I have concluded that M's application to remove Z to Pakistan over Christmas should be refused. Although I assess the likelihood of disobedience to the English court order as relatively low, the detriment to Z of breach would be very high. The contact arrangements are newish, and need more time to settle down. A period of stability (particularly after so much litigation) might build up a greater degree of trust between the parents. I also take the view that the benefit of a trip to Pakistan during this holiday period is outweighed by the benefit to Z of spending a week over Christmas with F, which she would miss if she went away. Finally, in my view a mirror order should be obtained before any trip to Pakistan takes place. I accept that this may not provide certainty, but it would provide a degree of reassurance and set at least an indicative benchmark in Pakistan.

25.
Looking ahead, it seems to me that in principle by the 2024 summer holidays, provided that a mirror order is in place, it may well be appropriate for Z to be able to accompany M to Pakistan. Indeed, I consider that M's suggestion of both parties going to Pakistan, and Z dividing her time between the two parties, has much to commend it. However, whether a trip abroad should be granted, and, if so, in what form, is a matter for the court on another day. I am conscious that there is a risk of yet more litigation but in my judgment that is unavoidable because of the relatively recent arrangements put in place by HHJ Wildblood KC which need to time to work though.

26.

I shall therefore:

i)
Refuse M's application to take Z to Pakistan for a holiday over Christmas;

ii)
Direct M to obtain a mirror order to reflect the order of HHJ Wildblood KC;

iii)
Record that Z is habitually resident here, that the courts of England and Wales hold jurisdiction over her welfare in this case, that both M and F have parental responsibility, that any removal of Z from this country to an overseas jurisdiction would be a breach of orders made by this court, and that any retention in any overseas jurisdiction after a removal would similarly constitute a breach;

iv)
Direct that any future application by either party to take Z to Pakistan for a holiday should be referred to the Family Presiding Judge for the Western Circuit (currently Judd J) for allocation.