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# Re R (Children: Temporary Leave to Remove from Jurisdiction) [2014]

## [2014] EWHC 643 (Fam)

03/03/2014

**Barristers**
Alex Verdan QC

**Court**
High Court (Family Division)

**Practice Areas**
International Children Law

**Summary**
Application for temporary leave to remove to non-Hague Convention country (India). Application refused. Criticism by the court of the Legal Aid Agency's refusal to fund a report from an expert on Indian family law in spite of repeated directions that the court considered the report a necessary disbursement on the parties' public funding certificates.

**Facts**
This case concerned four children, aged 7, 6, 4 and 3. Proceedings, which originally concerned the father's contact with the children, were long running and had required the joinder of the children as parties. The mother sought the court's permission to take the children on a trip to India. She was of Indian origin and wished to be able to take the children to visit relatives. At an earlier fact-finding hearing, the court had made findings in respect of domestic abuse on the part of the father and paternal family which were "at the lower end of the spectrum". There was deep distrust between the parties. The father opposed the mother's application for leave to remove, citing concerns in respect of non-return.

His Honour Judge Clifford Bellamy, sitting as a Deputy Judge of the High Court, set out the applicable law relating to applications for temporary leave to remove from the jurisdiction. The principles, he noted, were set out in two Court of Appeal decisions: *Re K (Removal from jurisdiction: Practice)* [1999] and *Re R (A Child)* [2013]. In the latter, Patten LJ stated:

'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.'

The Judge noted the first instance decisions of *Re A (Security for return to jurisdiction)* [1999] and *Re S (Leave to remove from the jurisdiction: securing return from holiday)* [2001] which contain examples of safeguards put in place in those cases in order to try to ensure that children were returned to the UK at the end of a holiday to a non-Convention country.

He also referred specifically to the comments in *Re R* (above) by Patten LJ at paragraph 23 that there was a need in most cases for the effectiveness of any suggested safeguard against non-return to be established by competent and complete expert evidence.

As a result of the Legal Aid Agency refusing to fund the instruction of an expert report (despite the court having twice made directions for experts to be instructed and considering their fees reasonable disbursements on public funding certificates), the court had to consider this case in the absence of any such expert evidence.

In applying the above principles to this case, the Judge considered that the risks of non-return were low, but not non-existent. The consequences of non-return, however, would be life changing and profoundly damaging for the children. When considering the available safeguards, the Judge noted that there were no particular safeguards proposed by the mother, but rather her counsel had pointed to various safeguarding measures used in other reported cases. He criticised this approach, commenting that it was "not good enough" to simply say to the court "take your pick" of safeguarding measures. An applicant should set out precisely the safeguarding measures s/he proposed, with a reasoned analysis of why those safeguards were (a) the best that can be achieved and (b) likely to be effective (paragraph 71). The court would have been assisted by expert evidence on this issue. Written evidence provided by the father from the Foreign and Commonwealth Office indicated that the task of recovering the children, if wrongfully retained, would be lengthy, complex and uncertain.

## Held

Considering the above three factors, together with the overriding provisions of section 1 of the Children Act 1989, the Judge concluded that the balance fell down on the side of refusing permission. Although there would be benefits to the children in taking the trip, the consequences of wrongful retention were so great and the safeguarding measures so uncertain that it would not be in their welfare interests for permission to be granted.

On a separate issue, the court was also called upon to decide the appropriate progression of the father's contact. The father had been having contact on alternate weekends from 10am on Saturdays to 4pm on Sundays. He sought an increase in this contact under which he would collect the children from school on Fridays and return them to the Mother at 7.30pm on Sundays. The mother's position was that contact should be from 7.15pm on Friday evenings (after the children had finished attending their madrassa) until 4pm on Sundays. The Judge determined that there should be contact from the end of school on Fridays to 5pm on Sundays. He also directed that the handover venue should be changed from a police station to the mosque closest to the mother's home.

*Per curiam*: The court was roundly critical the Legal Aid Agency (LAA) for refusing to fund an expert assessment on Indian family law. The mother's application had first been considered by the court on 18th July 2013 when the His Honour Judge Bellamy had permitted her to obtain an expert report and deemed the costs of such report, limited to £2,500, to be a reasonable, proportionate and legitimate expense on her public funding certificate. The mother's solicitors' application for prior authority for funding of the

expert's report was refused. In November 2013, Eleanor King J had further directed that the mother and the Guardian (who was by that stage a party) have permission to instruct a named expert. Recitals to her order recorded that the report was "absolutely necessary for the proper determination of the case", contained detailed reasons as to why the instruction was properly the instruction of the mother and the Guardian (and not the father) and indicated that further delay would prejudice the interests of the children. In spite of this the LAA again refused to grant authority for the instruction of the expert.His Honour Judge Bellamy described the system for applications for authority to fund experts as wasteful, inefficient and involving and almost impenetrable level of bureaucracy. He considered it "simply unacceptable" that the LAA had "overridden" the case management directions made by the Court (paragraph 96). He directed that his judgment be served on the LAA and that the Chief Executive of the LAA respond in writing within 28 days.