Neutral Citation Number: [2014] EWHC 3721 (Fam)

Case No: FD13P02415/FD14P00322

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2014

Before :

MR JUSTICE HAYDEN

- -

Between :

S B	**Applicant**
- and -	
M B	**Respondent**

- -
- -

Mr Charles Hale QC & Mr Michael Gration (instructed by **Clintons Solicitors**) for the **Applicant**
Mr Henry Setright QC (instructed by **Levison Meltzer Piggott**) for the **Respondent**

Hearing dates: 15th & 16th September 2014

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Judgment

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.

See also Judgment: [2014] EWHC 3719 (Fam)

Mr Justice Hayden :

1. On the 12th March 2014 I delivered an ex tempore judgment in this case. I am reminded by counsel that the court sat until 7 pm on Friday evening at the conclusion of a three day hearing in order that the subject child did not have to endure further delay before her future was resolved. Ultimately there had been only one substantive issue in the case, namely where the child ('M') was habitually resident. The father then represented by Mr Teertha Gupta QC contended M's habitual residence was in Israel, the mother represented then and during the course of this application by Mr Charles Hale QC and Mr Michael Gration contended that the child was habitually resident here in the UK. For the reasons set out in my judgment I found in favour of the mother. Mr Hale indicated at the conclusion of the judgment that he intended to

make an application to recover the costs of the hearing from the father, but recognised, that the application would have to be adjourned to a subsequent date if for no other reason that the lateness of the hour.

2. I was not surprised, in a case that I had already described as having been 'litigated to saturation point' that my findings were met by an immediate application, on behalf of the father, for permission to appeal. I observe, in passing, that there has been a parallel 'jurisdictional' issue pursued by the father in the Israeli courts. It has been pursued there with what I have come to recognise as the father's hallmark vigour. Following a resounding rejection of his application at first instance, a judgment that was highly critical of him personally, the points were pursued on to the Court of Appeal in Israel and eventually to the Supreme Court there. That litigation has been entirely futile, on my reading of the respective judgments. What is perhaps most reassuring however is the conformity both of principle and approach in the two country's respective Hague Convention jurisprudence.

3. I refused Mr Gupta's application for permission to appeal and, predictably, it was pursued by the lodging of a written application before the Court of Appeal. At this point, I suspect in the light of my trenchant observations concerning the litigation conduct of the case, both parties dispensed with the services of their respective solicitors. Mr Gupta was a casualty of the new regime and Mr Henry Setright QC now appears on the father's behalf. Ultimately, the appeal was discontinued and the costs application is now restored before me.

4. Both party's legal teams agree on the framework of the law relating to the determination of costs in applications of this kind. The following common ground has been identified:

   i) The High Court has jurisdiction to award costs in first instance cases brought pursuant to the 1980 Hague Convention. It is trite that it has such powers in applications made pursuant to the inherent jurisdiction though, for the reasons set out in my substantive judgment, that is of merely academic relevance here;

   ii) Though there are few reported cases of cost orders having been made against applicants in this Hague Convention jurisdiction, the basis of the power to award costs was analysed and confirmed by Ryder J (as he then was) in *EC-L v DM (Child Abduction:costs) [2005] EWHC 588 (Fam), [2005] 2 FLR 772.* There Section 11 of the Access to Justice Act 1999 was in focus and the Family Proceedings Rules 1991 that then applied. However, the principles identified in the case continue to hold, by parity of analysis, with the framework of the Family Proceedings Rules 2010;

   iii) In each case where a costs application is made there should be an inquiry into the merits *EC-L v DM (Supra)*

> 'it should be the expectation in child abduction cases that the usual order will be no order as to costs, but where a parties conduct has been unreasonable or there is a disparity of means then the Court can consider whether to exercise its jurisdiction in accordance with normal civil principles';

iv) It is misconceived to talk of a 'presumption' of 'no order' for costs at first instance in either Hague Convention cases or children cases more generally. In *Re J (Children) [2009] EWCA Civ 1350* Wilson LJ, as he then was, referred to the 'general proposition' of no order as to costs applied to a 'paradigm' situation. In *Re T (Costs: Care Proceeedings: Serious Allegation Not Proved) [2012] UKSC 36* 'reprehensible behaviour' or 'an unreasonable stance' were identified as markers for an adverse costs order;

v) *FPR 2010, r 28.1CPR 1998 r 44.3* do not circumscribe the Judge's discretion on costs and invite the Court to consider 'all the circumstances'. It should of course have regard to the matters set out at CPR rule 44.2 (4) and (5):

> *(4) 'in deciding what order (if any) to make about costs, the Court will have regard to all the circumstances, including –*
>
> *a) the conduct of all the parties;*
>
> *b) whether the party has succeeded on part of its case, even if that party has not been wholly successful;*
>
> *c) any admissible settlement by a party which is drawn to the Court's attention, and which is not an offer to which costs consequences under para. 36 apply.*

The conduct of the parties include-

> *d) conduct before, as well as during, the proceedings and, in particular, the extent to which the parties followed the practice direction – pre action protocol or any relevant pre action protocol;*
>
> *e) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*
>
> *f) the manner in which a party has pursued or defended its case or a particular allegation or issue;*
>
> *g) whether a claimant has succeeded in a claim, in whole or in part, exaggerated its claim.*

vi) It is generally undesirable to award costs where the consequence of such order is likely to exacerbate hostile feelings between parents to the ultimate detriment to the child.

5. Whilst this broad agreement on the applicable principles might seem encouraging Mr Setright emphasises, portentously, that there are nonetheless 'important nuances of interpretation'. Though it had not been foreshadowed in his skeleton argument Mr Setright volunteered very early on in his oral submissions that the father should indeed bear some of the mother's costs but only he contended "to a very modest degree". Given Mr Setright's emphasis on 'reprehensibility' of conduct or 'unreasonability of stance' as the major indicators pointing towards an adverse costs order, I take his concession to be an acceptance that aspects of the father's litigation conduct met the criteria which he himself identified. I am bound to say that such concession tacit or otherwise is to my mind inevitable on the history of the case and on the facts as I found them to be.

6. I do not consider it necessary to address each of the points raised by the parties as to the particular features of this case that influence the extent of the adverse costs order. It is, I hope, obvious that the fact the father was unsuccessful in his application does not render his conduct 'reprehensible' or 'unreasonable'. Nor is this a case in which disparity in means should lead, in and of itself to a costs order being made. Objectively, I am, in any event, dealing with a disparity that pits 'wealthy' against 'extremely wealthy'. Neither do I consider the fact of the father's extensive litigation in Israel to be directly relevant to my consideration of costs in this jurisdiction. It is however relevant in so far as it illuminates the father's mindset and general approach to litigation concerning his daughter. It is also important to emphasise that some of the remarks in my judgment concerning the father's personality have no relevance at all to his litigation conduct. Mr Gupta described his own client as 'terse', it was an exercise in forensic damage limitation. I found him to be 'dogmatic, occasionally capricious, highly opinionated and a bully'. All of this is irrelevant to my consideration of costs. (It is perhaps also worth noting that I also found despite this that he had much to offer his daughter, he has both dynamism and humour which she plainly shares). What is relevant is how these features of his personality influenced his litigation conduct. MB's own words in evidence are illuminating. When the mother withdrew her daughter from the Israeli school at which all agree (even the father) she was plainly unhappy, he described her actions as 'a war against me' and 'my daughter'. In cross examination he was given every opportunity to claw back from that sentiment. I had expected him to disown it as a phrase used in the heat of the moment. He declined to. This unilateral action was indeed an act of war in his mind. In my judgement that has wider resonance for I find it has characterised his entire approach to this litigation.

7. Mr Setright contends that the ultimate ground relied upon by the mother i.e. 'habitual residence' was a 'finely balanced issue properly requiring two days of oral evidence to resolve'. It is true that from the papers the conclusion as to 'habitual residence' was not readily apparent. That it was not so however was, as I found, due to the fact that the father had deliberately sought to obscure it. The test is, as I set out in the judgment, essentially a question of fact which 'should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce' (per Baroness Hale *Re KL (a child) [2013] UKSC 75* . When the evidence was scrutinised it did not prove to be in any way finely balanced. In Israel I found M to be 'conflicted, unsettled, unhappy and unable to integrate'. She found no 'stable environment', she was unable to 'put down roots'. The contrast, I found with her life in Chelsea 'could not be more stark'. This was not a case of a father deluding himself that his daughter had settled and in effect, become habitually resident in Israel, he knew full well how unhappy his daughter had been. He was simply determined to get the outcome to the litigation he wanted, believing his daughter would be happy eventually. When the evidence was stripped down the reality was clear. That this process had to be undertaken forensically was due to the father's deliberate camouflage of the facts and his general dissimulation to the Court. In his terms it was 'war' and he wanted to win.

8. There is no magic or formula in a case of this kind for determining how costs should be attributed in percentage terms. It is I think always relevant to bear in mind that an adverse costs order inevitably exacerbates feelings between two parents even where, as here, pride I suspect is more important than the money itself. This was a case

where the mother had cast her net widely, both her statement and skeleton argument prepared on her behalf relied on the defences of 'Consent', Article 13 (b) and the 'child's objections'. In the event, as I have said, it honed in at the hearing to the single issue of habitual residence. This manner of opportunistic pleading in Hague Convention cases is far too common and antithetical to the summary philosophy of the proceedings themselves – it is to be deprecated. Here, as always, it caused both delay and unnecessary expense.

9. In the circumstances I consider that the father should be responsible for half the mother's costs. As I am firmly of the view that there is every risk of satellite litigation as to costs in this case I considered whether it was possible, having been provided with the mothers bill of costs, for me to undertake a Summary Assessment, focusing on a global view of proportionality of costs incurred rather than itemised consideration. Mr Hale and Mr Gration were, understandably, keen that I should do so.

In Naylor v Monahan and Churchill Insurance [2011] EWHC 1412 (QB) at para. 14. Coulson J endorsed the broad brush discretionary approach:

> "A degree of robustness is not only permitted by the C.P.R it is positively encouraged"

I confess this attracted me. However it does not preclude some itemised consideration of the individual elements of the costs and I am simply not in a position to assess them, nor would it be an appropriate use of this Court's time. In any event Summary Assessment here is likely to fall foul of C.P.R 43 PD 13.2 which indicates the appropriateness of such approach is limited to a fast track trial or a hearing which lasts no more than a day. Neither of course apply here.

Accordingly I direct the Father to pay half the costs incurred by the mother's response to the application, subject to detailed assessment on a standard basis.