Neutral Citation Number: [2014] EWFC 2758

IN THE FAMILY COURT
AT LEICESTER

Before:

His Honour Judge Clifford Bellamy sitting as a Judge of the High Court

(Judgment handed down on 4th August 2014)

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Re AB (A Child: temporary leave to remove from jurisdiction: expert evidence)

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The Applicant father appeared in person
Miss Dewinder Birk appeared for the Respondent mother

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JUDGMENT

JUDGE BELLAMY :

[1] These proceedings concern a little boy, AB. AB is now 6 years old. His parents are RK ('the mother') and DS ('the father'). On 8th May 2012 the father issued an application for a residence order or, alternatively, a contact order in respect of AB. The proceedings are ongoing. Until May 2014 the case had been proceeding before lay Justices. The proceedings were transferred to me as a result of an application by the mother to take AB on holiday to India for three weeks. The application is opposed by the father. This judgment deals only with that application.

The background

[2] The father is 36 years old. He was born in Leicester. Though of Indian parentage, he has lived in England all his life. He is a British citizen with a British passport. He lives with his parents. He has family living in India. His parents own land in India. Although he has never lived in India he has visited from time to time. It was during one such visit in 2004 that he was introduced to the mother.

[3] The mother is 32 years old. Until her marriage to the father she had spent her whole life living in India. Her parents, her younger sister and her wider family all live in India. She has no family living in England.

[4] The parents underwent an arranged marriage, in India, on 22nd February 2005. The

mother came to live in England in May 2005. Apart from a three week holiday to India in November 2010, since May 2005 she has lived continuously in England. Since separating from the father she has obtained British citizenship. She now has a British passport.

[5] AB was born in England in May 2008. He is a British citizen. He has a British passport. Save for accompanying his parents on their visit to India in November 2010 he has spent his entire life living in England. He is habitually resident in England.

[6] The parents' marriage became unhappy. They separated in March 2011. Since their separation the father's contact with AB has been problematic. It was in the hope of resolving that issue that he made an application to the court. As a result of work undertaken by Cafcass the father now has contact with AB for four hours once a fortnight. The Cafcass officer supports in principle the continuation and development of contact. The father hopes that contact will become more frequent and that at some point it may move on to include overnight contact. That is an ongoing issue.

The mother's evidence

[7] The mother has not been to India since November 2010. She wishes to be able to go to see her family. She wants AB to have the chance to spend time with her family and to be able to explore his cultural roots. She says that she no longer considers India to be her home. She wants AB to live and be educated in England. In her written statement she says,

'I would not want to reside in India due to the cultural implications arising from my divorce…There is a disapproval of women who separate or divorce from their husbands and who are single mothers. There is a lack of understanding and insight into the plight of women who have suffered as a result of a marriage breakdown. It would not be culturally appropriate for me to go and live with my parents in their village and further it would simply cause more difficulties for my family in India. My sister…is not married and this would also have an impact upon finding a suitable partner for her to marry due to the cultural implications.'

She ends her statement by saying, 'I wish to make it very clear that I have absolutely no intention whatsoever [of] remaining in India with AB'.

[8] The mother and AB live in rented accommodation in Leicester. The mother does not work. She is dependent upon state benefits for their support.

[9] Although the mother has been living in England for more than nine years, her English is poor. At this hearing she required the help of an interpreter. She says that she would like to take a course to improve her English.

[10] Both parents are Sikhs. The mother says that she attends two local Gurdwaras. AB sometimes goes with her. It did not appear that the practice of her religion has enabled her to develop a close support network through the Gurdwara. She says that she only has three close friends in Leicester. They do not live nearby.

[11] The mother has been in a new relationship since early 2013. The existence of that relationship only came to light as a result of a question I put to her. Prior to this hearing neither the father nor the Cafcass officer was aware of the relationship. The information provided about this relationship is scant. Her boyfriend is also of Indian origin and is a Sikh.

He has been living in England for around fifteen years. He works as a machinist. He has his own home. He does not have any children. He lives alone. It is not intended that he should accompany the mother and AB on their proposed holiday to India.

[12] The mother remains in close contact with her parents. She speaks to them by telephone and Skype on a regular basis. They live in Nagra. Nagra is small remote village (population around 500 people) located in the Indian state of Punjab.

[13] The maternal grandfather has provided the mother with £900 for to meet the cost of airfares to India for herself and AB. The mother was asked how much she expected the flights to cost. She said that she has not checked recently but on the basis of previous enquiries believed a return ticket for herself would cost around £600 and for AB around £550. If those figures are correct then it is clear that the money provided by her father will not be sufficient to cover the cost. The mother says that her father will make up any shortfall.

[14] The mother says that her parents are aware of the fact that she is in a new relationship and have raised no objections. When asked whether her parents may seek to arrange a further marriage for her if she returns to India, she was adamant that that will not happen. Her parents have arranged one marriage for her and that marriage failed. They will not arrange a second marriage for her.

[15] The mother seeks to reassure the court and the father that if she is allowed take AB on holiday to India she will return him to England. In her written evidence the mother says,

'9. …I am prepared to give whatever reassurances the Court requires…I would agree to give an Undertaking to use my best endeavours to lodge with an advocate in India, any Court Order made here and to obtain a Mirror Order to reassure the Court that we will return.

10. Whilst in India I would be agreeable to lodging my passport and AB's passport with the British Embassy, either in Jalandhar or in Delhi.

11. Neither myself nor any members of my family are in a financial position to offer the Court a surerity (sic) nor can we offer to lodge the title deeds of any property with the Court as we do not own any property.'

[16] The mother exhibits to her written statement two affidavits, one by her parents and another by KSN. Her father is the 'Sarpanch' (which she described as an elected mayor) of Nagra. In their affidavit her parents say that they 'undertake and assure that both RK and AB will return back to UK before expiry of their visa period'. KSN is a 'Lambardar'. According to the mother this as a position of some status and authority. In his affidavit KSN says,

'That above RK and AB are going to visit India shortly and I…undertake and take guarantee that both of them shall return back to UK within the period of their Visa and is no case they shall over stay here in India.'

[17] The mother says that her life and ties are now in the UK. She has been living here since 2005. AB was born here. His father lives here. The facilities available to AB in England are better than those available in India. If allowed to take AB on holiday to India, she will return him to England at the end of her holiday.

The father's evidence

[18] The father does not trust the mother to return AB to England if allowed to take him to India. He fears that once in India AB could be used by the mother's family as a bargaining tool in support of an attempt to claim some of his family's land in India. He opposes the mother's application. If she wishes to go and see her family then he and his parents would very gladly care for AB whilst she makes her trip.

Foreign and Commonwealth Office

[19] The Foreign and Commonwealth Office ('FCO') website contains guidance to travellers in respect of 225 countries and territories around the world. With respect to India, the guidance advises against travel to certain named areas. The mother confirms that travelling to her home village of Nagra does not require her to travel through any area identified by the FCO as presenting a particular risk to travellers.

Expert evidence

[20] India is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction concluded at The Hague on 25th October 1980. In *Re R (A Child)* [2013] EWCA Civ 1115 Patten LJ, giving the judgment of the court, repeated a point made in previous cases:

'23. The overriding consideration for the Court in deciding whether to allow a parent to take a child to a non-Hague Convention country is whether the making of that order would be in the best interests of the child. Where (as in most cases) there is some risk of abduction and an obvious detriment to the child if that risk were to materialise, the Court has to be positively satisfied that the advantages to the child of her visiting that country outweigh the risks to her welfare which the visit will entail. This will therefore routinely involve the Court in investigating what safeguards can be put in place to minimise the risk of retention and to secure the child's return if that transpires. Those safeguards should be capable of having a real and tangible effect in the jurisdiction in which they are to operate and be capable of being easily accessed by the UK-based parent. Although, in common with Black LJ in *Re M*, we do not say that no application of this category can proceed in the absence of expert evidence, we consider that there is a need in most cases for the effectiveness of any suggested safeguard to be established by competent and complete expert evidence which deals specifically and in detail with that issue. If in doubt the Court should err on the side of caution and refuse to make the order. If the judge decides to proceed in the absence of expert evidence, then very clear reasons are required to justify such a course.'

[21] On 21st May 2014 the mother issued an application for permission to obtain expert evidence from Mr Ravindra Kumar, a dual qualified solicitor and advocate (India and England) who is a specialist in Indian law. On 13th June I granted the mother's application. The Legal Aid Agency refused to grant prior authority for this expenditure. That is an issue to which I refer again later in this judgment.

[22] Mr Kumar is an expert whom the mother's solicitors have recently instructed in a similar case. With the consent of the parents in that case, and also with the agreement of Mr Kumar, the mother has filed redacted copies of the letter of instructions to Mr Kumar in that case and of his report.

[23] India is a quasi federal country. There are state laws for every state and there are central laws which are applicable all over India except for the state of Jammu & Kashmir. Mr Kumar's opinion is based on provisions under the Hindu Minorities and Guardianship Act 1956, the Guardians and Wards Act 1890 and the Code of Civil Procedure. All three statues are central Acts and are applicable in all states of India except the state of Jammu & Kashmir. Although Mr Kumar's opinion was written in respect of the proposed removal of child to the State of Gujarat he has confirmed that his opinion applies equally to the removal of a child to the State of Punjab.

[24] The questions put to Mr Kumar, and the opinion he gives in response, are relevant to the concerns I must address in this case:

'ANSWER TO QUERIES

(i) What is the legal position in India if the Mother does not return to the United Kingdom with the child and remains instead with her in India? What impact, if any, would be made by pre-existing orders from the High Court in England making declarations of habitual residence in England and mandatory orders in relation to the return of the child by a certain date? Answer If the mother does not return to the United Kingdom with the Child, the father will have to bring a claim for custody in India under provisions of Hindu Minority and Guardianship Act 1956. The pre-existing orders from the High Court in England making declaration of habitual residence in England and mandatory order in relation to the return of child by a certain date will only be one of the factors to be considered and court will draw up independent judgment on merits having regard to welfare of the children.

(ii) What legal remedy would the father have, and what procedure would apply if he found himself having to take steps to effect the return of the child to the United Kingdom? What would be the likely timescale, cost and likelihood of success? Answer Father would have to file an application for custody of children under the provision of Hindu Minority and Guardianship Act. The proceedings may take from 1 year to 2 year and likelihood of success cannot be predicted as it will be dependent on Court's fact finding to ascertain best interest and welfare of the children in deciding the custody rights.

(iii) As India is not a signatory to the Hague Convention, is there any other Agreement or Treaty in place with the United Kingdom which would assist in alleviating the Father's concerns or in assisting if the child was not to be returned? Answer No there is no other treaty except treaty to enforce judgements passed by reciprocating courts in UK and India, however in matters of child custody, courts will not pass summary judgements and will pass independent judgement considering welfare of the children.

(iv) Is there scope for the mother obtaining a Mirror Order on her arrival in India? If so, what is the relevant procedure and what protection would such order give in ensuring the return of the child to the United Kingdom? Answer No, Courts in India will not pass mirror orders but will pass independent orders considering welfare of children.

(v) Are there other practical or legal safeguards which could be put in place before or on the Mother's arrival in India? For Example (sic), requiring family members to take oath in relation to not assisting in the retention of the children, or lodging the children's passport with a British Embassy or another place? Answer Since the foreign custody orders cannot be

enforced mechanically, it is suggested that in the event of any litigation in the foreign country of habitual residence, a letter of request be obtained from the UK court in which litigation is pending for incorporating safeguards and conditions to ensure the return of the minor child to the country of normal residence. This letter of request should be addressed by the UK court to the Registrar General of the High Court within whose jurisdiction the estranged spouse is residing with the minor child. It should also be specifically mentioned that the passports of the parent and the child should be deposited with the Registrar General of the state High Court to ensure that the child is not taken away from the jurisdiction of the [state] where he or she is confined.'

The law

[25] Before I review the evidence it is appropriate to remind myself of the law to be applied in determining the mother's application. The starting point is s.1 of the Children Act 1989. AB's welfare must be my paramount consideration. In determining what is in his best welfare interests I must have regard to each of the factors set out in the welfare checklist in s.1(3). I must also have regard to the Article 8 rights of AB and of both parents. Ultimately, the order I make must be proportionate and in AB's best welfare interests.

[26] It is also important to have regard to those authorities which give guidance on the approach to determining such applications. The principles are to be found in two decisions of the Court of Appeal, *Re R (A child)* [2013] EWCA Civ 1115 and *Re K (Removal from jurisdiction: Practice)* [1999] 1 FLR 1084. As the guidance given in the latter was expressly approved in the former, it is only necessary for me to refer to *Re R (A Child)*.

[27] In *Re R (A Child)* Patten LJ summarised the correct approach as follows:

'25. As the quotation from Thorpe LJ's judgment in Re K (see paragraph 19 above) confirms, applications for temporary removal to a non-Convention country will inevitably involve consideration of three related elements: a) the magnitude of the risk of breach of the order if permission is given; b) the magnitude of the consequence of breach if it occurs; and c) the level of security that may be achieved by building in to the arrangements all of the available safeguards. It is necessary for the judge considering such an application to ensure that all three elements are in focus at all times when making the ultimate welfare determination of whether or not to grant leave.'

[28] It is also appropriate to refer to the recent decision of the Court of Appeal in *Re H (A Child)* [2014] EWCA Civ 989. Although materially different on its facts (Iran was the proposed destination for the temporary removal and there was a clear warning in place from the FCOwarning of the risks to British nationals travelling to Iran) some of the points made are relevant to the case with which I am concerned. Giving the leading judgment, Ryder LJ said that (para 9),

'There was a prima facie case from the child's perspective that if the mother left the jurisdiction with the whole of the birth family (i.e. all three children), then unless her less than significant ties to this jurisdiction could be strengthened, she might decide or be persuaded to remain in Iran with the child. Whether that is likely was a value judgment based on very limited fact. A judge exercising a protective jurisdiction should have regard not just to the likelihood but also to the consequences were the risk to materialise and should consider putting into place proportionate protections if an order is to be made.'

Underlining the point made in *Re R (A Child)*, Ryder LJ went on to say (paras 14 and 15) that,

'This was an application to temporarily remove a child to a 'non-Hague Convention country' that has no other arrangements in place for recognition or enforcement of decisions made by the courts in this jurisdiction. That does not preclude a decision being made on an application such as that made in this case, but it calls for rigorous scrutiny of the risk involved, the consequences of that risk becoming a reality and the safeguards that are available both within the domestic law of the foreign jurisdiction and as between the parties and the court in this jurisdiction.'

Discussion

[29] Following the guidance given in *Re R (A Child)* I consider first the magnitude of the risk of breach of an order permitting the mother to take AB on holiday to India and requiring her to return him to England at the conclusion of her holiday.

[30] There are positive arguments that can be made on the mother's behalf. She has lived in England for nine years. It was not until after her separation from the father, a time when one might have expected her to want to return to her family in India, that she sought and obtained British citizenship. She is settled in her home. AB is settled in school. She has been in a new relationship for more than 18 months. She has some (though a limited number) of friends. She has some (though it would appear limited) connection with two local Gurdwaras.

[31] Against that, it was not until asked directly whether she was in a new relationship that the mother disclosed any information at all about that relationship. The same Cafcass officer has been involved in the life of this family for more than a year yet the mother did not see fit to disclose to her that she is in a new relationship. She has no family ties in England. Although she is now in an established relationship there is no evidence of her family's response to that relationship. In the society in which the mother was brought up arranged marriage is the cultural norm. Her marriage to the father was an arranged marriage. Although she has said that her parents would not arrange another marriage for her, there is no evidence from them on that issue.

[32] On balance, I am satisfied that there is a risk that the mother may not return AB to England at the end of her proposed holiday. I assess that risk as low to medium.

[33] I turn next to the magnitude of the consequence of breach if it occurs. So far as the practical consequences of breach are concerned, the expert evidence spells out very clearly the challenge the father would face in trying to secure AB's return to England. He would have to issue proceedings in India. Those proceedings may take between one and two years to complete. They would be determined on a welfare basis. Orders made in a foreign jurisdiction would be just one factor taken into account in undertaking a welfare analysis. A parent not living in India would be likely to find the process of pursuing a remedy through the Indian courts to be a very significant challenge. For the father, the consequences of breach would be profound.

[34] In the event of breach, there would also be consequences for AB. The most recent report

from Cafcass is dated 24th June. In the recommendations at the end of her report, the Cafcass officer says,

'38. My recommendations remain unchanged from previous reports. Again I fully appreciate that there is no agreement between the parties regarding time spent at the paternal home, however I respectfully recommend that it cannot be in AB's best interests, developmentally, culturally or emotionally to have such limited access to his paternal family.

39. It is my professional opinion that the parties should persevere with any arrangements for AB to spend time with his father and for the paternal family to be gradually introduced.

40. I think there is a potential need for further work from Cafcass in order to reintroduce the paternal family. Although this matter has been in court a long time, it is clear progress has been made and it is this progress upon which we must capitalise…'

[35] Although AB's contact with his father and paternal family is limited, in the opinion of the Cafcass officer it is in his best interests developmentally, culturally and emotionally, for that contact to be developed. It follows, in my judgment, that in the event that the mother should fail to return AB to England at the end of her proposed holiday that that would be likely to be detrimental to his welfare interests. It should not be assumed that because the present level of AB's contact with his father is low that the consequences for his developmental and emotional welfare of breach of an order to return him to England would also be low.

[36] Thirdly, I must consider the level of security that may be achieved by building into the arrangements all of the necessary safeguards. The mother offers three safeguards. Firstly, she offers to obtain a mirror order upon arriving in India. The expert evidence is that it is not possible to obtain such an order. Secondly, the mother offers to lodge a copy of my order with an advocate in India. Whilst that order may have some persuasive value in any subsequent litigation in India, such an order would not be binding in India. It is difficult to see how this step would be likely to provide any degree of security. Thirdly, the mother offers to lodge her passport and AB's passport with the British Embassy in Jalandhar or Delhi. If the mother decided not to return to England, I am not persuaded that the depositing of passports with the British Embassy would amount to a meaningful safeguard.

[37] The mother acknowledges that she is unable to offer any financial security either by way of the deposit of a sum of money or by way of the deposit of title deeds to land.

[38] In this case, the reality is that the safeguards proposed by the mother are not capable of having any real and tangible effect in India.

[39] Ultimately, the court's consideration of the three elements identified by the court in *Re R (A Child)* must be brought within the welfare analysis required by s.1 of the Children Act 1989. The court is exercising a discretion and must weigh and balance the competing factors before arriving at a conclusion that it is both proportionate and in AB's best welfare interests for the mother to have permission to take him on holiday to India.

[40] I have no doubt that if asked AB would say that he does wish to go on holiday to India. Many six year old children would give the same response. However, at that age a child would not have the level of understanding required to enable him to foresee the consequences for his

own development of being retained in a foreign jurisdiction and thereby denied the opportunity to have direct contact with his father.

[41] AB has family living in India. He also has cultural roots there. I acknowledge that in principle it is in his wider welfare interests to have the opportunity to spend time in India at some point. As he grows older that argument is likely to become increasingly compelling. However, at this point in time, weighing the consequences of breach against the benefits of temporary removal, I am in no doubt that the balance comes down against granting the mother's application.

The Legal Aid Agency

[42] This is the second time this year that it has been necessary for me to consider the conduct of the Legal Aid Agency when dealing with an application for prior authority to incur the fees of an expert in an application for the temporary removal of a child to a non-Hague Convention state – see *Re R (Children: Temporary Leave to Remove From Jurisdiction)* [2014] EWHC 643 (Fam). In that case I was critical of the LAA (see paragraphs 81 to 97). Before deciding whether further criticism is merited it is necessary to consider the history of the application for prior authority.

The mother's application for prior authority

[43] As I have noted, the expert proposed by the mother was Mr Ravindra Kumar. Mr Kumar is a legal associate with Singhania & Co, a firm of 'Solicitors & Indian Advocates' with offices in India and London. In his curriculum vitae Mr Kumar says that he is 'a consultant in Singhania's litigation group, concentrates his practice on handling litigations in UK and in India. He has advised clients on Indian laws and India-specific issues including family laws and matrimonial laws issues. Maintenance and Adoption Laws issue. Mr Kumar had given expert witness evidence on issues pertaining to India laws on matrimonial matters, wills and contacts issues. Affiliations: Supreme Court Bar Association [SCBA], India. Delhi High Court Bar Association [DHCBA], India'.

[44] I heard the mother's application for permission to obtain expert evidence on 13th June. I was satisfied that expert evidence was necessary and that Mr Kumar was an appropriately qualified expert. I decided that the cost of the expert evidence should be borne by the mother. In an extempore judgment I said,

'8. There can, in my judgment, be no doubt as to the need for an expert's report in this case. The law relating to the reliance upon expert evidence in Children Act proceedings is now to be found at s.13(6) of the Children and Families Act 2014 of which reads:

'The court may give permission as mentioned in subsection (1), (3) or (5) only if the court is of the opinion that the expert evidence is necessary to assist the court to resolve the proceedings justly.'

There is in this case absolutely no doubt that expert evidence is necessary.

9. The issue that then arises is who is to pay. The mother is publicly funded and the father is a litigant in person. The father's means are extremely straightened. He works for [a supermarket] and has an income of £1,200 per month out of which he has mortgage

repayments of £500, car insurance of £28, fuel of £300, a mobile phone contract of £42, electricity of £76, food of £178 and finally a debt management payment of £76. The father has produced evidence from a debt management company which shows that the £76 per month that he is paying is for the payment of some eight debts which together amount to around £6,500. There can be, in my judgment, not the slightest doubt of this father's inability to be able to afford to pay.

10. If the father cannot pay, is it appropriate to require the mother to pay for the whole of the costs of this report? In my judgment it is, and for two reasons. The first reason is the obvious one that it is her application for the temporary removal of AB from the jurisdiction. It is she who wants to do something that potentially could cause the breakdown of contact between AB and his father, and could potentially leave the father in an extremely difficult position in trying to right a wrong. Therefore, it is only just, in my view, that she should bear the costs of paying for that report, and that would be the case even if she were not publicly funded. The second reason why it is appropriate for her to pay the costs is because the father simply cannot afford to pay, of that I am in no doubt.

11. The position with respect to the Legal Aid Agency funding the entirety of the costs of an expert under one party's public funding certificate is an issue that has been considered by the court twice over the course of the last twelve months. Firstly in the decision of Ryder J (as he then was) in *JG v The Lord Chancellor & Ors* [2013] 2 FLR 1174 and more recently by the Court of Appeal overturning the decision of Ryder J in that same case in *JG v The Lord Chancellor & Ors* [2014] EWCA Civ.656. In that case it was argued on behalf of the Lord Chancellor and the Legal Aid Agency that the normal rule was one of equal apportionment of expert costs amongst all parties to proceedings. At para.86 of the judgment of Black LJ in the Court of Appeal, she said this:

'I do not accept that there is a normal rule of equal apportionment of the costs; in my view, like so many of the issues that arise in this appeal, it all depends on the particular circumstances of the case.'

At para.90, having referred to three authorities, she said this:

'What I draw from the three authorities to which I have just made reference is that the court has discretion as to what order is made as to the costs of instructing experts in family proceedings and that that discretion must be exercised bearing in mind all the circumstances of the particular case.'

Then at para.93, she said this:

'None of the authorities which I have just cited turned on the impecuniosity of the parties. Although they differ from the present case in that they were care cases, they are capable of providing assistance as to "the principles on which the discretion of [the] court is normally exercised" in relation to the cost of expert evidence. As I have explained, to my mind, they do not reveal the existence of a normal rule that costs be apportioned equally any more than Rule 25.12(6) does. Accordingly, in so far as the Lord Chancellor's submissions proceed upon the basis that equal apportionment is the norm, I would question the premise.'
In order to decide whether a court order has fallen foul of s.22(4), a more sophisticated exercise is required. It is necessary to ask what order the court would make in its discretion on the particular facts of that case, leaving aside any resources problems. The answer may not

uncommonly be an order for equal apportionment of the costs but that cannot be assumed. It may be that a full consideration of the circumstances of the case produces the result that the publicly funded party should be paying a greater share of the costs in any event, quite irrespective of any financial difficulties that the other parties may have in sharing the costs of the expert. In such circumstances, s.22(4) does not prevent the court from making an order accordingly, because the order is in no way affected by the fact of public funding. The reference in her Ladyship's judgment to s.22(4) is to s.22(4) of the Access to Justice Act 1999.

12. In light of her Ladyship's comments, I am in no doubt at all that it is right to say in this case that even leaving to one side the ability to fund the costs of an expert report, the cost of the expert report proposed in this case should be borne entirely by the mother. The fact that she is publicly funded makes no difference to that conclusion. There is, as I have already said, the subsidiary point that the father simply cannot afford to pay.

13. It is my sincere hope that the problems encountered by the court and the parents in *Re R (Children: Temporary Leave to Remove from Jurisdiction)* will not be visited again upon this mother in this case. I shall make the order giving permission for the expert's report. I approve the draft letter of instruction, and the costs will be limited to £1,000. The costs will be met by the mother and I deem that to be a reasonable and proportionate expense on her public funding certificate. I direct that there be an expedited transcript of this judgment at public expense to assist the mother in obtaining prior authority.'

[45] The Court of Appeal's decision in *JG v The Lord Chancellor & Ors* was handed down on 21st May. The mother's application for prior authority was sent to the LAA a month later, on 20th June. The application was made in the LAA's prescribed form APP8A and was submitted together with relevant supporting documents. Following an enquiry as to progress, the application was re-sent by e-mail on 3rd July.

[46] An e-mail response from the LAA on 3rd July suggests that the writer of that e-mail was unaware of the Court of Appeal's decision in *JG v The Lord Chancellor & Ors*. The e-mail reads:

'I can confirm on the information provided we would expect the costs to be apportioned between the parties as per S22(4) AJA 1999 which expects all parties to bear an equal share in the costs of an expert. The costs were originally being shared between the parties therefore it is not considered reasonable to transfer the burden of costs onto the publically (sic) funded party. We will need to see evidence to satisfy itself that the father should share in the costs and the court will need to undertake a robust assessment of the father's means.'

[47] The mother's solicitors replied on 8th July. By then they had received the transcript of my judgment of 13th June and attached it to their response. Initially, it appeared that my judgment would help to resolve the issue. On 11th July an e-mail from Ann Davies, a senior caseworker at the LAA, said

'Thank you for your e-mail and confirm I have reviewed our earlier decision. An authority will be issued in this matter however, despite my search of our completed applications I have been unable to find your APP8A…Please e-mail me a copy to enable me to consider this properly…'

The mother's solicitor had already sent the LAA an application for prior authority in form APP8A on 20th June and on 3rd July. Form APP8A was sent to the LAA for a third time, by e-mail, on 14th July.

[48] The optimism generated by Ms Davies' e-mail was misplaced. On 14th July the mother's solicitors received two letters from the LAA, both sent by e-mail, one from Shaun McNally, a LAA Director and the other by the senior case worker, Ms Davies. Both suggest that LAA personnel were still unaware of the decision of the Court of Appeal in *JG v The Lord Chancellor & Ors*.

[49] In his letter, Mr McNally said,

'Thank you for your request for prior authority. After considering the information provided, I have refused your application for the following reasons(s): your request covers work which should either be borne by the other party or apportioned between the parties having regard to section 22(4) Access to Justice 1999 or the equivalent under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and all the circumstances. Since the introduction of the 2010 Standard Civil contract and the 2012 Family Contract there is no right of appeal.'

In her letter, Ms Davies says,

'I refer to my e-mail to you of the 11th July; since receiving your application I note that the children are being removed from the country for a holiday of 3 weeks to which the father refuses to consent. In the circumstances I am unable to issue a prior authority to instruct Ravindra Kumar (you had not included his CV and estimate in any event) and further have date limited the Specific Issue element of your certificate to today's date. The Agency would argue that the cost benefit ratio has not been met if the cost of hearings and the expert is taken into account. I note that your client is in receipt of benefits therefore, please confirm how RK will fund the trip to India. If the trip is being funded by someone other than RK, does she have alternative funding available for these court proceedings?'

[50] The mother's solicitor responded the same day. She dealt with all of the issues raised in Ms Davies' letter and enclosed a further copy of Mr Kumar's details, making the point that that information had already been sent to the LAA twice.

[51] By 15th July the LAA's position had changed significantly. Ms Davies wrote a long letter to the mother's solicitor. In a covering e-mail she said, 'I am forwarding to you my letter in relation to Mr. Kumar, your preferred expert with this e-mail as you will need to identify someone else quickly, if the appeal is successful'. In her letter, she said,

'I am in receipt of your recent e-mail and confirmed that I should confirm with you immediately now that you have identified Mr. Kumar and his status that your application is refused on the following reason: Solicitor Expert It is not possible to instruct a solicitor to provide legal advice (rather than an expert opinion). Under the Standard Terms of the 2013 Standard Civil Contract, where you do not carry out legal work it can only be done on your behalf by agents or counsel (and not by experts). I would refer you to Clause 1.1 Clause 3.2 of the Standard Terms and paragraphs 2.5 – 2.8 of the contract specification. You will note that there is no provision for legal work in the schedule of experts' rates and fees in the Civil Legal Aid (Remuneration) Regulations, because this is intended always to be paid at provider

or counsel rates. It is clear that an expert falls within the definition of "Approved Third Party" and so cannot be instructed to carry out legal work under the terms of your firm's legal aid contract. The work that you propose clearly falls under the contract definition of an Agent. Clause 3.2 of the Standard Terms allows you to use Agent and Counsel for carrying out Contract Work (i.e. legal work) and Approved Third Parties to work (i.e. non-legal work). If you choose to use an Agent to carry out work on your behalf they are paid as if you had carried out the work directly as detailed in paragraph 2.7 of the 2013 Civil Contract Specification. In the circumstances you would need either to refer your client to Singhania & Co for them to undertake the discrete work in relation to the status of the way in which English law would interact with Indian, as set out in your letter of instruction or, you will need to instruct counsel.'

[52] Once again, in addition to the letter from Ms Davies there was a second letter written by Mr McNally. He said,

'After considering the information provided, I have refused your application for the following reason(s): the authority that you have requested is outside the scope of the certificate or the scope of the certificate is exhausted…'

[53] There was a further exchange of e-mails between the mother's solicitor and the LAA. In an e-mail sent on 16th July, Ms Davies said,

'...further to my e-mail yesterday you will need to find a non-solicitor expert to give an opinion. If you use a solicitor it would be necessary for you to refer your client to that firm who would then give immigration advice under that solicitor's own contract.'

The reference to 'immigration advice' clearly suggests that the LAA had misunderstood the nature of the advice required from an expert in this case.

[54] In her e-mailed response sent that same day, the mother's solicitor said,

'…May we respectfully point out that this is not a matter concerning immigration it is a matter concerning Indian Law. The expert we have proposed is an Indian Advocate in the law firm Singhania and company who are based in India as well as in London. He is a dual qualified lawyer and is providing an expert opinion on what the law is in India should a parent retain a child there and what the procedure would be for the other parent to ensure the child's return to the UK. The proposed expert is not giving advice to either of the parties as individuals he is simply providing an expert opinion on Indian Law. We therefore would respectfully suggest that your decision regarding Mr Kumar be reconsidered as he is not giving our client legal advice. In any case, please could you clarify that if your position remains the same that Mr Kumar cannot be instructed, are you granting our client prior authority for another expert to be instructed or would you be expecting us to prepare a further prior authority application.'

[55] The LAA was not persuaded. Later that day Ms Davies sent a further e-mail to the mother's solicitor in which she said,

'The expert is clearly stated as a solicitor in England & Wales therefore, the provisions to which I referred in my letter apply. He is acting within this country as a solicitor not a barrister and is registered with the Law Society/SRA as such.'

She did not respond to the question asked by mother's solicitor. The question was put again. On 21st July Ms Davies responded saying, 'Authority would be given for an expert other than a solicitor'. Given that the mother's application for permission to take AB to India was listed for hearing on 25th July and that she wished to be able to take AB to India in August, it would have been unrealistic to have expected the mother's solicitor to obtain a report from an alternative expert in time for the hearing on 25th July. It would also have been disproportionate and wasteful of court time to have adjourned the hearing. Is Mr Kumar an expert?

[56] In proceedings in the Family Court, the position concerning expert evidence is clear. The Family Court Practice 2014 states (p.2009) that.

'The general rule is that a witness may only give evidence as to fact observed by them. That rule is overridden in the case of opinion evidence given by a person whose expertise justifies the court in receiving that opinion.'

Hershman & McFarlane Children Law and Practice states (C3057) that,

'It is for the court to determine in each case that the witness has the necessary expertise to come within the exception to the normal rule that opinion evidence is not admissible.'

Section 3(1) of the Civil Evidence Act 1972 provides that,

'Subject to any rules of court made in pursuance of…this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.'

[57] Section 4(1) of the Civil Evidence Act 1972 is also relevant. It provides that,

'It is hereby declared that that in civil proceedings a person who is suitably qualified to do so on account of his knowledge or experience is competent to give expert evidence as to the law of any country or territory outside the United Kingdom, or of any part of the United Kingdom other than England and Wales, irrespective of whether he has acted or is entitled to act as a legal practitioner there.'

[58] In the circumstances of this case I am in no doubt that Mr Kumar is 'qualified to give expert evidence' (s.3(1) of the Civil Evidence Act 1972) and is properly to be regarded as an expert in Indian law.

The provisions relied upon by the LAA

[59] The LAA's decision that Mr Kumar cannot be regarded as an expert is founded on its interpretation of the 2013 Standard Civil Contract and of the Civil Legal Aid (Remuneration) Regulations 2013. I have not heard argument on behalf of the LAA. My views on the interpretation of this material are, therefore, necessarily provisional.

[60] The following passages from the 2013 Standard Civil Contract are relied upon by the LAA for the proposition that a solicitor cannot be an expert:

Standard Terms

1.1 In this Contract the following expressions have the following meanings: … "Approved Third Party" means an individual or organisation engaged by you to undertake non-legal work ancillary to Contract Work, including experts and translators but excluding Agents and Counsel… "Contract Work" means the work that you may perform for Clients in the Category or Categories of Law and/or Class(es) of Work specified in your Schedule(s) and the Specification under, or by virtue of, this Contract … 3.1 This Contract is personal to you. Subject to Clause 3.2 you must not give, bargain, sell, assign or otherwise dispose of the benefit of any of your rights, or sub-contract, novate or otherwise delegate any of your obligations, under this Contract without our prior written consent. Any breach of this Clause 3.1 shall be a Fundamental Breach. 3.2 For the purpose of Clause 3.1, we consent to you (a) sub-contracting your obligations under this Contract to the extent specified in your Contract for Signature; (b) appointing Agents to undertake Contract Work in accordance with the Specification; (c) appointing Counsel to undertake Contract Work in accordance with the Specification; and (d) appointing Approved Third Parties to undertake work in accordance with the Specification. Specification 2.5 You may instruct Agents, Counsel or Approved Third Parties from time to time to carry out or assist with Contract Work where you are satisfied that it is in the interests of your Client to do so, subject to your compliance with the rules on working with third parties in Clause 3 of the Standard Terms. However, you may not entrust an entire Matter or case to Counsel or an Approved Third Party and you may only entrust an entire Matter or case to an Agent if the Agent satisfies all the conditions set out in Paragraph 2.6 2.6 The conditions referred to in Paragraph 2.5 are that: (a) the Agent's work is subject to your supervision; (b) the Agent works solely or mainly for you; (c) the Agent is integrated into your processes, including Data Protection and equal opportunities, and is shown in your management structure; (d) the Agent's work is covered by your insurance; (e) you retain responsibility for each Matter or case undertaken by the Agent; and (f) Matters and cases undertaken by the Agent are not referred to a separate organisation. 2.7 Where you instruct an Agent you may claim payment for the work as if you had carried it out directly. Where you instruct an Agent to carry out services which are covered by a Standard Fee or Graduated Fee, any fees or costs related to your use of the Agent will be included in the Standard Fee or Graduated Fee and may not be claimed separately. 2.8 Unless we have specified otherwise, you may not rely on the use of any Agent or Counsel as evidence of satisfying any of the Service Standards in this part of the Specification. Although the definition of an 'Approved Third Party' includes an expert, neither the Standard Terms nor the Specification provides a definition of the word 'expert'.

[61] The LAA also relies upon the provisions of the Civil Legal Aid (Remuneration) Regulations 2013 ('the regulations'). The regulations contain an Explanatory Note which, so far as is relevant, states that, 'The Civil Legal Aid (Remuneration) Regulations 2013 ("the Regulations") make provision about the payment by the Lord Chancellor to persons who provide civil legal services under arrangements made for the purposes of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c.10) ("the Act"). The fees and rates set out in the Regulations are subject to definitions and payment schemes contained in the following contracts made between the Lord Chancellor and a provider of civil legal services under Part 1 of the Act, the relevant contract in any particular case being the contract which governs the provision of civil legal services for which the claim for remuneration relates: the 2010 Standard Civil Contract, the 2013 Standard Civil Contract and the 2013 Individual Case Contract (Civil).'

[62] Although no particular part of those regulations is referred to in the exchange of e-mails between the LAA and the mother's solicitor, it would appear that the following regulations are relevant to the LAA's argument: Regulation 2 provides that,

'In these Regulations…"provider" means a party, other than the Lord Chancellor, to the relevant contract'.

Regulation 10 provides that,

'The Lord Chancellor must pay remuneration to a provider in relation to expert services incurred as a disbursement by the provider in accordance with— (a) the relevant contract; and (b) the provisions of Schedule 5.' Schedule 5 is headed 'Experts' fees and rates'.

Paragraph 1 provides that,

'Subject to paragraph 2, where the expert service is of a type listed in the Table, the Lord Chancellor must pay remuneration to the provider for the expert service at the fixed fees or at rates not exceeding the rates set out in the Table.'

Schedule 5 paragraph 3 provides that,

'Where the expert service is of a type not listed in the Table after paragraph 1, in considering the rate at which to fund the expert service the Lord Chancellor— (a) must have regard to the rates set out in the Table after paragraph 1; and (b) may require a number of quotes for provision of the service to be submitted to the Lord Chancellor.'

Discussion and conclusions

[63] It is a matter of concern that two months after the Court of Appeal handed down its decision in *JG v The Lord Chancellor & Ors* [2014] EWCA Civ 656 a senior case worker and a Director should both reject an application for prior authority by advancing arguments based on an interpretation of s.22(4) of the Access to Justice Act 1999 which had been so roundly rejected by the Court of Appeal. That, though, is not the only concern about the approach of the LAA in this case.

[64] As I noted earlier, the 2013 Standard Civil Contract does not define the word 'expert'. That is unsurprising. The determination of whether expert evidence is necessary in order to resolve a case justly and whether a particular witness 'is qualified to give expert evidence' (s.3(1) of the Civil Evidence Act 1972) are issues for determination by the court not by the LAA. I am concerned that in this case the LAA should have disregarded a decision by the court that Mr Kumar is an expert. In my judgment it was not open to the LAA to disregard a judicial decision on this issue.

[65] The Standard Terms of the 2013 Standard Civil Contract define the term 'Approved Third Party' as someone engaged by a party to the Contract 'to undertake non-legal work ancillary to Contract Work, including experts'. The expression 'non-legal work' is not defined. In my judgment, it includes giving expert advice on the law of any country or territory outside the United Kingdom. Whether the 'expert' is an academic specialising in that area or a person who is a practitioner in that foreign state is immaterial. It is equally immaterial if such a practitioner happens to have dual qualification enabling him also to

practice law in England and Wales. I reject Ms Davies' analysis and interpretation of the 2013 Standard Civil Contract.

[66] I also reject Ms Davies' attempt to pray in aid the provisions of the Civil Legal Aid (Remuneration) Regulations 2013. The regulations do not define the word 'expert'. Ms Davies refers to the 63 different categories of expert set out in the Table which follows paragraph 1 of Schedule 5 of the regulations. The point made appears to be that there is some significance in the fact that nowhere in this list is there 'provision for legal work'. It is clear from Schedule 5 paragraph 3 that the list of experts in the Table is not intended to be either an exhaustive list of the categories of experts for which fees will be paid by the LAA or an indicative list of the categories of expertise in which expert evidence will be funded.

[67] All of the issues I have raised so far give rise to concern about the adequacy of training for those members of LAA staff responsible for determining applications for prior authority.

[68] In addition to these particular issues I also have two general concerns. Firstly, I am concerned that the mother's solicitors had to submit their application for prior authority three times before the LAA finally acknowledged that it had received a complete set of documents. I am also concerned that to arrive at the stage at which the LAA appeared to agree in principle to fund a non-solicitor expert in Indian law took more than four weeks and in excess of 20 letters and e-mails between the solicitor and the LAA. In *Re R (Children: Temporary Leave to Remove From Jurisdiction)* [2014] EWHC 643 (Fam) I expressed concern about a similar state of affairs in that case. I said that,

'95. The applications for prior authority to instruct an expert have been going backwards and forwards between the LAA and solicitors for some six months. Although I have not been given details of the time spent by the solicitors in pursuing this issue with the LAA, it seems to me to be self-evident that it must have been considerable. This process is wasteful and inefficient. Solicitors are being required to deal with a level of bureaucracy that is almost impenetrable. They are also being required to deal with the consequences that flow from decisions that are unappealable including explaining to their clients why they cannot have the expert evidence which the court has directed is necessary. This is unsatisfactory.'

When considered alongside *Re R (Children: Temporary Leave to Remove From Jurisdiction)* [2014] EWHC 643 (Fam) the facts of this present case strongly suggest that, administratively, the LAA is disorganised. The consequences of this for litigants and their hard-pressed solicitors are matters of concern.

[69] Secondly, I am concerned about what appears to be resistance by the LAA to the granting of prior approval for the use of an expert as to the law of a foreign state in connection with an application for temporary leave to remove a child to a non-Hague Convention country. In *Re R (Children: Temporary Leave to Remove From Jurisdiction)* [2014] EWHC 643 (Fam) the correspondence between the LAA and the mother's solicitor suggested that the LAA was highly resistant to meeting the cost of such an expert The correspondence between the LAA and the solicitor for the mother in this present case gives the same impression.

[70] In light of my further criticisms of the LAA I direct that the mother's solicitor shall forthwith forward a copy of this judgment to the Chief Executive of the LAA.