



Neutral Citation Number: [2024] EWHC 2687 (Fam)

Case No: FD24P00118

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

-

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/10/2024

Before :

THE HONOURABLE MRS JUSTICE JUDD

Between :

D	<u>Applicant</u>
- and -	
D	<u>1st Respondent</u>
-and-	
Y and M	<u>2nd & 3rd</u>
(through their children's guardian)	<u>Respondents</u>

Naomi Wiseman (instructed by **Shepherd Harris**) for the **Applicant**
Katy Chokowry (instructed by **IFLG**) for the **1st Respondent**
Christopher Osborne of Cafcass Legal for the **2nd & 3rd Respondents**

Hearing dates: 9th-11th October 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 24th October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MRS JUSTICE JUDD

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must

ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Judd :

Introduction

1. This is an application by a father for the return of the parties two youngest children to Norway. The background is somewhat unusual for a case brought under the 1980 Hague Convention for the applicant father did not bring proceedings for almost four years after the children were brought here. In that time he visited the children on a number of occasions, and, in 2023, agreed with the mother that the oldest children should go to Norway for a holiday.
2. When the oldest children arrived in Norway they made some allegations about the mother's treatment of them. They did not return to England after the holiday, and the mother travelled to Norway to try and retrieve them. There was a scene at the home, the father called the police, and the mother had to leave. The authorities in Norway conducted an investigation, interviewing the oldest children about their allegation. A referral was made to Children's Services in this country with respect to the two youngest children. An assessment was carried out by them in April 2024 which concluded that, whilst there were concerns that the mother had used physical chastisement, home conditions were good, the mother had support from her family, and the children appeared to have a good relationship with her. The case was closed.
3. This application was issued on 15th March 2024. The father sought and obtained location and passport orders on the basis of his expressed fear that the mother would remove the children to Somalia if she was made aware of the proceedings in advance.

Family background

4. The parents were both born in Somalia, moving to Norway when they were young. They married there in 2010 and have had children together, the youngest being the subjects of this application (they are now aged 6 and 5). The family all lived in Norway until 2020 save for a period of a year between July 2018 and July 2019 when they were, for the most part, in Dubai.
5. In the summer of 2020, in disputed circumstances, the mother and all the children came to England. They remained here until July 2022 when they went to Somalia, again in disputed circumstances. They were there until March 2023 when they returned to England. The youngest children have remained here ever since. As stated above, in the summer of 2023 the parents agreed that the older four children would travel to Norway for a holiday with the father.

The parties' respective cases

6. The father's case is that the children were removed to England in 2020 in breach of his rights of custody and without his permission. He said he repeatedly asked the mother to return them and she would not. He says she also took them to Somalia without his consent. Whilst he acknowledges that the period of time which elapsed between the children coming here and the application brings the issue of settlement into play pursuant to Article 12, he argues that the children are not settled because of their experiences in the care of the mother. In the alternative he submits that the court should decline to exercise its discretion to refuse a return. The Convention sets no

time limit for applications and a summary return order should be made despite the length of time that has passed.

7. The mother raises the defences of consent, acquiescence, settlement and Article 13(b). Her case is that the father consented to the children coming to live in England, and never asked her to return them. She says that the father is motivated by the fact that she now has a new partner.
8. The Children's Guardian submits that the children are settled in this country and return orders should not be made.

The hearing

9. I have read all the documents in the bundle provided to me, and the report of the Children's Guardian. I heard oral evidence from the mother and father as to the question of consent and acquiescence, and oral evidence from the Guardian as to settlement.

The father's evidence

10. In his statement and oral evidence the father's evidence was that he and the mother agreed she could bring the children to England for a holiday for some two weeks in August 2020, but not to live. He said that he tried many times (including by visiting the family) to persuade her to return the children but she refused. He felt helpless and did not report her to the authorities because he did not want to create a problem for the children. In his oral evidence he said he had stopped asking the mother for the children's return following their separation in 2021, saying that it had taken him a long time to give up.
11. He said that the mother took the children to Somalia in 2022 without his permission, having tricked him into renewing their passports by suggesting they would all be coming back to Norway. He visited Somalia to try and persuade the mother to bring the children back, but she refused. He said he did not report her to the authorities or take action because he knew that there were no treaties between Norway and Somalia. It was when she took the children to Somalia that the father said he again asked the mother to return the children to Norway and persisted in doing so when they came back to England. The parties agreed that the older children should go for a holiday in Norway in the summer of 2023, and, when they made allegations to him of ill-treatment by their mother he became concerned. In his statement he said that the children refused to return. The mother went to Norway to try and get the children, and he called the police. The Norwegian Child Welfare Services became involved and interviewed the children. They are apparently waiting to interview the mother. In his initial statement the father said 'In the meantime, I am extremely concerned about [the children's] well-being in England with the Respondent and respectfully seek their immediate return'. He also stated that he was concerned the mother would remove them to Somalia with the children continuing to live an unstable life and continuing to be subjected to violence, not only at the hands of the mother, but in Somalian schools.
12. I found the father's evidence about the circumstances in which the children came to arrive in England in the summer of 2020 to be vague and confusing. In his oral evidence there were some things that he volunteered for the first time. He accepted,

for example, as the mother has always asserted, that he had been in England in July 2020, albeit saying he had left before she arrived. He said at first that he had come to England on 10th July and went back on 30th. He said he still had the ticket. Later in his evidence he said that he did not go straight back to Norway on 30th July but went to Dubai for a week first.

13. When asked about what had happened in advance of the move to England, he denied that the children's school in Norway had been told that they were leaving, or that he had played any part in the decision to give up their flat. He said that this was the mother's doing when he was away. His evidence remained that the mother had bought tickets for herself and the children to come to England with money presumably provided to her by her mother, and that he had been given a return date of 17th August.
14. The father accepted that the children's school had phoned him in early September about the children's whereabouts. He stated that he told the school that he did not want the children to be in England although there is no mention of this in their letter.
15. By contrast with the father, the mother's evidence, both in her written statements and before the court was much more detailed as to the circumstances of she and the children coming to England in 2020, and thereafter. What she said to the Guardian was consistent with what she said to this court. She was adamant that it was at the father's instigation that the family came to live in England in 2020, having given up the tenancy of their flat and telling the children's schools that they would be leaving, albeit to go to schools in another part of Norway. Her evidence has always been that in the first instance it was the intention to go and live near her mother whilst the father found work in England, but that she could not find accommodation. She said that the father had phoned her from England just a few days before they left on 9th August and told her to come.
16. The mother was also clear that the father had never asked her to bring the children back to Norway, nor did she take the children to Somalia without his agreement. In fact he came over on numerous occasions to see the children over the years that they were here, and in Somalia too.
17. I acknowledge that what the mother was reported as saying to the social worker for the assessment in March/April of this year was less clear about the circumstances in which they left to go to England, and that the mother said there that she and the father had divorced in 2020 because of his cheating on her. I note that the focus of this report was on the welfare of the children and not whether or not the father had consented. The report does not deal with that at all.
18. I turn to the Guardian's evidence. In order to complete her enquiries the Guardian spoke to both the mother and father at length. She met both the children, joining the mother to collect them from school and seeing them at home afterwards. I will not set out all of her evidence here as it is clearly set out in the report. Suffice it to say she concluded that the children clearly identified their environment as their home, and that they have established school lives where they are considered to be well integrated and settled. The children experienced school positively, conveyed close relationships with members of the extended family who lived locally. The Guardian said 'the children's day to day lives appear well-settled in England and there appears to be a

good prospect of their circumstances remaining secure and stable'. Whilst taking into account the social work assessment of the children, the investigation by the Norwegian authorities and what the children have said about physical punishment her own observations were positive, with the children being relaxed, uninhibited and happy, with reciprocal displays of affection.

19. She noted the significant concern that the children have been separated from their older siblings, having been raised with them for the whole of their lives until 2023. She noted that they have been very much affected by the loss of their older siblings in the home, but that they have adjusted. Whilst she advised it is essential for the children to be given the opportunity to renew their relationships she was not of the view that this undermined her overall assessment of the children's settlement.

The law

Settlement

20. Art 12 of the Convention provides:

"The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment".

21. In the case of *Cannon v Cannon (Abduction: Settlement) (No1)* [2005] 1 WLR 32, the Court of Appeal determined that settlement comprises a physical, psychological and emotional component and that a residual discretion to order a return exists by virtue of Art 18 and under Art 12 itself.

22. In *Re B (A Child)* [2018] EWHC 1643 (Fam), Williams J summarised the law as follows:-

"41. The courts have considered the principles of settlement in a number of cases, the principal amongst which are (a) Re N (Minors) (Abduction) [1991] 1 FLR 413, (b) Cannon v Cannon [2005] 1 FLR 169 ; (c) C v C [2006] 2 FLR 797 ; (d) Re M (Zimbabwe) [2008] 1 FLR 251 . A recent example of the application of the principles is Re T (A Child - Hague Convention proceedings) [2016] EWHC 3554 (Fam) . The principles which can be derived from those cases are these:

(i) The proceedings must be commenced within one year of the abduction. The making of a complaint to police or an application to a Central Authority does not suffice.

(ii) The focus must be on the child. Settlement must be considered from the child's perspective, not the adult's. The date for the assessment is that date of the commencement of

proceedings not the date of the hearing. This is aimed at preventing settlement being achieved by delay in the process.

(iii) Settlement involves both physical and emotional or psychological components. Physically, it involves being established or integrated into an environment comprising a home and school, a social and family network, activities, opportunities. Emotional or psychological settlement connotes security and stability within that environment. It is more than mere adjustment to present surroundings.

(iv) Concealment and delay may be relevant to establishing settlement. Concealment is likely to undermine settlement. Living openly is likely to permit greater settlement. The absence of a relationship with a left behind parent will be an important consideration in determining whether a child is settled.

(v) A broad and purposive construction will properly reflect the facts of each case – it does not require a 2 stage approach but must, to use a probably over-used expression involve a holistic assessment of whether the child is settled in its new environment. It has to be kept in mind that the settlement exception is intended to reflect welfare. The Article 12 settlement exception of all the exceptions is most welfare focused. The underlying purpose of the exception is to enable the court in furtherance of the welfare of the child to decline a summary return because imposing a summary return (i.e. without a more detailed consideration of welfare) might compound the harm caused by the original abduction by uprooting a child summarily from his by now familiar environment.

42. As I have said earlier, there is clearly a degree of overlap between the concepts of settlement and habitual residence. Settlement does not require a complete settlement, any more than habitual residence requires full integration. Settlement is plainly an evaluation which is, to some degree, subjective. There will be a spectrum ranging from the obviously and completely settled to the very unsettled. In between there are many possibilities.”

23. Counsel are not aware of any authorities where the court has exercised its discretion to return children who are found to be settled. There is some disagreement about the relevant date at which the court considers the issue of settlement, but for the most part the courts have taken the view that it should be the date of the application, and I do so here.

Consent

24. In Re G (Abduction: Consent/Discretion) [2021] EWCA Civ 139 the Court of Appeal stated as follows:-

“24. ... The applicable principles were considered by this court in Re P-J (Children) (Abduction: Consent) [2009] EWCA Civ 588 [2010] 1 WLR 1237, drawing on the decisions in Re M (Abduction) (Consent: Acquiescence) [1999] 1 FLR 174 (Wall J); In re C (Abduction: Consent) [1996] 1 FLR 414 (Holman J); In re K (Abduction: Consent) [1997] 2 FLR 212 (Hale J); and Re L (Abduction: Future Consent) [2007] EWHC 2181 (Fam); [2008] 1 FLR 914 (Bodey J). Other decisions of note are C v H (Abduction: Consent) [2009] EWHC 2660 (Fam); [2010] 1 FLR 225 (Munby J); and A v T [2011] EWHC 3882 (Fam); [2012] 2 FLR 1333 (Baker J).

25. *The position can be summarised in this way:*

(1) The removing parent must prove consent to the civil standard. The inquiry is fact-specific and the ultimate question is: had the remaining parent clearly and unequivocally consented to the removal?

(2) The presence or absence of consent must be viewed in the context of the common sense realities of family life and family breakdown, and not in the context of the law of contract. The court will focus on the reality of the family's situation and consider all the circumstances in making its assessment. A primary focus is likely to be on the words and actions of the remaining parent. The words and actions of the removing parent may also be a significant indicator of whether that parent genuinely believed that consent had been given, and consequently an indicator of whether consent had in fact been given.

(3) Consent must be clear and unequivocal but it does not have to be given in writing or in any particular terms. It may be manifested by words and/or inferred from conduct.

(4) A person may consent with the gravest reservations, but that does not render the consent invalid if the evidence is otherwise sufficient to establish it.

(5) Consent must be real in the sense that it relates to a removal in circumstances that are broadly within the contemplation of both parties.

(6) Consent that would not have been given but for some material deception or misrepresentation on the part of the removing parent will not be valid.

(7) Consent must be given before removal. Advance consent may be given to removal at some future but unspecified time or upon the happening of an event that can be objectively verified by both parties. To be valid, such consent must still be operative at the time of the removal.

(8) Consent can be withdrawn at any time before the actual removal. The question will be whether, in the light of the words and/or conduct of the remaining parent, the previous consent remained operative or not.

(9) The giving or withdrawing of consent by a remaining parent must have been made known by words and/or conduct to the removing parent. A consent or withdrawal of consent of which a removing parent is unaware cannot be effective.”

Acquiescence

25. In Re H and others (Minors) (Abduction :Acquiescence) [1998] AC 72 , Lord Browne-Wilkinson set out the following applicable principles:

“(1) For the purposes of Art 13 of the Convention, the question whether the wronged parent has ‘acquiesced’ in the removal or retention of the child depends upon his actual state of mind. As Neill LJ said in Re S (Minors) ‘the court is primarily concerned, not with the question of the other parent’s perception of the applicant’s conduct, but with the question whether the applicant acquiesced in fact’.

(2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.

(3) The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law.

(4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced”.

26. In the case of Re W (Abduction: Acquiescence: Children’s Objections) [2010] EWHC 332 Black J (as she then was) concluded that a father had not acquiesced in circumstances where he had travelled to the UK and remained there for a few months attempting to salvage his relationship, during which he had lived with the mother and

children for a time. In *Re G (Abduction: Withdrawal of Proceedings, Acquiescence and Habitual Residence)* EWHC 2807 the Court of Appeal held that the withdrawal of a first set of proceedings under the Hague Convention did not amount in law to equivalent of an adjudication, or species of waiver or estoppel preventing the taking of fresh proceedings after an abortive attempt at reconciliation. It should be noted that in that particular case the order recording the withdrawal proceedings had specifically recorded that the father did not acquiesce in the wrongful retention of the child by the mother.

Discretion

27. In the event that the mother proves that any of the defences are made out, then there is a discretion to refuse to order a return. The discretion is at large and there is no exhaustive list of factors. The court should have regard to welfare considerations so far as it is possible to take account of them on the limited evidence available. The court must give weight to Convention considerations and at all times bear in mind that the Convention only works, in general, if children who have been wrongfully removed or retained from their country of habitual residence are returned promptly. There is no requirement to establish exceptionality; policy considerations will be balanced against other factors relating to any defence established and welfare considerations (*Re M* [2007] UKHL 55).

The issues

28. There is no doubt that the mother brought all the children, including the ones who are the subject of this application, to England in 2020 or that the father has rights of custody. The issues for the court relate to the circumstances in which that happened, and the question of settlement.

Consent/Acquiescence

29. Whilst there is an absence of documentary evidence in this case, the mother's evidence that the father not only agreed to but prompted the children's move to live in England is cogent and clear. I have no hesitation in accepting her evidence in preference to that of the father. Her evidence that the parties gave a month's notice to the landlord of their flat and packed up all their belongings is consistent with what she said about going to stay with her mother, and the information that was given to the school. At this point the parties had no home of their own in Norway, and I do not accept that the mother did all of this without the father's knowledge or agreement. I accept the mother's evidence that this was part of a plan for the family to live in England when the father had secured work.
30. I also accept that when the mother said to the father that she could not find suitable accommodation near her mother to live whilst the father secured work, he told her to bring them to England then, and bought the tickets. Whether he was in England at the time or in Dubai is not possible to say.
31. If the father had told the school that the children had been taken to England against his wishes, it is more than likely that this would have been recorded in the letter.

32. Further, I do not accept the father's evidence that he repeatedly asked the mother to return to Norway with the children. He stated that he did not report the mother to the authorities because he did not want to cause trouble for the children, but I consider the reason is that he did not take any action over such a prolonged period was because he had agreed for the children to come in the first place. There is a lack of supportive evidence in this case generally, but it is striking that the father has not been able to produce any evidence of any digital communication in which he expresses his objections. The mother has not done so either, but despite the fact that the burden of proof lies upon her I accept that it is more difficult for her to prove a negative.
33. It is therefore my finding that the father unequivocally consented to the mother bringing the children to this country to live, and that this consent was given before the children left. It was part of a longer term plan that was accelerated when the mother could not find suitable accommodation for herself and the children near her mother whilst they waited for the father to make arrangements in England.
34. Subsequent evidence demonstrates that the father continued to agree to the children remaining here. It is highly unlikely that the mother would have agreed to the older children going to Norway for a holiday in the summer of 2023 (or indeed suggested that she and the younger children accompany them). had she known the father objected to the children being in England.

Settlement

35. Apart from the period between July 2022 and March 2023 when the mother and children were in Somalia, the children have been in the same area of this country since 2020. That amounts to over three of the last four years, a very large proportion of their lives. Given their ages they have no memories of Norway. Their first language is English.
36. The father has sought to argue through Ms Wiseman that the children are not really settled in England. He states that they have lived a peripatetic existence, not knowing whether they are about to move from one place to another. He states that the move to Somalia, the introduction of a new stepfather, and ill-treatment by their mother will have prevented them from becoming settled in psychological or physical terms. Ms Wiseman submits on his behalf that the Guardian has not given these matters sufficient weight, nor the fact that the siblings have been separated. She argues the Guardian has been unfair to the father by suggesting that it is his own actions that have brought about that separation and in any event that the source of such a destabilizing factor is not relevant.
37. I reject these arguments. The Guardian's evidence was careful, cogent and entirely well-founded. I fully accept what she says. The children have not led a peripatetic existence since 2020. Although they have moved house they have remained in the same area, close to their maternal family. The visit to Somalia took place for a few months and ended a year before these proceedings were started. Whilst there is some evidence that the children have been subjected to some physical punishment the conclusions of the assessing social worker and this experienced Guardian is that the children and their mother have a good and affectionate relationship and the children are not unhappy or wary of her.

38. The separation of siblings is a serious matter, and it is plain that the children are missing their brothers and sisters. The Guardian's view is that this has not prevented the children from being thoroughly settled in their home environment. I agree. This is hardly a surprise when the time that the children have spent in this country is so very long. Article 12 of the Convention refers to the child being settled in a 'new environment'. The children's environment here is not new at all.
39. The findings above give rise to a discretion whereby the court can decline to order that the children should return. The facts in this case are stark. The children have lived here for a long time. They have never been separated from their mother and despite the loss of their older siblings are happy in their home environment and at school. A move back to Norway would be likely to affect them very much, given the fact they have no memories of being there, they do not speak the language, and would have to go to a completely new environment. This is not a case where the object of the convention to secure the prompt return of children to their country of habitual residence so that decisions for that child's future can be made there can carry any significant weight.

Conclusion

40. I therefore find (a) that the father consented to the children's removal to live in England. I also find that a period of almost four years elapsed between the date the children came here and the date of the application and the children are settled here. For the reasons set out above, I refuse the applicant's application for return orders.

Postscript – Article 13(b)

41. The mother also raised a defence under Article 13b in this case. No doubt because of the strength of the other defences, this aspect of the case has not featured very much at this hearing albeit the parties have filed statements dealing with the issue of protective measures. The main issue of concern is the position so far as proceedings against the mother in Norway as the police still apparently wish to question her about the allegations made by the older children. I do not have all the information before me as the last direction made by Mr. Justice Poole, namely that ICACU respectfully requests disclosure of all documentation in relation to the criminal investigation has not yet been complied with. In my judgment the court would need to see this in order to make an informed decision as to whether there is a grave risk that the children would be exposed to psychological harm or placed in an intolerable situation by being separated from their mother. As I have come to a clear view that I should not return the children on the basis of the other matters, in my judgment it would be disproportionate to deal with this any further.