Case No: BD12P00866

Neutral Citation Number: [2014] EWHC 4125 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
LEEDS DISTRICT REGISTRY

Coverdale House
East Parade
Leeds

Date: 04/12/2014

Before :

MR JUSTICE COBB

- -

Between :

C
Applicant

- and -

K
Respondent

- -

Farzana Tai (instructed by Makin Dixon) for the Applicant
Deborah Smithies (instructed by YVA Solicitors) for the Respondent

Hearing dates: 3-4 December 2014

- -

Judgment

The Honourable Mr Justice Cobb :

Introduction:

[1] These proceedings concern two children, S (born on 17.4.09, therefore 5 years old), and Y (born on 8.11.11, therefore 3 years old). They are the two children of the parties who I shall refer to respectively as the 'mother' and the 'father'. The children have a maternal half-sibling, B, who is aged 11 who lives with them.

[2] The mother applies, by application dated 26 March 2013, for the discharge of a

Prohibited Steps Order ('PSO') which was made on 12 June 2012 by DJ Hickinbottom on the application of the father (and confirmed by DJ Dodd on 22 June 2012). By that order, the mother was prohibited from:

"[removing] the children from this jurisdiction pending further order"

[3] The mother wishes to be able to travel with the children to visit her home country, namely the People's Democratic Republic of Algeria (Algeria); she has no specific plans for a holiday there at this point, but contemplates that she would wish to spend some of the school summer holidays there in 2015.

[4] For the purposes of making this determination, I read the bundle of material provided; I heard evidence from the parties and from the expert witness. I give this ex tempore judgment at the conclusion of the hearing (a typed note of the judgment being circulated to the parties immediately following the hearing).

Background

[5] The parties are Algerian by birth. They met in Algeria, and were married there. The mother's parents live in Algeria, as do the father's; other family members (including parental siblings) reside in Algeria and France. This was the second marriage for the mother; during her first marriage she lived in England having moved here in 2001. B was the only child of that union, and was included as a subject of these proceedings at one time (the father maintaining that he treated her as a child of the family), but she is no longer so included. The mother's first marriage came to an end in 2005 and the divorce from her first husband was obtained (I have been advised) through legal proceedings in Algeria; the financial remedy proceedings relevant to that marriage were conducted here. Following the end of the mother's first marriage, she spent a period of several months in Algeria; there was some dispute at this hearing as to whether this was an extended holiday, or reflected an intention to make a more permanent home there (the dispute is not of significance to my decision).

[6] These parties married on 6 February 2008. Prior to and during the marriage, the father maintains that the couple had discussed, and agreed, that any children of the marriage would be raised in England; the mother does not I believe contest this. They moved here after the marriage, the father being sponsored by the mother to do so, and they made their home in Bradford. On one occasion, when S was only 8 months old, the family travelled to Algeria for a holiday.

[7] The marital relationship deteriorated in 2011, and the parties separated in December of that year; at that time, the father travelled to London in search of work, the mother remaining at the family home in Yorkshire. The parties agree that the mother effectively brought the marriage to an end during a telephone conversation on 27 January 2012, though the precise content of that call is in dispute. The father maintains that in that telephone call the mother told him that (a) she planned to take the children to Algeria, where they would be raised by their maternal uncles, (b) that he could expect to receive divorce documents from Algeria, and (c) that the father would face the full force of the law, intimating the involvement of the police. The mother denies these aspects of the call (identified in (a)-(c)).

[8] For a while, the father harboured a hope to reconcile with the mother; a hope which was not fulfilled. It seems that may have contacted her multiple times over the following weeks,

for in March 2012, he was interviewed by the Bradford police on suspicion of harassing her. The father was not in fact charged with any offence.

[9] In the spring of 2012, though I am unsure precisely what date, the mother issued divorce proceedings in the Al Harrach Family Court in Algeria. Her divorce papers reveal the fictional assertion that at the time she was 'residing' at an address in Bordj Kiffan, a suburb of Algiers; this is in fact her parents' address. The divorce documents appear further to bear the father's parents' address in Bordj Kiffan as his residence. At the material time, both the mother and father were permanent residents in England.

[10] In May 2012, the father issued an application for a PSO to restrain the mother from removing the children from the jurisdiction. The application was listed before District Judge Hickinbottom on 12 June inter partes and he made the order requested, pending a further hearing on 22 June. DJ Dodd confirmed the order at that later hearing. By the time of the hearing before DJ Dodd, the father had been served with the Algerian divorce papers and he produced them to the court. After hearing evidence, the District Judge confirmed the PSO, relying principally (though not exclusively) on the evidence that the mother had chosen to litigate her divorce in Algeria rather than – as he would have expected – England:

"…mother's explanation was that it is easier for her to do this in Algeria because she could not keep coming to court in the United Kingdom with small children. The reality, of course, known to anyone who asks – and free advice is available – is that the divorce will occur almost certainly without a hearing. … it is odd on the face of it to seek monetary relief in Algerian dinars if you are settled in the United kingdom…" (§8 of the judgment).

[11] Nine months later, on 26 March 2013, the mother made this application to discharge the PSO. At that time her claim was framed by her solicitor in these terms:

"Both her brothers are getting married in Algeria this year and she would like to travel there with the children for the weddings."

It will be quite apparent, given the chronology, that the weddings have now taken place; neither the mother nor the children attended. The mother nonetheless wishes the PSO to be lifted so that she has the freedom to take the children to Algeria at some point in the future, possibly next summer (2015) – to visit her family, and to give the children an opportunity to experience their undoubtedly strong culture which they have inherited from both of their parents.

[12] On 15 August 2013, the mother made a separate application for permission to travel with the children for a holiday in France (where some of her brothers live); one week later, the mother, with leave, withdrew that application.

[13] There have been many failed attempts at a final hearing on this application, largely as a result of difficulties over obtaining the relevant expert evidence (see [22-23] below).

[14] The children continue to reside with their mother in Bradford; they see their father (who currently continues to live in London) four times each year pursuant to a court order (HHJ Hillier: 4 March 2014).

The parties' positions

[15] The father's case is essentially that if given the freedom to travel to Algeria with the children, the mother will not return them. In this respect, specifically he asserts:

i) The mother threatened to remove the children permanently to live in Algeria in the phone call in January 2012; the father contends that this threat was a real one;
ii) The mother's family are predominately in Algeria; he believes that she has a natural wish to return there now that the marriage has come to an end; by contrast, she has no support network here (that she has no support network here was conceded by her counsel during closing submissions);
iii) The mother instituted divorce, custody and financial remedy proceedings in Algeria at a time when the family were living in the UK; this indicates – he says – her intentions to establish herself legally as a divorced person there, with relevant financial and child arrangement orders in that jurisdiction;
iv) The mother has few durable connections in this jurisdiction;
v) That the mother has financial resources in Algeria which she does not have here;
vi) There are no effective safeguards available to ensure the children's return. Any sum lodged by way of security, or offered by way of surety, is not going to offer him much comfort as a fighting fund; as is apparent from the expert evidence, his prospects of succeeding in any claims in Algeria are negligible, so he would be engaging in a fight without a purpose.

He further points out that the maternal family are able to travel to this country to visit the mother and children. The maternal grandparents indeed visit the mother here once or twice per year; in this way, the mother and children are able to maintain a real relationship with their relatives.

[16] The mother disputes an intention to reside permanently in Algeria; she had initially wished to travel there for a wedding, but now simply wishes the opportunity to travel there for the duration of the school summer holidays. She has no specific plans. She maintains that she has built up her life here, pointing out that she has been living here for the best part of 13 years now; her children are also settled and in school here. The father of her older daughter lives here, though he sees B for contact only during the school holidays. The mother has a private rented housing authority home.

[17] The mother, through counsel, submits that if the threat had been as real or troubling to the father as he now says he would have taken steps to prevent her relocating before making an application in May 2012.

[18] The mother offers a number of undertakings including an undertaking to return the children to this jurisdiction following any holiday in Algeria. She offers security in the sum of £4,000; during her evidence she indicated that she was no longer in a position to offer that security, though I was advised by her counsel in submissions that this sum could in fact be raised by her parents if required. It is acknowledged by counsel that a 'security' rather than a 'surety' would be appropriate here, given that those raising the funds live outside the jurisdiction; it was further agreed that if I considered that financial security would be required, I could impose such a requirement as a pre-condition to travel, and it would then be for the mother to find the money. If I took that approach, I would of course take into account the means of the mother, and her evidence generally about the difficulties of raising even £4,000.

The law

[19] The application for the discharge of the PSO must be decided by giving paramount consideration to the best interests of the two children (section 1(1) CA 1989). In reaching a conclusion, I have considered carefully and weighed in my overall evaluation the Article 8 ECHR rights of all of the parties involved: the children, the mother and the father.

[20] I have been referred to a number of authorities which are relevant to resolving this dispute. The most helpful seems to me to be Re A [2014] 1 FLR 643 (sub nom Re R (A Child) [2013] EWCA Civ 1115) which draws on earlier authorities including Re K (Removal from the Jurisdiction: Practice) [1999] 1 FLR 1084 and Re M (A child) [2010] EWCA Civ 888. In Re A Patten LJ, giving the judgment of the court, said this at [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 (Removal from Jurisdiction: Adjournment), 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." (emphasis by underlining added).

[21] At paragraph 25, Patten LJ added:

As the quotation from Thorpe LJ's judgment in Re K (Removal from Jurisdiction: Practice) (see para [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".

Expert evidence

[22] When the matter was before me for directions in June 2013, I directed the parties to

obtain expert evidence on Algerian law. In hindsight, I should have required stricter compliance with the obligations of the parties under Part 25 of the FPR 2010, for when an expert report was obtained in purported compliance with my order, it had been commissioned from Mr. Abdullah-Zadeh, an independent social worker and 'Consultant in Overseas Cultural and Socio-Legal Practices'; this was not the discipline in which I had directed the commissioning of evidence. On receipt of his report, it was agreed by the parties (and recorded on the face of an order made by HHJ Heaton QC on 10 October 2013) that "there are no effective legal mechanisms in Algeria that can act as safeguards for the return of the children."

[23] Moylan J, at a hearing on 11 December 2013, identified that Mr. Abdullah-Zadeh did not provide the requisite expertise and unusually (but not unsurprisingly in the circumstances) directed the commissioning of a further report by an expert in the appropriate discipline.

[24] At this final hearing, I had the benefit of a report from Mr. Aziz Lahouasnia, Avocat in Algeria and Legal Consultant in the UK; he has answered additional questions of counsel in writing, and gave brief oral evidence at the hearing before me. He has provided a summary of the Algerian family law code, which he advised had been radically reformed after 2005, and has applied his expert knowledge of Algerian law to the facts of this case. His detailed advice can be summarised thus:

> i) Family law in Algeria which is essentially in the form of a civil code has to be construed in accordance with the tenets of the Islamic faith or Shari'a;
> ii) Algeria is not a signatory to the 1996 Hague Convention on the Abduction of Children;
> iii) The mother applied for a divorce in Algeria on the basis of Kholu'u (the father accepting the divorce in return for a compensation payment);
> iv) The proceedings in Algeria have been conducted in the absence of the parties; it has been most unusual for the whole process to be conducted without either of them putting in a personal appearance, particularly the mother;
> v) The Al Harrach Family Court has awarded the mother custody ('Hadana') and "sole" and "exclusive" guardianship ('Wilaya') of her two children within the divorce proceedings. Accordingly, she is entitled to choose the place (and the country) of residence where she would be living with her children in accordance with Algerian Family laws: "the mother of the minor children retains full control of the guardianship and these would include travelling with her minor children abroad, acting on behalf of her children when dealing with official authorities be it in the educational, administrative, judicial or health field. Therefore the father is no longer entitled to exercise such guardianship";
> vi) There is no shared parenting as a matter of law after divorce in Algeria;
> vii) The father has been granted weekly and holiday contact ('visiting rights') in the Al Harrach Court;
> viii) The court has made orders for financial provision in favour of the mother and children against the father. The father appealed those orders but was largely unsuccessful. He has not complied with those orders and faces "severe penalties" in Algeria if the Courts were invited by the mother to enforce the same; non-payment of maintenance is viewed as desertion of the family and would "attract a sentence of 3 years prison and a payment of a fine". Similar penalties would be imposed on the mother if she were to deny the father the ordered visiting rights.
> ix) Should the mother decide to choose to live with the children in Algeria, she will be

allowed to make that decision in relation to the children under Algerian law, as she exercises custody and guardianship of her children; "she can theoretically choose where the children should live on a permanent basis. This is particularly true if she decides to elect residence and argue that she wishes to bring up her two children in the religion of their father i.e. Islam … and that Algeria is a better place to bring up children in their Islamic faith."

x) In the event that the father wished to challenge the mother's intentions in the Algerian courts, the mother would be able to rely on provisions of the Algerian Family Law, which direct the holder of the children's custody and guardianship to raise the children as Muslims in a Muslim context i.e. in Algeria;

xi) Any application by the father to require the mother to return the children to the UK against her wishes is not likely to succeed;

xii) Any application by the father for 'Hadana' or 'Wilaya' "would not be successful", as more than one year has passed since the grant of divorce. Only in certain defined circumstances would the mother be likely to forfeit 'Hadana';

xiii) Any decision of the English court requiring the mother to return the children to the UK would not be likely to recognised or enforced in Algeria; the courts would be "reluctant" to enforce any order made here. Specifically it would not pass through the exequatur as it would be seen to be contrary to the divorce decision made in the courts in Algeria: "the concept of national sovereignty is elastic and can be used almost in any case to deny any enforcement of the decision from a foreign jurisdiction"… "The Algerian Judge is likely to refuse enforcing the English Prohibited Steps Order as the divorce was decided in Algeria and not wish (sic.) that a foreign jurisdiction interferes with the issue of divorce that has already been decided";

xiv) Even if the mother was to sign an undertaking to return the children to the UK after a holiday (whether that undertaking were to be given in the UK or in Algeria), the court in Algeria would acknowledge the mother's entitlement to change her mind. Any undertaking to return the children to the UK which had been signed in the UK would not be enforceable through exequatur in Algeria.

Discussion

[25] I approach this case on the basis that it would indeed be in the interests of the children to be given the freedom to travel with their mother, and to enjoy the culture and richness of their parents' homeland. Travel broadens the horizons even in the very young, and such an experience would undoubtedly meet their educational and emotional needs. Algeria represents a real and vivid aspect of their 'background' circumstances. It would also give them the chance to spend time with their maternal family in their home environments, again entirely in accordance with their best interests.

[26] While I accept that the mother has previously visited Algeria with S (in 2009-2010) and has returned, the circumstances then obtaining were very different from those obtaining now; then they travelled in the company of the father, and at a time when the parties were still enjoying their marital relationship. I garner no comfort in the circumstances from noting that she returned from such a trip. I recognise that the mother has lived here for many years, and that she proclaims a wish for this to continue; however, while she has ties to this country (in terms of schooling for the children, and a rented home), there are none which represent profound investment; these are ties in fact which are reasonably easily severable.

[27] The threat of abduction appears to have arisen (certainly on the father's case, which I

accept) as soon as parental separation was first discussed between the parties. That threat was, in my judgment, inevitably heightened by the mother's actions in launching and pursuing divorce proceedings (together with the full range of ancillary orders) in Algeria. I share DJ Dodd's concerns about the mother's motivations in seeking her divorce in Algeria, and more specifically in seeking financial relief in Algerian dinars. Although Ms Tai indicates that the mother needed the divorce orders in Algeria, in the absence of a letter from the father, in order to authorise her travel, this explanation first appeared (somewhat as an afterthought in my view) only in the written statement of the mother a year after the issue had first arisen (May 2013). Significantly, this was not the account which the mother had earlier given:

i) to the District Judge, who was told (see above) that she had litigated in Algeria because "because she could not keep coming to court in the United Kingdom with small children".
ii) in her statement dated 25 March 2013 (§6), in which she said:

a) "I applied for divorce proceedings in Algeria as opposed to applying for them in England because I had an Algerian solicitor advising me in respect of divorce matters in Algeria" and later
b) "because I believe that this was the correct and right thing for me to do at the time and I was supported by my family in this matter".

I should add that no evidence was led before me about why she did not ask the father for written authority to travel (instead of relying on divorce orders).

[28] In a statement dated 15 June 2012 (§13), the mother postulated that the father had only brought the application for a PSO because she had indicated that she wished to commence divorce proceedings in Algeria (i.e. not indicating that she had in fact done so); in fact by the time of that statement, divorce proceedings had been issued there (certainly by 5 June 2012). I am satisfied that the father's delay in bringing the proceedings was attributed to his hope that he and the mother would reconcile; the urgency of the process was caused when the mother intimated imminent divorce process.

[29] The mother was unable in evidence to give a good explanation for the fact that her divorce documents suggested that she was residing in Algeria at the time of those proceedings, and only 'currently living' in Bradford (see undated letter from the mother's Algerian lawyer); she was unable to give any explanation at all for why the father was said also to be residing there at that time. Given that, on Mr. Lahouasnia's evidence it was unusual for the process to be conducted wholly in the absence of the parties, I was left concerned about this misrepresentation.

[30] The mother indicated in a statement dated 23 May 2013 that she "will not be enforcing the claim for maintenance to support the children" (§16), yet, as indicated above, less than two weeks earlier, (according to Mr. Lahouasnia) had vigorously opposed the father's appeal against the maintenance determination and had sought an order enforcing the Algerian orders in Algeria. Again, notably, following her first divorce she told me that the financial arrangements had been resolved in this jurisdiction.

[31] The parties' competing accounts of the telephone conversation on 27 January 2012 was

considered by DJ Dodd; he was of the view on the balance of probabilities that the conversation took place as the father described it.

[32] I do not believe that I have heard materially different evidence about this conversation, and accordingly afford proper respect to DJ Dodd's conclusion. Inevitably discussion of it featured in the oral evidence of the parties at this hearing and I have, like DJ Dodd, considered the parents' differing accounts. I do not consider that memory of events so long ago is likely to be so accurate that the witnesses could remember the precise words used, but I am satisfied, having seen and heard both parties, that the father's account is indeed (as DJ Dodd found) to be preferred. I accept that the mother told him that she intended to take the children to live in Algeria and be raised by maternal uncles.

[33] The expert legal advice makes clear that the father is impotent in the event that he should seek to enforce in Algeria any order made here. He is in no stronger position in seeking to pursue proceedings there; indeed it appears that he is vulnerable to a 'severe penalty' for the non-payment of the maintenance award, made in his absence in the proceedings in the Al Harrach Court, were he to travel there. He is, I accept, genuinely fearful of the consequences of travelling to Algeria, telling me in evidence that he had not visited for his father's funeral there, and was to be in the next few days meeting up with his mother – but in Tunisia rather than in their home country.

[34] I have pointed up, in this concluding section of the judgment, those areas of the evidence in which I have found the mother to be an unsatisfactory witness, and someone on whose word I would find it difficult to repose any or any significant trust. The court's trust is essential if an applicant is to attract support from the court for foreign travel to a non-Hague country such as proposed here. Overall, I found the father to be a more satisfactory witness, even if at times somewhat verbose, whose account was – where their versions differed – to be preferred.

[35] Taking matters overall, I am satisfied that it is not in the interests of the children to discharge the prohibited steps order. There is, in my judgment a clear and identifiable risk that any order for the children's return would be breached; I am not satisfied that the mother has been candid with the court on issues of importance to my deliberation. I consider that if the mother were to go to Algeria, even with the intent of returning but change (or be persuaded to change) her mind, then the consequences for the children would be grave; they would be effectively dislocated from all that they have known, deracinated from their homes in Bradford, and put beyond the effective reach of the father. The safeguards discussed are ineffective to mitigate these risks. Ms Tai conceded in submissions that Mr. Lahouasnia's evidence offered her no comfort; the safeguards discussed by him do not have any "real and tangible effect" in Algeria and are not "capable of being easily accessed by the UK-based parent" (namely the father, here). I cannot in the circumstances say that I am "positively satisfied" that the advantages to the children of visiting Algeria outweigh the risks to their welfare which the visit will entail.

[36] I have reached this decision clearly; even had I been less sure, I would have accepted the advice of the Court of Appeal in Re A given the lack of safeguards, to err on the side of

caution. I am not by this judgment saying that the children should never have the chance to visit Algeria. There may come a time when they express the clear wish to go themselves, and when, with maturity and greater autonomy, they may be able to provide for themselves a degree of self-protection against the unilateral actions of their parents.

[37] But at the present time, and on the basis of the evidence laid before me, I decline the mother's application.

[38] That is my judgment.