Re J (Children: Permission to Remove from Jurisdiction) [2018] *EWCA Civ 1372*

Case No: B4/2018/1013; B4/2018/1024

Neutral Citation Number: [2018] EWCA Civ 1372

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
(MR JUSTICE MOSTYN)

Royal Courts of Justice Strand, London, WC2A 2LL
Date: 8 May 2018

Before :

LORD JUSTICE McFARLANE
and
LORD JUSTICE PETER JACKSON

Between :
RE: J (CHILDREN: RELOCATION)

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Tel No: 020 7404 1400 Email: TTP@epiqglobal.co.uk
(Official Shorthand Writers to the Court)
MS R KIRBY and M EDWARDS (instructed by Sears Tooth) appeared on behalf of the Father

MS D EATON QC and S JARMAIN (instructed by Charles Russell Solicitors) appeared on behalf of the Mother

HTML VERSION OF JUDGMENT

LORD JUSTICE McFARLANE:
I will invite Lord Justice Peter Jackson to give the first judgment.

LORD JUSTICE PETER JACKSON:

Introduction

1. On 27 April Mostyn J, sitting in the Family Division, made an order in proceedings between the parents of two children now aged 5 and 2 after a hearing lasting four days that had taken place earlier in the month. Giving a reserved judgment, he firstly refused an application by the children's mother to relocate with them to her native country, the Ukraine, but secondly, allowed the mother to return temporarily to Ukraine with the children, she having been living there with them effectively since December 2017. The period of temporary permission was set as being from 2 to 27 May (or such later date as the court shall determine).

2. Neither parent was content with this outcome. The mother immediately issued an application for permission to appeal against the first order. She seeks to overturn that order and secure a re-hearing. For his part, the father immediately issued an application for permission to appeal and for a stay in relation to the second order. When the matter came before me on the papers on 1 May, I granted a stay of the second order and gave a direc-

tion for further skeleton arguments on the questions arising from both permissions to appeal. On 4 May, having considered those documents, I granted permission to appeal to the father and adjourned the mother's application for permission to appeal to an oral hearing. Today's hearing, fixed at short notice, is therefore the hearing of the father's appeal against the second order and the mother's application for permission to appeal from the first order.

Background

3. The mother is Ukrainian and the father Russian. Both hold UK passports and both are wealthy. They met in 2010 and were married in the Ukraine in 2012. In late 2015, the father ended the marriage, to the mother's distress. He remained in the family home in London and she bought a very large property nearby. The parties divorced in 2016 with their financial affairs being dealt with in accordance with a pre-nuptial agreement.

4. Also, in May 2015, they entered into a parenting agreement in the Ukraine, providing for the children to live with the mother permanently in the UK, but with substantial time spent with the father. The agreement provided for the mother to be able to move abroad with the father's consent, which was not to be unreasonably withheld.

5. The father's situation is that he has three children in their teens from a previous marriage. He married his third wife in July 2016 and lives in London with her and her five-year-old son. He works in a substantial line of business in this country. The mother's situation is that she met her second husband ("S") in December 2016. In January 2017 she proposed to the father that she and S would move to California for the sake of S's work. He considered that proposal but refused it in May 2017. The mother then proposed moving to the Ukraine; the father refused and these proceedings were then issued.

6. At the same point, the mother became pregnant with S's child and the baby was in due course born in February 2018.

The proceedings

7. These began in June 2017 and in July at a hearing there were cross-undertakings by the parents that the children would not be removed from this country without the other par-

ent receiving seven days' notice of any trips abroad and 48 hours' notice of any missing of school attendance. An independent social work report was commissioned.

8. That report was delivered by Ms Elena Sandrini, an experienced independent social worker, on 10 November. Her conclusion was that the mother's application was premature and that it was in the best interests of the children to remain living with her in London.

9. A week later on 17 November, there was a dispute resolution hearing. The mother on that occasion agreed to produce S's passport. That was not in fact done and the court later made an order. When seen by Ms Sandrini, S did show his current passport but that raised for her a number of questions to which the judge said he had received no answers.

10. On 25 November, the mother and the two children travelled to Kiev on return tickets for 28 November. The mother gave no notice of this trip to the father or to the school or to anybody else. While in Ukraine, the mother says that she suffered health problems which led to her being admitted briefly to hospital between 27 and 30 November, at which point she was over five months' pregnant. On 6 December, the mother married S without, it seems, telling anyone that she was to do so. At this point, to put it colloquially, the balloon went up.

11. A final hearing had been due to take place on 4 December and after a number of preliminary hearings, the matter came before HHJ Lord Meston QC on 6 and 7 December. He heard submissions but was not in a position to take evidence. He came to the conclusion that the mother had experienced genuine health problems and gave her permission to stay with the children until an adjourned final hearing; that was the hearing that ultimately took place before Mostyn J on 16 April.

12. In the meantime, the mother had been arranging for the children to come backwards and forwards on several occasions for contact with their father in this country.

13. On 9 April, a second report was obtained from Ms Sandrini updating her previous enquiries. She concluded, referring to paragraph 8.15 of her report, that permission to relocate the children to Kiev would be risky and should only be granted if the mother was able to satisfy the court that she could be trusted to prioritise the needs of the children above those of her husband and to facilitate frequent contact with the paternal family and of

course the father.

14. The hearing, as I say, took place over four days during which time the judge heard from the parents, the nanny, Ms Sandrini. He did not hear from S. The judge concluded the mother's move to Kiev in November 2017 was "cynically contrived" and that her conduct in getting permission to stay from the court was "highly manipulative". She had, he said, shown "arrogant disregard" for court orders.

15. He then focused upon the position of the mother's husband S and quoted from the second report of Ms Sandrini to this effect:

> "I have not been able to gain an accurate measure of S. He has availed himself to be interviewed and has been courteous but he has been reluctant, resistant and evasive about his past business involvement and about his finances, his demeanour changing to borderline aggressive in response to any questions he considered to be personal."

16. S's position had also changed during the course of the proceedings from agreeing at an earlier stage to move to London to be with the mother if he had to, to a refusal to move in any circumstances. But the mother did not produce a statement from S or produce him for oral evidence, even by video link and the refusal to give up the passport for inspection continued. The judge described this state of affairs as unprecedented in a relocation case, and one from which he could draw the inference that the mother and S "had something serious to hide". He described S's approach as being evasive and said that he considered the mother to be "within the sphere of influence of S who plainly has an extremely negative view of the father".

17. The judge also noted the breakdown in the mother's relationship with her own mother in Ukraine and apparently with the parties' nanny. He dismissed her claim to feel homesick for the Ukraine in the light of the California plan and the roots that she had made in London. It was, he found, in reliance on Ms Sandrini's opinion, "90 per cent about S, not about Kiev".

18. Ms Sandrini expressed concern that had grown since the deterioration in the mother's family relationships and told the court that she had "a deep sense of concern". She gave

detailed reasons directly connected with the children's welfare, which at paragraph 56, the judge. Having done so, he continued in this way:

> "I accept Ms Sandrini's evidence and recommendation. However, that is not the only basis on which I make my decision. An important reason for refusing the application is that I am satisfied that I have been presented with a manipulative and contrived case which is wanting in candour, as I have explained above, and that there has been an arrogant and contemptuous disregard for the court's authority. This has led me to have very serious concerns as to the likelihood of the mother's compliance with orders for contact in favour of the father in circumstances where she is within the sphere of influence of S, who plainly has an extremely negative view of the father. I have no reason to think that contact enforcement litigation in the Ukraine would be any more fruitful or efficient than it is in this country.
>
> 57. In the circumstances I am not satisfied that the mother has demonstrated that it would be more in the children's interest for the change she proposes to be allowed than it would be for the familiar life of the girls in London to be resumed. I am satisfied that the father's consent to the move to Kiev has not been unreasonably withheld.
>
> 58. I confirm that in reaching this decision I have taken into account, and carefully weighed, all of the matters specified in section 1(3) of the Children Act 1989."

19. The judge's reference to the father's consent not being unreasonably withheld is, of course, a reference to the parenting agreement, not to the law.

After the judgment

20. The judgment was sent to the parties in draft on 26 April and handed down at a hearing on the morning of 27 April. During the course of that short hearing, the judge firstly refused Ms Eaton's application for permission to appeal on behalf of the mother. Secondly, Ms Eaton then informed the judge that the new born baby's visa to come to the UK had been refused, something that the mother would have known from shortly after the point that she gave her oral evidence but something that had not been made known before the day of the renewed hearing. Bearing in mind that the mother was breast-feeding, Ms Eaton applied for a temporary re-instatement of Judge Meston's order so that the three

children should not be separated in the immediate future.

21. In response, Ms Kirby replied that the order that Judge Meston had made should, on the judge's findings, not have been made, that the children could remain with their father while the mother sorted out the baby's visa position; but most significantly, that there was a major risk of the children being again retained in the Ukraine.

22. The judge gave a judgment about this in very short form. He confirmed that the children are habitually resident in England and Wales and stated that he would have refused the mother's application but for the visa information. He said this (and I take two passages from the short judgment):

> "However, I have just been told, although I have been given no documents at all, that the baby has surprisingly been refused a visa by the British Embassy in Kiev."
>
> "In circumstances where the very basis of my judgment is that the mother has been and will continue to be the primary carer of these children, in circumstances where these children have been joined by a half-sibling who is an infant, who is also in the primary care of the mother who is indeed breast-feeding that child, it seems to me to be reasonable to permit the children for a period of one month to return to Kiev, which should be enough time for the visa situation of the baby to be resolved."

23. It appears that the period of one month was a period selected by the judge. It had not hitherto been mentioned.

24. At that point, Ms Kirby acting for the father immediately asked for permission to appeal. It was refused on the basis that the Ukraine is a signatory to the Hague Conventions of both 1980 and 1996. The judge, when refusing permission to appeal, addressed the difficulty that might arise if the mother did not bring the children back voluntarily: "They will be sent back if they do not come."

25. That hearing was completed in somewhat under 25 minutes in total, the judge having a busy list ahead of him. The parties went back before him later in the morning for about five minutes but that changed nothing.

The father's appeal

26. I shall deal first with the father's appeal against the permission to the mother to remove the children temporarily to the Ukraine this month.

27. The father makes these submissions. Firstly, that the judge should have found a real risk of disobedience to the return order in the light of the events in November, in the light of his overall findings and in the light of the influence that S bore over the mother. He should, says Ms Kirby, have carried out some kind of analysis of the risk of retention and the consequences if that occurred, in the manner of the decision of this court in Re R [2013] EWCA 1115.

28. Finally, Ms Kirby submits that the father was, in effect, ambushed by an application of which they had had no notice before the day of the hearing. There was no evidence before the court on which the judge could carry out a proper assessment of the situation, nor was there any explanation of the refusal of the visa for the baby, something that was regarded by all lawyers present as being surprising. In addition to that, the submission was that any incentive for obedience on the part of the mother had been removed by the adverse decision which had just been given.

29. In response it is said by Ms Eaton that the judge did not identify the mother as being a flight risk, and that he was entitled to take account of the wider canvas with which he was familiar. He had trusted her to be a primary carer. She had brought the children back four or five times since November and had not breached any contact order. Even when she received the adverse decision on the eve of the hearing and had the children's passports, she did not take them away, she can give security to the court and to the father, and finally the order by its nature allows for the parents and children to travel abroad on giving notice to each other.

30. Ms Eaton argues that the analysis in Re R, which applies to non-Convention countries cannot apply here and that the judge was entitled to take a view and rely on the Ukrainian authorities. As to issues of fairness, the fact that the mother would want to travel was foreseeable, as everybody should have realised.

31. I consider that the appeal against paragraphs 3 and 6 of the order which grant the temporary permission must succeed. Against the background of the findings that he had just

made, the judge's decision to grant immediate permission for the children to return to the Ukraine was inconsistent. He was bound to weigh up the arguments in reaching a conclusion about the degree of risk that might exist. The fact that the application was made without notice (or without effective notice) in the middle of a busy list meant that this did not happen. True it is that Ukraine is a Hague Convention country, but the process of enforcement of return might be protracted. True it is that the order allows the mother, and indeed the father, to travel in future, but only on 14 days' notice. That allows opposition to be properly voiced and safeguards to be put in place, for example, an order in the Ukraine to be put in place to prevent default or the consequences of default. True it is that the mother had complied with previous orders for the return of the children, but those were in the context of her previous retention and her incentives for compliance were now quite different. True it is that the situation with the new born baby was very difficult for the mother, but that arose from the unexplained difficulties concerning the visa and the consequences of the separation in the short-term of the two children from their mother and from the baby were, on the face of it, far less concerning than the possible consequences of the separation of the two children from their father in the medium to long-term.

32. In my view, had the judge had the opportunity to address these matters fully, it is more than likely than permission for temporary removal would not have been granted in conformity with his overall view of the case.

33. I would therefore allow the appeal on that ground and set aside paragraphs 3 and 6 of the order. There are also a number of consequential amendments to the order which should be considered at a later stage.

The mother's application for permission to appeal

34. I turn to the mother's application for permission to appeal for which, of course, she needs to show that there is a real prospect of the judge being shown to have been wrong in his decision or for there to be some compelling reason for an appeal to proceed.

35. Ms Eaton relies on both limbs of the permission test. In particular, as a matter of law she says that the judge introduced an incorrect burden of proof and that he, on a doctrinaire

basis, disregarded the impact of his decision on the mother who is the children's primary carer. Overall, she charges the judge with making a decision that was adult-focused, emphasising blame rather than welfare and overlooking the effects of the decision on the children as a result of the effects on their mother. She says that there was no proper analysis at all of positive facets of the mother's plan and negative aspects of the father's opposition.

36. She points to the fact that what she described as the status quo had arisen for the children in Kiev since the end of last year, the judge's conclusions in relation to the events when the children were brought to the Ukraine, were not justified and infected his overall approach. Lastly, he accepted hearsay evidence in relation to the position of the grandmother and the nanny in an unprincipled way.

37. I state my conclusion in relation to the mother's application for permission to appeal.

38. In my view, the application would not have a real prospect of success if it was allowed to continue. Individually, I understand the arguments presented by Ms Eaton on behalf of the mother, but taken together or collectively, none of them address the fatal flaws that were at the heart of this relocation application. Firstly, the judge, having seen the parties and read all the evidence, did not accept that the mother's motivation for this move was a genuine one. Secondly, he had no confidence in her trustworthiness. Thirdly, there was what might be described as a gaping hole in the presentation of the case left by the absence from the court's view of S, who the judge considered to be a prime mover in there being a move at all.

39. Against the background of those effectively undeniable difficulties, the submissions about the judge's approach to the law or analysis of the evidence are, in my view, matters of much lesser significance. For what it is worth, however, I would not accept that he applied a burden of proof wrongly. What he said in paragraph 5 of his judgment is this:

> "Common sense dictates that where one parent seeks that a well-functioning status quo should be changed, she has to make the running in terms of the evidence and argument to show that change would be more in the children's interests than no change."

40. In the welfare checklist, one of the matters that the court is obliged to take account of is the effect of any change in the children's circumstances. Whether or not the judge was right to reformulate matters in any different way, a reading of his judgment as a whole does not lead to the conclusion that he invested the mother with a burden of proof. Nor do I accept the criticism that he approached matters in a linear manner when, having concluded that the mother's proposal was not in the children's interests, he dismissed her application. It is clear from the judgment that the judge was aware of all the aspects of the matter and his dismissal of the mother's application was no more than that.

41. His view of the level of disappointment that might be caused to a parent in these circumstances, took him to one of his own earlier decisions, AR (Relocation) [2010] EWHC 1346, in which he expressed views to the effect that stoical parents should not be penalised at the expense of others less stoical. To my mind, it may not be particularly helpful to introduce additional concepts when applying the welfare checklist, which already includes a consideration of the ability of a parent to meet the needs of a child. But however the judge expressed himself, it is clear from an overall reading of the judgment that he looked carefully at the motivation of the mother and at the likely consequences for her if her application was refused. He concluded that, notwithstanding what S had said, that he could easily be granted a visa to come and live here.

42. The balance of the mother's application concerns issues that were essentially to do with findings of fact and in particular the findings in relation to events at the end of last year. Listening to Ms Eaton's submissions, I would readily accept that the judge might have reached different conclusions about those matters. But he did not and there is, in my view, no basis upon which this court could be brought to say, if the appeal continued, that he should have decided those matters differently.

43. We have been taken in quite narrow focus to the medical evidence that the mother secured after her hospital admission. That was but one part of what concerned the judge. He also had to consider why the mother went in the first place, whether there was a good reason, and whether, as he found, her underlying intention was to set up a status quo. Indeed, that matter, the status quo, formed another part of the mother's argument in this court. In the context of this case, it seems to me to be a weak argument only.

44. Lastly, in my view, the judge's concern at the position of S was perhaps, above all, a concern that he was entitled to hold. An application for relocation can scarcely expect to succeed if the applicant and the members of her close family are unwilling to put their cards on the table.

45. In all of these circumstances, I see no prospect of the mother persuading this court at a further hearing to interfere with the judge's main decision in relation to her relocation application and I would refuse her application for permission to appeal.

46. That leaves only matters which can perhaps be dealt with after judgment in relation to the revision the order consequential upon the decisions taken by this court.

LORD JUSTICE McFARLANE:

47. I agree, for the reasons given my Lord, that the father's appeal should be allowed and that the mother's application for permission to appeal is to be refused. It follows that the leave to the mother granted by the judge to remove the children to Ukraine until 27 May, as recorded in paragraphs 3 and 6 of the order is set aside.

48. There also is now no longer a pre-appeal period that falls for consideration and in those circumstances, as I understand the mother's case, she does not seek to vary the order that would otherwise run after 27 May. As my Lord has indicated, the wording of the order will require some consideration and, as will have been apparent during oral submissions, both my Lord and I are concerned as to the terms of paragraph 13 in its current wording, insofar as it provides for removal on less that 14 days' notice if it is impracticable to give such notice and provided reasonable notice has been given.

49. Our preliminary view is that that wording simply invites further short-notice litigation between the parties and leaves entirely in the air, and at the first instance, the decision of the person who wishes to remove the children, contemplation of what is or is not impracticable, or what is or is not reasonable. It may be that the default position should simply be 14 days' notice and if any party wishes to remove the children on a shorter timescale, then the ball is in their court to make an application. But that is merely an observation at this stage and we would invite the parties to consider alternative drafting.

50. Two or three further matters require clarification. Ms Eaton submitted that the mother had leave under section 13 of the Children Act to remove the children for a period of up to a month, she having a "live with" order. From reading the judge's order, in particular the wording of the warning which is at the foot of the order, it is plain that in its current draft, that has been modified so as expressly to be subject to the 14-day notice requirement in paragraph 13.

51. Secondly, it may well be that the parties wish to consider including a penal notice in the order and, as my Lord has indicated, consideration might be given to the requirement for a mirror order in whatever jurisdiction the children may be taken to.

52. With those observations, unless my Lord has anything further of detail to add, we look to the parties to see whether they wish to spend time in considering drafts now or to make submissions to the court at this stage as to what the final version of the order should be.

Order: Appeal of the father allowed; application of the mother for leave to appeal refused.