Neutral Citation Number: [2014] EWHC 507 (Fam)

Case No: FD13P00981

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2014

Before :

MR JUSTICE COBB

- -

Between :

N	**Applicant**
- and -	
K	**Respondent**

- -
- -

Mehvish Chaudhury (instructed by **Dawson Cornwell**) for the Applicant (mother)
The Respondent (father) was neither present nor represented

Hearing dates: 24 January 2014

- -

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.

....

MR JUSTICE COBB

This judgment shall be cited as N v K (No.2) [2014] EWHC 507 (Fam)

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.

The Honourable Mr. Justice Cobb :

Introduction & Summary

1. On 11 September 2013, I delivered a judgment at the conclusion of an interlocutory hearing in which a mother sought a declaration that the English Court should assert jurisdiction to determine her application under the *Children Act 1989* concerning her daughter M, now aged 13 years old (see *N v K* [2013] EWHC 2774 (Fam)).

2. In that judgment I gave my reasons for concluding that the English Court does indeed have such jurisdiction (per *Article 8* of the *Council Regulation 2201/2003* (BIIR)); I formed the clear view, on the evidence, that M is habitually resident in England, applying the test then only very recently clarified by the Supreme Court in *Re A (Children)* [2013] UKSC 60. I confirmed a residence order in favour of the mother, and adjourned the issue of defined contact (see §42 and 46 of the earlier judgment).

3. At the time of that hearing, proceedings concerning M were being pursued simultaneously on two continents: here and in the United States of America. In my earlier judgment (see §28-30), I referred to the benefits of international judicial liaison in a case such as this. I specifically made this plea concerning the future conduct of the litigation (§30):

   > "*I nonetheless hope very much that judicial liaison can yet be actively engaged. It is unfortunate that judicial liaison has not been achieved thus far, particularly as both parents wish for it to happen. The result is that, simultaneously in two jurisdictions, welfare-based decisions are being sought and made in respect of the child*"

   Adding (§44) that:

   > "*Perhaps such liaison is needed now more than ever; it is obviously unsatisfactory for there to be competing judgments in two different jurisdictions*".

4. This judgment gives an opportunity to explain a little further the mechanics of international judicial liaison, and to explain why it has so far failed in this case.

5. Regrettably, the legal process here – which has been indulgent to parental requests for opportunity to negotiate an agreed outcome – has so far led to further frustration. Frustration for the mother. Frustration for the Court. But more significantly, frustration for M who has been denied the certainty and

clarity of parental agreement or court determination on issues concerning her welfare.

6. At the conclusion of this judgment I set out the limited orders which I feel I can properly make at this stage; I shall leave it to the father to apply to the English Court for further or other relief in the absence of a negotiated outcome.

7. But before explaining my reasoning, I turn first to explain some core principles of international judicial liaison. I do so specifically for the father who has not been present or represented at this hearing, but who had expressed a hope – through correspondence issuing from his recently disengaged solicitors – that resolution to these proceedings may still be achieved by direct judicial communication. I also do so for the benefit of practitioners in the field, given (as is apparent from my comments at §22 and §36-37 below) that even experienced family law solicitors had a mistaken understanding of the ambit of, and procedure involved in, this exercise.

International Judicial Liaison

8. Many judgments and articles in international legal journals over the last fifteen years or so have identified, and paid tribute to, the value of international judicial liaison (from *Re HB (Abduction) (Child's objections)* [1998] 1 FLR 422 to *HSE Ireland v SF (A minor)* [2012] EWHC 1640 (Fam), and others). I intend to do no more than to add my own public recognition of its value, having engaged in collaboration usefully through the medium of Network Judges in Ireland (*Re LM* [2013] EWHC 646 (Fam)) and Spain (*PB v SE Re S* [2013] EWHC 647 (Fam)) in the last twelve months.

9. The principles by which international judicial communications are achieved through the Hague Network Judges, together with practical advice, are authoritatively set out in the guidance 'Direct Judicial Communications' ('DJC') published by the Hague Conference on Private International Law (2013).

10. While this is not the place to rehearse the regime in its entirety, it should be noted that it is common practice, where direct communication is indicated, for written questions to be prepared for consideration by the judges in the two jurisdictions. This guidance is specifically to be located in §7.5(f) of the DJC: the provision "*in writing*" of "*any specific questions which the judge initiating the communication would like answered.*", and corresponds with the more general expectation that "*a record is to be kept of communications*" §6.4 (ibid.)

11. The DJC publication illustrates the sort of matters which may be the subject of direct judicial communications; this is not an exhaustive list:-

   a. *scheduling the case in the foreign jurisdiction:*
      i. *to make interim orders, e.g., support, measure of protection;*
      ii. *to ensure the availability of expedited hearings;*

> b. *establishing whether protective measures are available for the child or other parent in the State to which the child would be returned and, in an appropriate case, ensuring the available protective measures are in place in that State before a return is ordered;*
> c. *ascertaining whether the foreign court can accept and enforce undertakings offered by the parties in the initiating jurisdiction;*
> d. *ascertaining whether the foreign court can issue a mirror order (i.e., same order in both jurisdictions);*
> e. *confirming whether orders were made by the foreign court;*
> f. *verifying whether findings about domestic violence were made by the foreign court;*
> g. *verifying whether a transfer of jurisdiction is appropriate*.

12. For a wider review of the evolution of this important mechanism for achieving international communication and collaboration, and a digest of relevant case-law, reference should further and usefully be made to the article by Edward Bennett, formerly Legal Secretary to the Head of International Family Justice, at [2013] (July) Family Law 845. Mr. Bennett gives practical advice to practitioners, consistent with the DJC Guidance referred to above, which I respectfully endorse. Relevant to the problems which arose in this case, I draw attention to a particular passage from that article (at p.850):

> "*All requests* [for direct judicial communication] *should be accompanied by: (a) a (preferably agreed) concise case summary; and (b) a set of questions to be put to the network judge which: (i) ask for information of a practical and emphatically non-legal nature; and (ii) are in no way phrased in anything other than a neutral, non-tactical way. Direct judicial communication is not intended as a tool for practitioners to: (a) receive legal advice by the back door; (b) avoid having to seek expert evidence as to foreign law or procedure in circumstances where it is appropriate; or (c) use as a substitute for their own legal research into English family law and practice. Likewise it would be a grave abuse of process to attempt to use network judges as a means of making submissions to a foreign court, thus short-circuiting the relevant procedural rules for such matters in the jurisdiction concerned. This is not to say that sealed orders and judgments cannot be transmitted to judges in other jurisdictions quickly via network judges in certain circumstances, which is relatively common*".

13. As will be seen from the more detailed narrative in this judgment of the events subsequent to the 11 September 2013 hearing, the father's solicitors in England and his Attorneys in the USA contemplated a different exercise altogether.

Developments since 11 September 2013

14. The general background history, and more detailed litigation history, is set out in the earlier judgment [2013] EWHC 2774 (Fam) at §5-27. I pick up the story thereafter.

15. Following the hearing on 11 September, I arranged for my judgment to be sent to the Network Judge in the USA for onward transmission to the office of Judge Peter Mallory in Panama City, Florida.

16. Following receipt of that judgment, on 23 September, the Judicial Assistant to Circuit Judge Peter Mallory helpfully contacted the office of International Family Justice (IFJ) in London hoping to arrange a conference call with me regarding this case.

17. I invited the office of IFJ to respond to him proposing that the most appropriate course would be for the parties to raise specific questions in writing for Judge Mallory and me to consider, in accordance with the guidance set out above. I proposed that the parties should have a period of time (until 16 October) to raise questions for judicial liaison, following which I indicated that the Network Judges would further communicate about the most appropriate method of judicial liaison.

18. In response to my proposal, on 9 October, American attorneys acting for the father wrote to the IFJ in the following terms:

> "*Florida jurisprudence provides that the parties and their attorneys of record have the absolute right to be present during any judicial liaison and to actively participate in such proceedings. The submission of questions in writing for the judges to consider does not comport with Florida jurisprudence nor do I believe that it comports with the provisions of the UCCJEA*."

19. Although the DJC Guidance does contemplate that "*parties or their representatives should have the opportunity to be present in certain cases, for example via conference call facilities*" §6.4 DJC, the rejection of the procedure for the consideration of written questions was, as I have indicated, plainly not in accordance with the Guidance (see §10 above).

20. Almost simultaneously, the father instructed a distinguished firm of London family law solicitors, and they went on the record as acting for him in these English proceedings. In contrast to the views expressed by their American counterparts (§18 above), they indicated their willingness to engage with this process, to prepare written questions, and asked for an extension of time in order to do so. I granted this extension. Indeed, a further extension was sought and granted for a further seven days.

21. The questions from the parties' solicitors were therefore received by the Office for IFJ on 30 October. I do not intend to set out the detailed narrative of the father's questions in this judgment, but can summarise them thus:

    (a) The father first invited the judges to consider and determine the extent to which the mother could maintain that she was not bound by a judgment entered in the American court (Panama City, Florida) in August 2007;

    (b) The second question referred to the father's agreement in 2009 (see §12 [2013] EWHC 2774 (Fam)) to extend the period of the mother's

temporary relocation in the UK. After an exposition of the background history, the question posed was:

> "*To what extent, if any, should the fact that the extension was granted voluntarily detract from the validity of the final judgment in requiring [M]'s return to Florida by 1 September 2009?*"

(c) Thirdly, the father asked whether the finding of habitual residence in England is "*incompatible with the recognition and enforcement of*" the Florida order?

(d) The fourth question concerned the question of whether the English court would "*uphold*" the "*visitation provisions*" of the original Florida order;

(e) Finally, the father set out a detailed proposed time-table for future holiday staying contact over the ten-month period to September 2014, involving five separate visits to the USA during M's school holidays and half-terms. Specific dates were proposed. He invited the judges to "*discuss*" these arrangements in the "*anticipated judicial liaison*".

22. At least three of these five questions (§21 (a), (b) and (e)) were completely unsuited to judicial liaison, as contemplated by the International Hague Network; the first question was self-evidently not a matter on which an English Judge could or should contribute or 'liaise' effectively or at all. International judicial communication is not intended to be a substitute for obtaining legal advice, nor can it be used as a means to avoid having to seek expert evidence as to foreign law, or procedure. It cannot be deployed as a mechanism for judges to settle welfare disputes (§21(e) above), nor can it be used "*as a means of making submissions to a foreign court.*" (Bennett: p.850).

23. While the mother's five questions (with one possible exception) were better suited to the judicial liaison process, it was dispiritingly clear that that the exercise could not be initiated in this case, at least at this time.

24. I therefore re-listed the application before me, of my own motion, to give directions on a determination (if necessary) of the contested issues. The application was originally scheduled to come before me on 25 November 2013.

25. Shortly before that hearing date, I was advised that the parties had embarked on constructive negotiations with a view to resolving the international, aswell as the welfare, dispute, and I was invited to vacate the hearing until 5 December. Those negotiations were taking place between the parties directly, involving solicitors when required.

26. From correspondence now before the court, it appears that on 20 November, some five days before the scheduled hearing, the mother's solicitors wrote to the father directly (wrongly as it turned out, as his English solicitors were still on the record as acting) with detailed proposals to resolve the disputes both as to jurisdiction and welfare. The mother's solicitors indicated that the contact order proposed would be contingent upon:

a. A commitment from the father to withdraw the proceedings in Florida, and take steps to discharge the order of 26 August 2013 (see §26 [2013] EWHC 2774 (Fam));

b. An undertaking from the father that he would not make any further application in respect of M;

c. Acknowledgement by the father that M is habitually resident in England & Wales;

d. A residence order in favour of the mother and an order for regular direct contact with the father in the USA and England & Wales;

e. A commitment (I assume undertaking) that the father would return M to this jurisdiction following contact, and would not remove M from the care of the mother save for the periods of contact

f. An order that the English order be registered in the Florida court.

27. The father personally acknowledged receipt of that letter, on 25 November, and indicated that he would "*send a responding e-mail back*". That e-mail is dated 3 December and contains the following important passages:

> "*I am aware of the current proposals and I would be willing to agree to the proposals under these conditions.*
>
> *1. Assurance I will be granted my visitation rights and these rights cannot be infringed upon.*
>
> *2. We keep the visitation rights as agreed upon in the final judgment from the court of Florida.*
>
> *3. In the event my visitation rights are not granted or infringed the mother will give up 'habitual residence status' of the child, and turn over jurisdiction to the state of Florida.*
>
> *4. The mother will discharge the allegations of child abuse, kidnapping and child abduction.*"

28. Implicit in this response is that:

a. The father appeared no longer to be challenging the English Court's jurisdiction to make welfare decisions in relation to M;

b. He was accepting that M is habitually resident in England & Wales;

And

c. He would take the steps proposed in the mother's solicitor's letter which I have set out at §26 (a) and (f) above.

29. The adjourned hearing (fixed for 5 December 2013) was adjourned again for a short time to allow the parties to finalise the agreement.

30. A draft order was then prepared on 9 December and circulated between the parties; I have now seen this. It contains detailed provisions, reflecting *inter alia*, more an expanded version of the proposals set out in the 20 November letter (see §26 above).

31. After a further request for time to negotiate, the parties signalled their readiness to come before the court earlier this year. Specifically, on 16 January my clerk was informed by e-mail sent by the mother's solicitors (cc-ing the father's solicitors) that it would be convenient to the parties for the case to be listed on 24 January 2014 by which it was hoped that an agreed order would be presented, or an order "*agreed save for very minor issues*". This hearing was listed in consultation with the father's solicitors; it was said that the father's English lawyers would be writing to him again that night to obtain final instructions.

32. On 20 January 2014, the father's solicitors wrote to Dawson Cornwell with reference to the draft order indicating that there were a few points with which the father took issue, but, notably, the jurisdiction of the English Court to make orders concerning M, and the discharge of any Florida orders, were not among them. Two of the father's key concerns set out in that letter were (a) the precise length of M's summer contact with her father, and (b) the responsibility for arranging M's flights to and from the USA. The solicitors confirmed that "*otherwise I think we are probably in agreement…*".

33. Dawson Cornwell responded the same day, offering the mother's agreement to the majority of the father's points, leaving in issue only the length of the summer contact, and the responsibility for arranging the flights.

34. Regrettably, and without obvious explanation, the father, who as I say had engaged well-respected lawyers in London since late-October 2013, and who had played a full part in the negotiations, dispensed with his legal team on the eve of the hearing. The solicitors confirmed that the father would be acting in person at the hearing and a Notice of Acting in person was indeed lodged.

35. The father's solicitors wrote to the mother's solicitors on that day (23 January 2014) indicating that the father felt strongly that his proposals for contact, and the arrangements for the flights, should be agreed by the mother, and further "*that certain parts of the American orders should be respected, for example, the financial arrangements*".

36. It was further suggested by the father's solicitors to the mother's that the impasse over the length of summer contact and the arrangements for the booking of flights could be the subject of liaison between me and my "*counterpart in Florida*". The solicitors for the father wrote in similar terms to the Court, adding specifically that the father:

> "*... feels that judicial liaison as between England and Florida should proceed in the hope that it will help to settle the matters outstanding concerning [M]'s contact with her father in the future in Florida.*"

37. In this suggestion, the father's solicitors once again regrettably demonstrated a lack of understanding about the true nature and function of judicial liaison.

38. Arrangements were made for the father to participate in the hearing in person on 24 January 2014 by telephone from Florida. The mother's solicitors had e-mailed the father on 23 January 2014 to inform him that arrangements had been made for a video-link, and requested that he be available on the telephone from 10:15hs (GMT). When the case was called in on 24 January, I was advised of the considerable efforts which had been made to contact the father on the day by e-mail, telephone (landline and mobile phone), and text, but that he had not responded to any communication. The case was not reached until 16:30hs, and did not conclude until 17:45hs; so although the calls earlier in our day would have been made to the father pre-dawn, by the time the hearing started it would have been 11:30hs in Eastern Florida. He did not respond to the many calls (14 or more), or otherwise make himself available at the hearing.

39. The hearing therefore took place in the father's absence, without representation or any form of participation. I heard representations from Ms Chaudhury, and reserved judgment. The reservation of my judgment was in part due to the hour and partly because I wished to ascertain whether the father wished to put to the court an explanation or excuse for not participating in the hearing.

40. Accordingly, I directed the mother's solicitors to write a letter to the father immediately following the hearing inviting him to contact the court, and/or the mother's solicitors if he wished to explain his non-appearance. They wrote on 27 January 2014; they sent the father a copy of the order which the mother is inviting me to make. At the date of delivering this judgment, neither the court, nor the solicitors, has heard from the father.

Conclusion

41. For the reasons discussed above, I am aware that the parents had virtually reached agreement in relation to the future for M; the solicitors for each party chose to disclose to me the terms of the draft agreement under negotiation, and specifically identified the relatively narrow areas of outstanding dispute.

42. I cannot at this stage confirm, by way of order, those aspects of the proposed order which appear to have been agreed, while certain terms remain unresolved, and in any event in the absence of the father.

43. I am therefore driven to confine the substantive orders which I make at this stage to confirming for the avoidance of doubt that:

    a. M is habitually resident in England and Wales;

And that:

b. M shall reside with her mother.

44. I do not feel able to make any substantive contact orders, knowing that the father contests the mother's proposed arrangement, but not having his full representations on the issue. It will therefore be for the father to make application to this court for my determination. In the event that he makes such an application in relation to M, that application shall be made in writing, on notice to the mother's solicitors, giving notice also to my clerk to expedite listing arrangements. I shall reserve any further application to me.

45. I shall append to my order a schedule (which was outlined at court on the 24 January) which sets out explicitly the mother's detailed open proposals for contact; her proposals contemplate up to six weeks contact per year with the father in the USA, alternate Christmases with the father in the USA, and reasonably unlimited staying contact in the UK. There are further provisions for indirect contact, including by webcam.

46. The mother further sets out the terms on which she would invite the court to make such an order. Inevitably those terms include (as the draft consent order included) proposed requirements upon the father (which I summarise) to:

a. Give undertakings in relation to extant and future criminal and/or child arrangements applications and orders in the U.S.A.;

b. Withdraw all proceedings relating to M in the USA;

c. Apply to discharge the final order dated 26 August 2013 made in Bay County Florida

d. Register the English contact and residence order in the Florida Court;

e. Return M to the mother at the end of the periods of contact as set out in the order;

f. Not to remove, or seek to remove, M from the care and control of the mother save for the periods of contact as set out in this order;

g. Acknowledge that M is habitually resident in this jurisdiction;

h. Acknowledge that the courts of England and Wales have jurisdiction in regards to all matters of parental responsibility concerning M.

47. Issues of recognition and enforcement (§46(d) above) could in another context have been considered under the regime of *Chapter IV* of the *1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, but at present the USA, although a signatory (October 2010), has not yet ratified the Convention, and it is therefore not yet in force there.

48. In view of the history of this litigation, I can well understand why the mother seeks the re-assurances which she does in relation to jurisdiction, and in relation to the return of M after any contact between M and the father in the USA. I note that these requirements were not apparently controversial at the point at which the draft order was being finally discussed between solicitors in the lead-up to this hearing. But I cannot reach any informed or concluded view as to the appropriateness or proportionality of these requirements without hearing from the father.

49. For the avoidance of doubt let me make clear that there may be a role for future judicial liaison in this case on such issues as:
    a. the acceptance and enforceability in Florida of undertakings given by the father here;
    b. the mechanism for making a mirror order in Florida to reflect the terms of the English contact and residence order;
    c. confirming whether further or other orders have been made, or discharged, in Florida.

    I shall direct that this judgment be sent to the Network Judge for the USA, for onward transmission to Judge Mallory, so that he is aware of the developments in these proceedings.

50. The court here will readily accommodate the father's participation in any further proceedings by video-link, or telephone, with or without representation. It is plainly in M's interests that the father re-engages with the negotiations, or accesses the court, soon so that a final determination can be made in relation to the living and contact arrangements for M.

51. That is my judgment.