



Neutral Citation Number: [2022] EWHC 862 (Fam)

Case No: FD22P00014

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7/04/2022

Before :

MRS JUSTICE THEIS

Between:

	J	<u>Applicant</u>
	- and -	
	H	<u>1st Respondent</u>
	- and	
	Local Authority	<u>2nd Respondent</u>
	-and -	
	The children (through their Children's Guardian)	<u>3rd- 7th Respondents</u>
	- and -	
	Secretary of State for the Home Department	<u>Interested Party</u>

Mr A Perkins and Ms A Wilson (instructed by **Williams & Co**) for the **Applicant**
Mr D Day and Mr J Legg (instructed by **Jai Stern Solicitors**) for the **1st Respondent**
Mr M Roscoe (instructed by **London Borough of Barnet**) for the **2nd Respondent**
Mr H Setright Q.C. and Ms K Webb (instructed by **Osbornes Law**) for the **3rd Respondent**
Mr M Smith (instructed by **the Government Legal Service**) for the **Secretary of State for the Home Department**

Hearing dates: 15 - 17th March 2022
Judgment: 7 April 2022

Approved Judgment

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MRS JUSTICE THEIS

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. 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.

Mrs Justice Theis DBE:

Introduction

1. This is an application under the Child Abduction and Custody Act 1985 for an order pursuant to Article 12 of Hague Convention on the Civil Aspects of International Child Abduction 1980 (“the 1980 Convention”) directing the summary return of five children, aged between 14 and 7, to Germany. The application is made by the children’s mother, who remains in Germany with the two younger children of the family.
2. The mother’s application is supported by the children, who are parties to this application through their Children’s Guardian, Desmond Wheway. It is also now supported by the father. The local authority, who are parties to the proceedings as the children are subject to interim care orders, also support the return of the children to Germany under the 1980 Convention.
3. The father removed the children from Germany in July 2021, without the mother’s consent and brought them to this jurisdiction. On arrival the father claimed asylum, naming the children as dependants. The asylum claims sought not to return to Iraq.
4. Following a referral to the police the children were removed from the father’s care in August 2021. Since then they have been in the care of the local authority, most recently under an interim care order made under Article 11 of the 1996 Hague Convention when HHJ Karp determined in the care proceedings that the children’s habitual residence remained in Germany.
5. Since August 2021 the children have had no contact with their father (save for a one off occasion in February). They remain in regular contact with their mother and have been consistent in their wish to return to her care in Germany.
6. Until the start of this three day hearing the father opposed the return of the children. There is no issue the children’s habitual residence remains in Germany and they were removed without the mother’s consent. The father relied on a defence under Article 13 b of the 1980 Convention, namely that the children were at risk of grave harm or being placed in an intolerable situation. The father based that defence on his concern that if the children returned to Germany there was a real risk the mother would remove them to Iraq. That was largely founded on a document the father said she had signed in June 2021. The mother denies any knowledge of the document or that it contained her signature.
7. At the start of this hearing the father’s position changed, as outlined by his counsel, Mr Day. Mr Day confirmed the father no longer advanced an Article 13 b defence and acknowledged, in those circumstances, a summary order for return under Article 12 of the 1980 Convention could be made. Mr Day said the father sought for his and the children’s (if the latter is determined to exist) asylum applications to be determined by the Secretary of State for the Home Department (‘SSHD’) and for further clarification from the expert as to how what the father now recognised would happen could be brought to fruition, namely how the children could return to Germany.
8. At the request of the court the Secretary of State for the Home Department (‘SSHD’) helpfully attended this hearing through counsel, Mr Mark Smith, and filed written representations which confirm the father’s asylum application and that of the children

(if it exists) will be determined by 25 March 2022 under the expedited procedure put in place following *G v G* [2021] UKSC 9.

9. In the light of the father's change in position it was agreed the court would hear oral evidence from the jointly instructed German immigration expert, Ms Müller. Her evidence, set out in more detail below, confirmed the two immigration routes the children could return to Germany. She expressed confidence about the prospects of success of such applications and made it clear that continuing uncertainty about the asylum applications here relating to the children were, in her opinion, likely to reduce the chances of the immigration applications she outlined being granted.
10. Time was given for the father to consider his position in the light of that evidence and the tension in his position regarding the 1980 Convention application with the return order being made and his wish for the asylum applications to be determined. The mother confirmed she supported the asylum applications that related to the children being withdrawn, as did the Children's Guardian on behalf of the children, and the local authority. The father did not support that as he was concerned about the lack of certainty of the immigration route for the children to return to Germany
11. Following further short adjournments to allow the father to consider his position and for further matters to be clarified the court and the parties were informed by Mr Day that the father now accepted the asylum applications for the children should be withdrawn. This was later confirmed to include his own asylum application.
12. In the light of that change in position the only issue the court had to determine was whether the court should grant the declaration sought by the local authority that it could exercise its powers under s33 of the Children Act 1989 (CA 1989), if required, to withdraw any asylum application made on behalf of the children and take any steps necessary to effect the children's return to Germany.
13. The father opposed that on two basis, first that it was not necessary in the light of the change in his position and, secondly, a decision of such magnitude does not come within the powers under s33 and should be the subject of a separate application by the local authority under the inherent jurisdiction.
14. The mother and children's guardian supported the local authority's application.
15. Following hearing submissions from the parties the court announced its decision that in the circumstances of this case the local authority did have power under s33 and the reasons for that decision would follow. The parties were able to finalise the order for approval by the court. This judgment sets out the reasons for the court's decision.

Relevant background

16. The mother, father and seven children left Iraq and arrived in Germany in 2015. Their application for asylum there was refused in 2016.
17. The family were granted a 'Duldung' on 25 March 2021. This is a temporary leave to remain, granted for renewable periods of three or more months. The mother and the younger two children recently had their leave to remain in Germany renewed for a further six months until May 2022. Ms Müller confirmed in her report that the

‘Duldung’ is the status all Iraqi refugees in Germany have if their asylum applications are not successful. They are valid on renewable terms until the Ministry of Inner Affairs decides that it is possible to go back to Iraq.

18. The father and the older five children left Germany in July 2021 in disputed circumstances. According to the mother she had fled the family home with the two younger children two days previously due to the father’s threatening and abusive behaviour. Her intention was to seek the care of the older children with the assistance and support of Women’s Aid.
19. Unknown to the mother the father left Germany with the older five children and travelled overland to Calais, before crossing the English Channel and arriving in this jurisdiction on 19 July 2021.
20. Once the mother became aware the children had been removed she applied on 16 July 2021 to the local court in Germany and obtained orders prohibiting the father from taking the children out of Germany and authorising the border police to prevent any departure of the children from the territory of the contracting states of the Schengen agreement.
21. On the father’s arrival here he claimed the mother and two younger children had become separated at the border of Calais. According to what the older children later said to the police, their father had told them to give false names to the Home Office on their arrival.
22. The father was interviewed with the assistance of an interpreter on 21 July 2021. An ‘Initial Contact and Asylum Registration Questionnaire’ was completed when he gave a different name, date of birth and said he was born in Kuwait. He listed the five children as dependants to be included on his asylum application and gave different names for the children than those given by the children to the police on 25 August 2021. The questionnaire gave details of the journey to this jurisdiction but did not mention that the family had been in Germany for six years. The father was asked to attend an asylum interview on 3 February 2022, which was rescheduled to 28 February 2022 which he attended.
23. Following referrals to the local authority and the involvement of the police the children were removed from the father’s care on 25 August 2021 when the children made allegations of physical abuse against them by the father. The father was arrested and the police investigation continues.
24. The children were placed with foster carers, initially together but more recently, split between three foster placements. At the time they were placed in foster care the mother was contacted by the local authority to inform her what had taken place.
25. On 7 September 2021 the court in Germany made provisional orders requiring the father to surrender the five children to the mother and authorising the mother to use the assistance of the ‘responsible bailiff’ and the police to do that.
26. On 4 October 2021 the local authority issued care proceedings and interim care orders were made on 26 October 2021. Through those orders the local authority shared parental responsibility with the parents.

27. On 10 December 2021 HHJ Karp determined that the children's habitual residence remained in Germany. At that hearing the father confirmed he had removed the children from Germany '*without the consent or knowledge of the mother and in the knowledge that the mother would not have consented*'. The order declared that immediately before the children's removal from Germany on 12 July 2021 the five children were habitually resident in Germany and the removal was in breach of the mother's rights of custody. The interim care orders were renewed as interim protective measures under Article 11 of the 1996 Hague Convention.
28. The mother applied through the Central Authority for the return of the children to Germany under the 1980 Convention.
29. These proceedings were issued on 12 January 2022, served on the father and the first hearing took place on 19 January 2022. Comprehensive directions were made by the court leading to this three day hearing listed to start on 15 March 2022.
30. On 8 March 2022 the SSHD wrote to the court and the parties stating she would not be seeking to intervene in the proceedings or attend this hearing. Following further directions made by the court on 24 February, 4 March and 9 March 2022 the SSHD made further written representations and attended this hearing. The information provided by the SSHD has been very helpful, it has meant the court and the parties have had any relevant information regarding the outstanding asylum applications readily available.
31. At the start of the hearing on 15 March 2022 Mr Day outlined the father's revised position, namely that he no longer pursued his Article 13 b defence, recognised the children would return to Germany under Article 12 but wished for the children's outstanding asylum applications to be determined first. It was agreed that Ms Müller, the jointly instructed expert on German immigration law, should give oral evidence and the position would be re-considered after that.
32. Mr Setright Q.C., who had only very recently been instructed, also outlined the need for the Children's Guardian to speak to the older two children, to seek their views about what was being proposed about their return to Germany and the asylum applications here that relate to them. Mr Wheway was able to make arrangements to see them both separately on day two of the hearing. In his discussions with both children they each confirmed their wish to return to Germany, to be in the care of their mother and for the asylum applications here not to be continued on their behalf.
33. Following the oral evidence given by Ms Müller on day one of the hearing Mr Day set out the father's updated position the following day. With the clarification given by Ms Müller as to the immigration route for the children to return to Germany, the father agreed to the asylum applications for the children being withdrawn.
34. In the light of the fathers updated position the only issue the court was required to determine was whether the declaration sought by the local authority should be granted.

The expert evidence from Rebecca Müller

35. In her comprehensive written report Ms Müller outlined the position the children were in. As a result of the actions taken by the father in removing them from Germany they had lost the benefit of the 'Duldung'.
36. Ms Müller outlined two ways the children could return to Germany, which she recommended are pursued simultaneously.
37. First, the mother should apply for a legal permit to the Alien Department in Berlin under 7 section 1 sentence 3 AufenthG. She considers there are justified reasons to issue such a permit under the relevant provisions which protect rights to family life. Following this application by the mother the children should make an application for a visa to the German Embassy in London under section 1 or 3 AufenthG.
38. Second, is for the children to make an application for a visa at the German Embassy in London under 22 section 1 AufenthG which allows a foreigner to be granted a residence permit for urgent humanitarian reasons and be 'admitted from abroad'. In her report Ms Muller notes there has been correspondence between the Alien Department and the Ministry about this option in respect of this case.
39. In her cogent and pellucid oral evidence Ms Müller confirmed that through either of these routes if the visas were granted they would be for three months. She was confident the visas would be granted. She stressed it would be important for applications to be made by the children, once they were in Germany, for permits on the same legal grounds the visa was based on, which she expected to be granted. Although she was unable to say how long such a permit would be granted for it was unlikely to be less favourable than the 'Duldung' regime.
40. In her view any continuing proceedings in this jurisdiction or outstanding applications that are not determined here is likely to delay any decision regarding the immigration position of the children in Germany. As she said, if the option to remain here was still open there would be no reason for the German authorities to consider applications by the children to return to Germany.

Declaration

41. The submissions regarding the declaration sought by the local authority were heard on the second day of the hearing.
42. Mr Roscoe outlined the local authority's application in his written and oral submissions. He submits in the changing landscape of this case he seeks either for the court to determine that the way in which the local authority is able to exercise its parental responsibility under s33 CA 1989 in the circumstances of this case is permitted or, in the event that it isn't for the court to invoke the inherent jurisdiction to declare that the local authority can do what it seeks to do.
43. By the time Mr Roscoe came to make his submissions the factual position had changed. Both parents agreed the asylum applications for the children should be withdrawn and were united that the children should return to Germany. That position was supported by

the Children's Guardian as being in the children's best interests and accorded with their wishes.

44. In those circumstances Mr Roscoe sought, in effect, a declaration that in the circumstances that now exist the exercise of the powers the local authority have under s 33 CA 1989 regarding parental responsibility for the children includes any steps they need to take to ensure the children return to Germany, which can include taking the necessary steps to withdraw the children's applications for asylum.
45. Mr Roscoe referred the court to Peter Jackson LJ's comments in *Re Y (Children in care: Change of Nationality)* [2020] EWCA Civ 1038 at [13] where he stated as follows:

'On a literal reading, this provision would allow a local authority to make profound and irreversible decisions about a child, up to and including consenting to the withdrawal of life-sustaining medical treatment. This court has however held that, for the protection of the rights of children and of other holders of parental responsibility, certain decisions are of such magnitude that they should not be determined by a local authority without all those with parental responsibility having an opportunity to express their view to a court if necessary as part of the decision-making process. It held that the use of statutory powers in such cases would be a disproportionate interference with the rights of family members. In the recent decision of Re H (A Child) (Parental Responsibility: Vaccination) [2020] EWCA Civ 664, Lady Justice King put the matter in this way:

"26. On a strict reading of s.33(3)(b), and subject only to the exceptions already highlighted, the extent to which a local authority may exercise its parental responsibility is unlimited, provided that it is acting in order to safeguard or promote the welfare of the child in its care.

27. However, whilst that may be the case when considering the section in isolation, local authorities and the courts have for many years been acutely aware that some decisions are of such magnitude that it would be wrong for a local authority to use its power under s.33(3)(b) to override the wishes or views of a parent. Such decisions have chiefly related to serious medical treatment, although in Re C (Children) [2016] EWCA Civ 374; [2017] Fam 137 (Re C), the issue related to a local authority's desire to override a mother's choice of forename for her children. The category of such cases is not closed, but they will chiefly concern decisions with profound or enduring consequences for the child."

46. *Re Y* was a case where the local authority had intended to apply for British citizenship for the children, which would have the effect of removing their Indian citizenship. Mr Roscoe recognised that if the decision under scrutiny fell into the category of being of 'such magnitude that they should not be determined by the local authority' the court may be required to determine the issue through the exercise of its inherent jurisdiction under s 100 (3) and (4) CA 1989.
47. Mr Roscoe submits that the circumstances the court is now in, where the parents both agree the asylum applications should be withdrawn and the children should return to Germany, means the exercise of parental responsibility by the local authority under s33 CA 1989 to ensure the necessary steps are taken is not of such a magnitude that requires the intervention of the court under s100 CA 1989. Each situation needs careful consideration, depending on the facts of each case. Here what is being sought is to effect

the necessary steps to ensure the children return to the situation they were in prior to their unlawful removal from Germany by their father.

48. The way the local authority intend to exercise the powers under s 33 are different than those that existed in *Re Y* as any steps they need to take do not have a permanent effect, are being done in accordance with what is in the best interests of the children and in circumstances where the father no longer opposes the mother's application under the 1980 Convention for the children's return to Germany.
49. The local authority position is supported by the mother.
50. Mr Day, on behalf of the father, submits that the father should have the opportunity to do what he has said he would do, namely to take all the necessary steps to effect the withdrawal of the asylum applications for the children and the local authority application should be adjourned, with liberty to restore the application if necessary.
51. On behalf of the children Mr Setright supports the local authority position. He submits the Children's Guardian is clear the children's best interests are served by every step being taken to secure the children's return to Germany without delay. It is contrary to their interests for there to be any obstacle in place that may risk that outcome being secured. Any continuing uncertainty about whether or not the asylum applications by the children remain in existence is likely to adversely impact the children's best interests.
52. The Children's Guardian welcomes the changed position by the father during this hearing. However there must be no continuing uncertainty about the asylum applications or any steps that need to be taken to support the children's return to Germany. Both parents have had the benefit of expert legal advice and assistance during these proceedings. They now both agree the children's asylum applications should be withdrawn and all steps taken to ensure the children return to Germany. This accorded with the expert evidence from Ms Müller. There is an urgency to bring about certainty for these children and that would involve the local authority, in the circumstances of this case now, being able, if required, to exercise parental responsibility for the children under s33 to ensure, if required, these steps are taken.
53. Mr Setright submits that the magnitude of the decision has to be seen in the context of the particular circumstances of the case. Here the parents, having received legal advice, are united on what needs to be done, as is the Children's Guardian. The exercise of parental responsibility under s33 needs to be viewed in that context.

Decision

54. By the time the court announced its decision in relation to the declaration on the third day of the hearing the father's position had been clarified that he fully supported the withdrawal of the children's asylum applications. Mr Roscoe and Mr Smith, as well as the parents had liaised about the most appropriate process required to ensure this takes place.
55. The parties had been able to liaise and submit a detailed order for approval by the court setting out what had been agreed and the orders the court was being invited to make, which included, most importantly, the order under Article 12 of the 1980 Hague

Convention for the children to return to Germany by 25 April 2022. All the parties spoke with one voice that this order was not only justified and in accordance with the 1980 Convention but the children's best interests required this to be done. Although, of course, a matter for the relevant authorities in Germany, the information this court has demonstrates any further delay in the children returning to Germany is likely to be contrary to their best interests.

56. The change in position by the father is, in the view of the Children's Guardian, likely to help facilitate any steps taken to restore the fractured relationship between the father and the children. Any decisions taken about that will be a matter for the relevant courts in Germany, who have the jurisdiction to determine any future welfare matters.
57. Turning to the issue of the declaration sought by the local authority. In the way the situation has changed during this hearing I am entirely satisfied in the circumstances that now exist the local authority can and should be able to exercise parental responsibility under s 33 CA 1989 to take any steps necessary to effect the return of the children to Germany. That accords with the views of both parents, is supported by the Children's Guardian and is undoubtedly necessary as being in the best interests of the children concerned.
58. In the circumstances that now exist exercise of that power is not of such a magnitude to require the intervention of the inherent jurisdiction.