Neutral Citation Number: [2016] EWHC 504 (Fam)

Case No: FD15P00438

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 March 2016

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

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In the Matter of D (Children) (Child Abduction: Practice)

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Mr Richard Harrison QC (instructed by Lyons Davidson) for the applicant father
Mr Edward Bennett (instructed by Dawson Cornwell) for the respondent mother

Hearing date: 20 January 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

This judgment was handed down in open court

Sir James Munby, President of the Family Division :

1. This is an application by a father for relief under the Hague Convention. It raises an important question of practice on which it is desirable that I give a considered judgment.

The background

2. The background facts are shortly stated.

3. The father is American, the mother English. Their two children were born in 2007 and 2008 respectively. Until the events giving rise to the litigation, the family lived in the United States of America. Following the breakdown of the marriage, there were proceedings in the Superior Court of the State of California, County of Orange. I need not go into the details. What is important for present purposes is that on 18 February 2015 that court awarded legal and physical custody of the children to the mother and granted her a domestic violence restraining order against the father, and that on 17 March 2015 the same court made an ex parte order authorising the mother to remove the children from the United States.

4. In the course of subsequent proceedings in the Court of Appeal of the State of California commenced by the father on 20 April 2015 (that is, *after* the stay had expired), that court, in a judgment given on 24 September 2015, made clear that under the law of California a stay of 30 days of the order made on 17 March 2015 arose automatically by operation of law (see Transcript of judgment of Fybel J, with whom Rylaarsdam Acting PJ and Ikola J concurred, page 12). On 25 March 2015, while that stay was in place, the mother brought the two children to this country. Whether or not she was aware of the stay I do not know. It has not been explored before me.

5. On 15 September 2015 the father commenced proceedings in this court seeking the summary return of the children to the United States in accordance with the Hague Convention. I need not go through the subsequent history of the proceedings in this country. More important is the litigation in California.

6. On 24 September 2015 the father's challenge to the order that had been made on 17 March 2015 was determined, being allowed in part and denied in part. The reasons for that decision were explained in detail in the judgment of Fybel J. It suffices for present purposes to quote the following passage from the Introduction to his judgment (Transcript, page 2):

> "We grant [the father's] writ petition in part and order the issuance of a peremptory writ of mandate directing the respondent court to (1) conduct an evidentiary hearing on the issue of visitation and contact, make appropriate findings, and issue a new visitation and contact order; (2) conduct an evidentiary hearing on [the mother's] request to move to England with [the children]; and (3) conduct an evidentiary hearing to determine permanent custody. We will not, however, vacate any part of the domestic violence restraining order or the ex parte move-away order and will not require [the mother and children] to return to Orange County pending the evidentiary

> hearings. As we shall explain, the record disclosed exigent circumstances justifying the respondent court's ex parte order permitting [her] to move to England with [them]."

Later in his judgment (Transcript, page 14) Fybel J said that "[The mother and children] need not return to Orange County but may testify by telephone or Skype unless the respondent court, in exercise of its discretion and for good cause, determines otherwise."

7. Following that, the case was further heard in the Superior Court on 13 November 2015, 8 January 2016 and 15 January 2016. I have transcripts of the first and third of those hearings. It appears from the latter that the hearing in the Californian court has now been fixed for 2 May 2016. When the father's attorney asked Judge Miller on 15 January 2016 whether he would be ordering the children and the mother back for the hearing, the Judge replied (Transcript, page 14): "Unlikely. If you want to bring a formal motion, I'll consider it."

The hearing on 20 January 2016

8. It was in that state of affairs that the Hague proceedings came before me on 20 January 2016. The father and the mother were each represented by counsel expert in such cases, the father by Mr Richard Harrison QC and the mother by Mr Edward Bennett. Each acknowledged that, in the circumstances, there was no utility in continuing with the Hague proceedings. They differed in their analysis of what I should do. Mr Harrison sought permission to *withdraw* the Hague proceedings; Mr Bennett said they should be *struck out or summarily dismissed*; Mr Harrison disputed that the court had jurisdiction to make an order in the terms sought by Mr Bennett. Each was concerned that, whatever order I made, the parties should not be left exposed to the risk of the kind of uncertainties that Sir Mark Potter P had had to consider in somewhat similar circumstances in *Re G (Abduction: Withdrawal of Proceedings, Acquiescence and Habitual Residence)* [2007] EWHC 2807 (Fam), [2008] 2 FLR 351, paras 58-62.

9. In the event the parties were able to agree the terms of a consent order, which I was content to make, giving the father "permission to withdraw his application". The order, appropriately in my judgment, recited the basis upon which it was being made. It is convenient to set out those recitals to the order in the Annex to this judgment.

The law: the authorities

10. It is convenient to start with the decision of the Court of Appeal in *W v Ealing London Borough Council* [1993] 2 FLR 788, a case involving an application for contact under section 34 of the Children Act 1989. As it happened, I appeared for the appellant. My submission, summarised by Sir Stephen Brown P at 793, was that the case raised a question of law of general importance as to the power of the court to dismiss summarily, without hearing oral evidence or further investigation, an application under the Act for which the leave of the court is not required; that where Parliament has said that proceedings can be brought without leave it is not for the court to cut those proceedings short by summarily dismissing them unless it can be shown, in accordance with established principle, that the proceedings are an abuse of the process; and that proceedings are only to be 'struck out' if they are obviously

frivolous or vexatious or obviously unsustainable or if it is perfectly clear that the claim cannot succeed.

11. Giving the judgment of the Court of Appeal, Sir Stephen said this (at 794):

> "We reject Mr Munby's contention that an applicant in all applications for which leave is not required is entitled to a full trial unless only the respondent can satisfy the stringent test required to justify striking out proceedings in ordinary civil litigation. In the first place, as Balcombe LJ said in … [*Re A (Minors) (Residence Orders: Leave to Apply)* [1992] Fam 182, 194] '… this is not ordinary civil litigation: it concerns children'. In our judgment that is a salutary observation and it would be unwise in this jurisdiction to seek to restrict the discretion of the court by imposing a rigid formula upon the conduct of proceedings … [The judge] had to decide what, if any, further directions should be given and in particular whether the matter should proceed to what has been termed a 'full hearing' with further statements and oral evidence."

12. I can now jump forward to four more recent cases in the Court of Appeal: *Re C (Family Proceedings: Case Management)* [2012] EWCA Civ 1489, [2013] 1 FLR 1089; *Re B (A Child)* [2012] EWCA Civ 1545; *Re TG (Care Proceedings: Case Management: Expert Evidence)* [2013] EWCA Civ 5, [2013] 1 FLR 1250, paras 27-28, where the relevant passages from the two earlier cases are set out; and *Re Q (A Child)* [2015] EWCA Civ 991. The relevant principles are to be found in *Re C*, paras 14-15:

> "14 … these are not ordinary civil proceedings, they are family proceedings, where it is fundamental that the judge has an essentially inquisitorial role, his duty being to further the welfare of the children which is, by statute, his paramount consideration. It has long been recognised – and authority need not be quoted for this proposition – that for this reason a judge exercising the family jurisdiction has a much broader discretion than he would in the civil jurisdiction to determine the way in which an application … should be pursued. In an appropriate case he can summarily dismiss the application as being, if not groundless, lacking enough merit to justify pursuing the matter. He may determine that the matter is one to be dealt with on the basis of written evidence and oral submissions without the need for oral evidence. He may … decide to hear the evidence of the applicant and then take stock of where the matter stands at the end of the evidence.
>
> 15 The judge in such a situation will always be concerned to ask himself: is there some solid reason in the interests of the children why I should embark upon, or, having embarked upon, why I should continue exploring the matters which one or other of the parents seeks to raise. If there is or may be solid

> advantage to the children in doing so, then the inquiry will proceed, albeit it may be on the basis of submissions rather than oral evidence. But if the judge is satisfied that no advantage to the children is going to be obtained by continuing the investigation further, then it is perfectly within his case management powers and the proper exercises of his discretion so to decide and to determine that the proceedings should go no further."

13. Mr Harrison referred me to FPR 4.4 and to the judgment of Lord Wilson JSC in *Wyatt v Vince (Nos 1 and 2)* [2015] UKSC 14, [2015] 1 WLR 1228. As to this, I need only observe that, as Lord Wilson was careful to point out (para 19), rule 4.4 does not apply to proceedings in relation to children: see the opening words of rule 4.4(1).

14. The question is the extent to which, if at all, the principles set out in the cases to which I have referred apply in Hague proceedings.

15. I have been taken to three cases bearing on the point. I shall take them in chronological order.

16. In *Re G (Abduction: Striking Out Application)* [1995] 2 FLR 410, Connell J struck out a father's application under the Convention, where the children had been within the jurisdiction for 2½ years, the father had delayed before commencing the proceedings, and the proceedings, once begun, had not been pursued with appropriate expedition. Connell J posed the question (at 414), what possible purpose could there be now to the father seeking to pursue the Hague Convention proceedings? He explained why he was making the order sought by the wife (415):

> "Having considered all the circumstances and in particular bearing in mind what in my judgment is the manifest failure of this father to conduct his Hague Convention proceedings with proper diligence and speed, the conclusion to which I come is that it is appropriate in the circumstances here to strike out the application of the father under the Hague Convention. The conclusion that I reach is that in the circumstances described, those proceedings have not been properly prosecuted and now amount to an abuse of the process of the court."

17. The other two cases are very recent. The first is the decision on 15 October 2015 of Holman J in *AF v HS* [2015] EWHC 2968 (Fam). This was a father's application under the Hague Convention following what Holman J referred to (para 10) as "blatant" child abduction by the mother. But, the mother's counsel submitted, the application should be struck out or otherwise summarily dismissed as "that act of abduction has in effect been overtaken by the subsequent events that the subsisting French orders themselves provide that the children should live here in England, and, to put it colloquially, it simply makes no sense now to contemplate their return forthwith to France when both parents are living here in London."

18. Holman J accepted the general thrust of the submission (paras 12-13):

> "12 It seems to me that in this unusual situation it is patently not appropriate that proceedings currently continue under the Hague Convention for the return of the children forthwith to France. The mother is living here and does not wish to return to France. The father is living here. The father wishes the children to live with him here, pursuant to, and by way of enforcement of, the French orders.
>
> 13 It is no doubt possible to wrap this case up in an immense amount of legal learning and elaborate reference to a number of international instruments, as, indeed, appears from the learned and sophisticated skeleton arguments of both counsel today. I prefer to stand back from that detail and adopt the shorter route. Although patently there was an historical wrongful removal and abduction of these children, the situation that now obtains simply is not the sort of situation at which the Hague Convention is directed. Neither parent currently actually desires that these children move back to France."

In the event, and in the particular circumstances of the case, Holman J made an order staying the proceedings rather than striking them out or summarily dismissing them.

19. The most recent authority is the decision on 26 November 2015 of Baker J in *Re W (Children) (Abduction: Striking Out)* [2015] EWHC 4002 (Fam). Baker J did not refer to Holman J's decision in *AF v HS*, presumably because he had not been referred to it. This was another application by a father in a Hague case where the mother complained that the father had delayed in commencing the proceedings: she had brought the children to this country in July 2013 but it was not until September 2015, more than two years later, that the father launched his application. The mother, relying upon Connell J's decision in *Re G*, applied to strike out the proceedings on the ground (see para 11) that it was "overwhelmingly likely" that her defence based on Article 12 – that the children were settled within the jurisdiction – would succeed. Baker J refused the mother's application, describing it as misconceived.

20. In the course of his judgment, Baker J said (para 14) that it was "highly significant that in the twenty years since the decision in *Re G* there has been no other reported authority in which an application under the Hague Convention has been struck out." He described the facts in *Re G* as (para 15) "quite extraordinary." He continued (paras 15-17):

> "15 … I am not surprised that there has been no other authority on striking out. The fact that there has been no authority since *Re G* illustrates to me that this is not a course which a court should generally have regard to in these circumstances.
>
> 16 The scheme of the Convention plainly allows for issues arising out of any delay in launching proceedings under the Convention to be taken into account under the settlement defence set out in Article 12. The scheme of the Convention,

> which stipulates a different approach depending on whether or not the children have been in the country to which they have been brought for more than twelve months, is carefully drawn so that the issue of delay can be further taken into account in the analysis which the court has to carry out on any defence of settlement raised against such an application.
>
> 17 It seems to me that the issues which Miss Miller has advanced in support of her application for a strike out of the father's application under the Convention are properly matters which should be considered under the defences which the mother raises of settlement and, if appropriate, acquiescence. In my judgment, it is generally inappropriate for the courts in this country to entertain an application to strike out a summary application under the Convention, save in the exceptional circumstances illustrated by the decision in *Re G*."

Discussion

21. I start with the obvious point that Hague proceedings are, of their very nature, summary. Indeed, they are required by the Convention and the relevant jurisprudence to be determined within six weeks, a much shorter timescale than most cases involving children. As Mr Harrison puts it, the issue therefore is when, if at all, the court should deal with Hague proceedings in a manner which is not merely 'summary' but 'ultra-summary'. The answer, surely, is 'not very often'. I bear in mind also that Hague proceeding are sui generis and that we must be cautious before applying too uncritically purely domestic approaches to what are, after all, international cases governed by an international Convention.

22. It is convenient to consider first Baker J's judgment in *Re W*. I have no doubt that Baker J was entirely right to decide the case as he did and for the reasons he gave. Where, as there, the basis for the attempt to abbreviate an already summary process was an argument going to the merits (or, more precisely, the asserted demerits of the other party's case) the short point, as Baker J explained, is that, save perhaps in an exceptional case, such arguments are properly to be dealt with as part of the substantive hearing and not by way of preliminary point. Preliminary points here, as in other jurisdictions, have an unfortunate tendency, unless kept under strict control, to cause the very delay which it is their object to avoid. I would expect cases in which it can be appropriate to follow the course adopted by Connell J in *Re G* to be most unusual and very rare. As Baker J commented, twenty years had elapsed before the point next arose in *Re W*.

23. I equally have no doubt that Holman J was entirely right to decide *AF v HS* as he did and for the reasons he gave. That was not a case where the basis of the application was a challenge going to the intrinsic merits of the Hague proceedings. It was, like the one before me, a case where the Hague proceedings had been overtaken by subsequent events – a change in the family's circumstances or developments in the foreign court – the effect of which was to deprive the Hague proceedings of any continuing utility and to make it unnecessary and inappropriate to allow the proceedings to continue in circumstances where there was no obvious benefit either to

the parents or to the children in carrying on. In such a case, in my judgment, the court undoubtedly has power, applying the principles in *Re C*, to bring the proceedings to a premature conclusion. In the nature of things, I would expect such cases to arise only infrequently. The vast bulk of Hague cases will – must – continue to a substantive hearing in the usual way.

24. In the present case, the father sought, and was given, permission to withdraw the Hague proceedings. Had he not sought permission to do so, I would, and essentially for the same reasons as commended themselves to Holman J in *AF v HS*, have made the order sought by Mr Bennett summarily dismissing the proceedings.

25. In his helpful submissions, Mr Harrison drew attention to the requirement to give the child the opportunity to be heard in Hague proceedings: see *In re D (A Child) (Abduction: Custody Rights)* [2006] UKHL 51, [2007] 1 AC 619. That does not mean, in my judgment, that the court is disabled, in an appropriate case, from summarily disposing of the proceedings, without making a substantive order, just because the child has not been heard. After all, I did not hear from the children before making the order agreed between Mr Harrison and Mr Bennett, nor, I should point out, did Mr Harrison ever suggest that I should.

26. I add three further observations. First, there is pressing need in the context of Hague proceedings to avoid satellite litigation and the inevitable over-elaborate and ever-elaborating jurisprudence which always accompanies it. Secondly, I would strongly deprecate any attempt to create a taxonomy distinguishing between, if I may be permitted to use the expressions, a Baker-type case and a Holman-type case: compare what I said in *Re F (Relocation)* [2012] EWCA Civ 1364, [2013] 1 FLR 645, paras 58, 60. Thirdly, and to emphasise points I have already made, the circumstances in which the court can properly adopt an 'ultra-summary' approach in Hague cases are very limited and the cases in which it can ever be appropriate to do so are likely to be very few and far between.

Annex

27. The recitals to my order of 20 January 2016 were as follows:

> "THE COURT RECORDS THAT:
>
> 1 It remains the father's wish to secure the return of the children to California, USA;
>
> 2 The father's case is that the removal of the children from the USA by the mother on or about 25 March 2015 was a wrongful removal within the meaning of Article 3 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereafter 'the 1980 Hague Convention');
>
> 3 The mother's case is that the removal of the children by her from the USA on or about 25 March 2015 was not a wrongful removal or alternatively that she acted in ignorance of the fact that it was unlawful;

4 The mother, in the event that proceedings under the 1980 Hague Convention were pursued by the father, would also assert that the court should not order the return of the children to the USA by virtue of:

(a) Article 13(b) of the 1980 Hague Convention; and

(b) Article 13(2) of the 1980 Hague Convention (the child objections exception);

5 The court has made no determination in relation to the parties' respective cases set out at paragraphs 2, 3 and 4 above;

6 In withdrawing the present proceedings the father does not accept or acquiesce in the alleged wrongful removal of the children in March 2015;

7 The father's position is that the children remain habitually resident in the USA and will continue to be habitually resident in that jurisdiction until at least such time as the welfare issues concerning the children have been finally determined by the Californian Court;

8 The parties accept that the Californian Court is properly seised of proceedings concerning the welfare of the children, accept the jurisdiction of that court and are participating in proceedings before that court;

9 The Californian Court and the Court of Appeal in the State of California have granted the mother temporary permission to remain in England with the children until the final determination of her application before the Californian Court for permission permanently to relocate to England with the children, subject to any contrary ruling from the Californian Court in the meantime;

10 The proceedings before the Californian Court are presently set for a hearing due to take place between 2 and 9 May 2016;

11 The Californian Court has yet to determine any motion by the father for orders requiring the children to be returned to California prior to the hearing set for May 2016; so far as the English Court is aware the father has not as at 20 January 2016 issued such a motion;

12 The withdrawal of these proceedings by the father is done in the expectation that the mother will comply fully with any orders that might be made by the Californian Court;

13 In the event that the mother does not comply with orders of the Californian Court, the father reserves the right to issue a further application for the summary return of the children to California, USA under the 1980 Hague Convention in reliance upon the alleged wrongful removal in March 2015 and/or any future wrongful retention of the children occasioned by the mother's refusal to comply with orders of the Californian Court and/or on the basis of Article 18 of the 1980 Hague Convention and the inherent jurisdiction of the court;

14 In the event that the father issues a further application as set out in paragraph 13 above the mother reserves the right to contest such an application on the basis of her case as set out in paragraphs 3 and 4 above and any other matter she considers relevant".