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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**16/04/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

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A

Applicant

-v-

B

Respondent

_____

Ms Rice (instructed by McKeown & Co, Solicitors) for the Applicant
Ms McKeown (instructed by Joseph Magee & Co, Solicitors) for the Respondent

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SIR REG WEIR

Anonymity

[1] This judgment has been anonymised to protect the identity of the child concerned. Nothing may be published of or concerning the matter which would lead to the child's identification.

The Background in Brief

[2] The applicant father, a Nigerian by birth and upbringing, had a very short relationship with the respondent mother who is Northern Irish as a result of which the subject child, whom I shall call "C", was born in July 2014. Following proceedings in the Belfast Family Care Centre on 24 November 2016 before His Honour Judge Kinney the child has been in the continuous care of her father in Northern Ireland pursuant to a residence order made in his favour. Significantly, at the time of making that order, Judge Kinney also made a prohibited steps order prohibiting C from travelling to Nigeria.

[3] In 2019 the father applied to be allowed to take C on a six week holiday to Nigeria. The mother objected. By the time the matter was listed for final hearing on 28 June 2019 the date of the planned departure, namely 12 July 2019, was imminent. I therefore heard the matter that day and gave an *ex tempore* judgment refusing the application. I further made an ancillary order requiring C's British passport to be forthwith handed by the father to his solicitors and that they transmit it within 7 days of the judgment to the Office of Care and Protection ("OCP") for safekeeping. I further made an order prohibiting either parent from making an application for any other passport in respect of C without the leave of the court and directed that notice of this order be served upon the relevant and Irish and Nigerian authorities. A transcript of that *ex tempore* judgment is annexed to the present judgment and should be read in conjunction with it.

The Present Application

[4] The applicant did not appeal my order refusing him leave to take C on the Nigerian holiday. However, being unhappy with my decision to have C's passport lodged in the OCP for safekeeping, he now seeks the return of the passport to his care. In the alternative he seeks the release of the passport so that it can be sent to the UK Immigration Authorities in support of his application for leave to remain in the United Kingdom. That alternative application is not resisted on behalf of the mother who had previously consented to the release of the passport in strictly controlled circumstances in order to facilitate a visa application by the father. However, the unfettered release of the passport into the care of the father is resisted. Ms Rice appeared for the father and Ms McKeown for the mother and I am grateful to both for their helpful written and oral submissions.

The Applicant's Case

[5] Ms Rice submitted firstly that Article 3 of the Children (Northern Ireland) Order 1995 ("the 1995 Order") is engaged because the passport is C's "property" and a decision to retain it in court amounts to "a question with respect to the administration" of that property and that, accordingly, "the child's welfare shall be the court's paramount consideration." Ms McKeown expressed doubt about this proposition on the basis that a passport, while issued by a government for the use of the holder, remains the property of the issuing government. I do not find it necessary to resolve that issue as I am content to accept that whether the passport should be retained by the OCP or not is in any case to be viewed from the stand point of the welfare interests of the child.

[6] Ms Rice secondly submitted and Ms McKeown agreed that Articles 5 and 8 of the European Convention on Human Rights ("ECHR") are engaged and that the issue is whether the interferences to C's rights implicit in the retention of the passport by the OCP are justified.

[7] Under Article 13(1) of the 1995 Order where, as here, there is a residence order in force with respect to a child that child shall not be removed from the United Kingdom without either the consent of every person who has parental responsibility for the child or the leave of the court. However, it is further provided by paragraph 2 of that Article that a child may be removed for a period of less than one month by the person who holds the residence order. In the present case the restriction imposed by the Family Care Centre on travel to Nigeria is an additional specific constraint.

[8] The only practical difficulty advanced by Ms Rice arising from the retention of the passport by the OCP is that, should the father wish to take C on a holiday either of a duration or to a place beyond such as he is permitted to do by law it will be necessary to apply to court for the release of the passport which would involve costs either to the father or to the public purse. What the submission fails to recognise is that, in the absence of the mother's agreement, an application to take C for longer than the period permitted by paragraph 1 or, in any event, to Nigeria, would in any event require an application to be made to court and the requested release of C's passport would be an intrinsic part of that application with no additional costs involved.

Submissions by Ms Rice on the Law

[9] Although she acknowledged that there is clear and longstanding authority for the proposition that the High Court can properly make an order requiring someone to lodge a passport with the court or some other suitable custodian and, although as indicated above, she could advance no substantial practical disadvantage for the father in this case in being obliged to do so, Ms Rice nonetheless sought to reason by analogy from a number of authorities, none of them directly on point, that to make such an order in the present case would be disproportionate and that a less obtrusive or draconian measure would "meet the degree of risk that has been identified", namely the order of Judge Kinney that C be not permitted to travel to Nigeria without the leave of the court which order "was and is the most appropriate and proportionate order to make in this case." I shall examine in turn some of the authorities which Ms Rice contends are supportive of her contention.

***Re B (A Child: Evidence: Passport Order)* [2014] EWCA Civ 843**

[10] In this case a child was abducted by its mother to evade orders previously made by the court. The judge, believing that the maternal grandparents, the mother's partner and the child's half-brother could assist in persuading the mother to return the child, ordered them to lodge their passports. The half-brother appealed and the Court of Appeal held that, while there was no doubt that the High Court did, in proper circumstances, have power to make an order requiring someone to lodge their passport, the use of that power to induce those so ordered so as to put pressure on the mother to return the child was not permissible. This was a coercive order and there was no material difference between a coercive order where the

coercive method used was incarceration and one where the method used was a passport order. Each was equally outside the proper ambit of the court's powers.

B v B (Injunction: Restraint on L leaving a jurisdiction) **[1997] 2 FLR 148**

[11] The husband was a national of Singapore who lived in Lagos. The wife lived in London. The husband had failed to comply with an order that he pay the wife's costs of litigation between them. Counsel for the wife contended that the husband had ample means to pay the outstanding costs and therefore that he, being at that time in London, should be ordered to surrender his passport so as to restrain him from leaving the UK until he had paid the costs. The wife's application was refused on the ground, inter alia, that there is no power to keep a debtor in the country indefinitely until he satisfied a judgment against him which would be tantamount to creating a power to imprison. The jurisdiction to make orders prohibiting a person from leaving the country was ancillary to other powers of the court and not a freestanding enforcement procedure in its own right. It may therefore be seen that this case amounts to the rejection of a submission that forcing a debtor to lodge his passport and preventing him from leaving the country until he has settled a debt would be an impermissible use of a passport order.

Young v Young **[2012] 2 FLR 470**

[12] This first instance decision of Mostyn J concerned the continued impounding by the court of a husband's passport in order to prevent his leaving the jurisdiction before the final hearing of ancillary relief proceedings at which he was to be cross-examined. It has nothing to do with the lodging of a child's passport in aid of the court's order prohibiting the taking of a child to a specified country.

Bhura v Bhura **[2012] EWHC 3633 (Fam)**

[13] This too is a case concerned with failure by a husband to satisfy a court award. Again, it is a decision of Mostyn J with nothing to say to the passport order principles in relation to the protection of children.

Re K (Forced Marriage: Passport Order) **[2020] EWCA Civ 190**

[14] This is a decision of the English Court of Appeal concerned with the imposition of a forced marriage protection order in a situation where the proposed subject was an adult who did not lack mental capacity and considers whether there is jurisdiction to make an open ended or indefinite passport order in that context. The factual background is complex and rather far removed from that of the present case but the court identified the following as one of several issues of general importance reaching beyond the particular facts of that case:

> "14(c) What approach should a court take when determining issues such as this where there is apparent

> conflict between, on the one hand, a person's right to be protected by the State from inhuman or degrading treatment or punishment sufficient to engage Article 3 of the European Convention on Human Rights ("ECHR") and, on the other hand, that person's autonomy and right to respect for private and family life, including the right to travel, under Article 8."

At paragraph 37 the court concluded:

> "It therefore follows that, in cases where there is potential conflict between Article 3 and Article 8 rights, the court must strive for an outcome which takes account of and achieves a reasonable accommodation between the competing rights. In this context, I have deliberately chosen the word "accommodation" to reflect the court's approach. The required judicial analysis is not a true 'balancing' exercise in consequence of the imperative duty that arises from the absolute nature of Article 3 rights. Where the evidence establishes a reasonable possibility that conduct sufficient to breach Article 3 may occur, the court must at least do what is necessary to protect any potential victim from such a risk. The need to do so cannot be reduced below that necessary minimum even where the factors relating to the qualified rights protected by Article 8 are particularly weighty. Hence the need to find a word other than 'balance' to describe this process of analysis."

Consideration

[15] As noted above, Ms Rice has not challenged my conclusion when making the passport order that "if either of the concerns expressed in this case were to be realised the effect for C would be catastrophic and irreversible." Her submission as expressed in the conclusion to her skeleton argument is rather that there have been no findings of fact relating specifically to risks arising from travel that cannot be appropriately managed under a prohibited steps order as has been the position in this case since the order of Judge Kinney in 2016. Ms Rice further submits that the main concern of this court has been C travelling to Nigeria and it is contended that the order made by HHJ Kinney provided the protection sought i.e. C was not permitted to travel to Nigeria without the leave of the court. She submits "it is contended that the decision of HHJ Kinney was and is the most appropriate and proportionate order to make in this case." Ms Rice further points out that the making of the Order by Judge Kinney prohibiting C from travelling to Nigeria was assented to by the applicant father, the Trust, the GAL and the respondent mother.

It is worth noting at this point that C did not have a passport at the date of Judge Kinney's order, the father having applied for it subsequently.

Against that background I proceed to determine this application by employing the following key principles:

(i) The welfare of the child is to be the paramount consideration.

(ii) The court has power to make a passport order.

(iii) The decision to make such an order and the nature and extent of the restriction which it imposes involves a careful consideration of its proportionality.

(iv) In considering proportionality, where there is a tension between Article 3 and Article 8 rights the court must be mindful of the fact that the Article 3 rights are absolute in nature while those of Article 8 are qualified.

(v) Where the evidence establishes a reasonable possibility that conduct sufficient to breach Article 3 may occur the court must at least do what is necessary to protect any potential victim from such a risk. The need to do so cannot be reduced below that necessary minimum even when the factors relating to the qualified rights protected by Article 8 are particularly weighty.

[16] As I recorded in my earlier decision, Ms Rice properly acknowledged that, absent the passport order, there are no safeguards available for C beyond the father's solemn promises. The possible risks of non-return from a country which is not a signatory to the Hague Convention such as Nigeria and of Female Genital Mutilation being inflicted if C were taken there have already been established to my satisfaction and have not been disputed in the present application.

[17] Against that Ms Rice says merely that it would be disproportionate to retain C's passport because the applicant father would be required to make "repeated" applications to court for its release. In the next sentence she points out that as a taxi driver the father's means are limited and that the costs of any such application would have to be funded by him or the Legal Aid Fund. I find these submissions surprising and to an extent inconsistent. C is now seven and only two holidays requiring her to have a passport have been mooted during her lifetime thus far. The first was to America which took place and the second, that to Nigeria, which I refused to permit. There is no evidence nor any reason to suppose that such applications to court for release of the passport will require to be made "repeatedly." C can go on holiday with her father anywhere in the United Kingdom for up to one month without the need for any application to court as no passport will be required. If she wishes to travel to a Hague Convention country it seems likely, given her attitude to the American holiday, that the respondent mother will not seek to object to a reasonable proposal so that the application could be made on consent or with

very little in the way of hearing. In my view this objection is of little or no substance especially when balanced against the risks for C of travel to Nigeria.

[18] Furthermore, I have not lost sight of the fact that the applicant father proceeded to book flights for the proposed 2019 holiday to Nigeria before he applied to court for leave to take C there as he knew he was required to do in the light of Judge Kinney's order. His explanation for doing so was that he was able to acquire tickets more cheaply by booking in good time but there was nothing to prevent his first applying to the court for leave in even better time. Instead he chose to buy the tickets and to present the court with a *fait accompli* which would involve his losing the fares if travel to Nigeria were refused. As a demonstration of his "acting appropriately" this behaviour was less than persuasive.

[19] I therefore conclude, applying the principles set out above, that the making of the order requiring that C's passport be retained by the court is proportionate and directed only to ensuring compliance with the prohibited steps order made by Judge Kinney in 2016. I therefore decline to remove it. No duration was specified in the order and it is of course open to either party to apply at any time for its variation or removal if circumstances should change. However, in order to make that explicit I will amend the order by adding the words "until further order of the court."

[20] Two subsidiary points are made by Ms Rice. The first is that the applicant father requires C's passport to be seen by the UK Immigration Authorities in order to enable him to apply for leave to remain in the United Kingdom. If that be so I have no doubt that suitable arrangements could be made between the applicant's solicitor and the court office to enable the Immigration Authorities to have any necessary sight of the document without it being placed in the hands of the applicant. Secondly, it is suggested that the passport will be required on repeated occasions in order for C to establish her identity. No examples of those situations have been given and in my experience most children are asked to produce their birth certificate rather than a passport for that purpose. However, should there be some situation which requires an authority to have sight of the details of C's passport I have no doubt that the OCP will readily agree to provide a certified photocopy.

ANNEX

Transcript of the judgment in A v B (No 1) delivered *ex tempore* on 28 June 2019

Sir Reg Weir

In this case the applicant father wishes to take his daughter C, who will be five on 21 July, on a holiday to Nigeria between 12 July and 20 August. The father is Nigerian and his mother, two sisters and extended family live in the Lagos area which is where he proposes to stay. C's mother is from Northern Ireland and C was born here as a result of a brief relationship between the parents in 2014. She has been brought up in Northern Ireland by her father. C's mother has certain learning and other difficulties and was unable to care adequately for C. Following public law proceedings it was decided that C should be brought up by her father and it is not disputed that his care has been exemplary. One disappointing aspect however is that there has been no contact between C and her mother for some 18 months. The reasons for this are a matter of some controversy but the deprivation of contact between the mother and her young daughter is a matter that needs to be addressed and will be the subject of a further hearing in September when hopefully some mechanism can be devised.

However, it was agreed that the question of the proposed Nigerian holiday should be adjudicated upon today due to the imminence of a planned departure date.

The parents were only in a relationship for a month or somewhat less. That relationship resulted in the conception of C. Subsequent relations between the parents have not been cordial and there have been exchanges of unhelpful text messages which have not improved matters. The mother objects to the proposal to take the child on holiday to Nigeria and was not consulted by the father about the proposal, nor indeed, about a three week holiday on which the father took C to the United States in the summer of 2018. A resolution of the dispute has been delayed by the repeated failure of social services to produce an Article 4 report on the issue which was first requested in December 2018. In the light of that failure it was decided to request the Official Solicitor to act on behalf of the child and Ms Liddy agreed to do so and has moved at speed to familiarise herself with the case and its background and to produce a report for today's hearing. I am very grateful to her for accommodating this request.

The child is the subject of a residence order in favour of the father which precludes him from removing the child from the United Kingdom for more than one month without either the written consent of everyone with parental responsibility or the leave of the court. In addition there is a prohibited steps order in place preventing the removal of the child to Nigeria without leave of the court.

The mother objects to the holiday on two grounds. One is a fear that the father will not bring C back from Nigeria which is not a Hague Convention signatory and there being no other means to enforce return from that country should that become necessary. Her second objection is a fear that the child may be subjected to Female Genital Mutilation ("FGM") while in Nigeria.

I received helpful written statements from both parties and a report from the Official Solicitor together with excellent written submissions and a comprehensive bundle of authorities. I also today received oral evidence from the father and well-focused oral submissions from Ms Rice for the applicant father, Ms McKeown for the respondent mother and Ms O'Flaherty for the Official Solicitor. The father's oral evidence as recorded by me was to the following effect:

> "I want C to go to Nigeria during the summer holiday. I want her to see my own family. I was last in Nigeria in 2012. We went to America last year where my mother came. My mother and sister applied for a Visa to come to the United Kingdom but they were refused. I booked the flights in or around September time. I booked that time because of the costs. I have never heard of FGM. I had heard of male circumcision - that is what we do. We are going to Nigeria for six weeks. I want to celebrate my sister's birthday while I am there. I am not travelling outside Lagos. I will be with my family. C has all the immunisations she requires. I have had to put the Nigeria Visa on hold. I am a Nigerian citizen so I don't require a Visa to travel there. I have a taxi licence now and I am going to do that because of the working flexibility. I am not bringing my younger daughter to Nigeria because she is too young for the vaccinations needed to go there. My friend is going to travel with us to Nigeria and I may see him. C goes to the Child Development Clinic – there is an eye problem but it is now almost 100%. At the moment I live in a rented house where the rent is paid for. I have a Vauxhall Zafira car 2006 – I am willing to leave the keys to it. I have no intention of remaining in Nigeria. I came to the United Kingdom for a better life. I am prepared to give promises to this court that C will return. I do not know anything about FGM. I have been reading about it online. I went to a co-ed school, the same school from 5, 6 or 7 until 17 or 18. I came from Nigeria to the UK to do some work in computers. I think I would know if my family practiced FGM. I have a mother and two sisters who are 24 and 17. I do not know anything about this – I think my mother would have asked me – she asked me if the girl has had her ears pierced. Neither of my sisters

has any children. I am happy with an Order that C will not be made subject to FGM."

Cross-examined by Ms McKeown for the mother the applicant said "I came to Belfast because my uncle was here with his family. I stayed with him initially. I was together with the respondent mother for less than a month when she became pregnant. I was then in a position to apply for a parent visa and it has been granted." In the care order proceedings you said you would promote C's relationship with her mother? Yes. But for the last 18 months she hasn't had any contact? No and I didn't ask B (about the Nigerian holiday). C has a British passport I didn't apply for an Irish passport because both parents have to apply for that. C sees her half-sister D almost every day. I have not sent any photographs of C to the mother since contact broke down. The mother does not know my family in Nigeria. I am proposing that C should sleep with my mother. There are three bedrooms in my home."

Cross-examined by Ms O'Flaherty for the Official Solicitor the applicant was asked whether he understood that this is a very serious application. He agreed that he had known for some time that the mother objects to the Nigerian holiday. He confirmed that we have no information from the mother and the sisters as to their view of FGM. He agreed he had not discussed this matter with his mother and sisters. He said that he had mentioned it to his uncle who said that "we definitely do not do this in our family." He was asked could he not go to Nigeria at any time in the future? His reply was that he was going to come back and he would not treat his child D differently from C by not coming back. He said "family comes first before anything."

The position accordingly is that the father assures the court that he has every intention of returning with C to Northern Ireland after the holiday ends in August. His home is the United Kingdom and he has another child here born after C and her mother is his present partner although for some reason they do not live together. He says that he would not favour one child over the other by remaining away from Northern Ireland and, in effect, thereby abandoning his second child. As for FGM he says that he was unaware of the practice until it was raised in these proceedings, that he has done internet research since and from what he now knows of the practice would never agree to its being inflicted on C. He can however offer no tangible security for his return or the avoidance of FGM beyond his sworn promises on the Koran in court and an offer to make a similar promise on oath before an Imam of the local Mosque.

The mother was not called to give evidence, presumably because there is no evidence she could usefully give in relation to the two crucial issues at this hearing, return from Nigeria and FGM.

The Official Solicitor in a thoughtful and well-balanced report points out that the father has engaged well with social services and has been reported as caring well for

C and attending to the medical appointments that are a feature of her special needs. She also acknowledges the father's wish to ensure that C experiences the cultural and ethnic features of the Nigerian side of her make-up. However, as the legal principles that I will come to demonstrate, the focus in an application such as this must be firmly upon the interests of the child. The benefit of this holiday for a four or five year old child are to be balanced against the risks of non-return and of FGM. As to non-return it is clear that in this case – and Ms Rice so acknowledges – there are no safeguards available beyond the father's solemn promises. As to FGM the same applies. The Official Solicitor carried out research into government published materials which she instanced. From those it is clear that the practice of FGM in the area to which it is intended to take C, namely the South West of Nigeria where Lagos is situated, has been by no means eradicated even though it appears to be declining.

It was surprising to me that the father said in evidence that he had never heard of the practice until it was raised in this case last February. He is an intelligent and articulate man and while no doubt he might be somewhat reticent to raise a matter such as this with the female members of his family one would have thought that he would have found some means of doing so. However, as the Official Solicitor points out, the court has no independent information in relation to the issue, no analysis of the extent and practice, if any, of FGM within the father's family and no statements from his mother or either of the sisters about their knowledge of the practice. All that the applicant could offer was that he felt his mother would have mentioned FGM to him if there were any question of it and she had mentioned ear-piercing and also that he had asked an uncle who lives in Belfast about it and he had said that he believed that there was no such practice within the family. These assertions provide little reassurance to the court.

The Official Solicitor concludes that the risk of harm to the child outweighs the benefit of the trip for C and that she cannot be satisfied on the basis of the information available that the proposed holiday is in the child's best interest.

I turn now to the legal principles applicable to the application. There was no disagreement between counsel as to the line of authorities or the principles to be discerned from them. It is necessary for me consider each of the elements of the welfare checklist contained at Article 3(3) of the Children (NI) Order 1995 insofar as they bear upon the question for decision and so that I may honour the statutory obligation in Article 3(1) of that order to make the child's welfare my paramount consideration. Following that approach it seems to me that 3(d) – C's age and sex and 3(e) any harm which she is at risk of suffering, have the most relevance to the present issue. Having approached my assessment in this way and paying especial attention to the virtual impossibility of securing the involuntary return of C from Nigeria should that prove necessary, it seems to me that I must take an especially precautionary approach to this application. If either of the concerns expressed in this case were to be realised the effect for C would be catastrophic and irreversible. I am not satisfied that, balancing those grave risks and the absence of any assurance about either of the issues, beyond the father's own assurances in evidence, against

the benefit of this long holiday for a four or five year old child, that the balance comes at all close to my feeling able to permit this holiday. I am sorry that this will mean that the father will lose at least C's fare and perhaps his own but he ought not to have committed to purchase the ticket for C before this issue had been determined by the court. I refuse the application to take C on holiday to Nigeria.

Furthermore, in the light of the evidence that has been given about the existence of C's British passport, I order that the father forthwith hands that passport to his solicitors and that within seven days from today they transmit it to the Office of Care and Protection for safekeeping.

I also make an order prohibiting either parent from making an application for any other passport in respect of C without the leave of the court and I direct that notice of this order be served upon the relevant Irish and Nigerian authorities.