

## Re DO and BO (2017)

### [2017] EWHC 858 (Fam)

12/04/2017

#### **Barristers**

Christopher Hames KC

#### **Court**

Family Division

#### **Practice Areas**

International Children Law

Mother's unsuccessful application for permission to take her two sons to China for a holiday – judgment of Baker J

The Mother, a Chinese national who had recently acquired a British passport, sought permission to take the parties' two children, aged 8½ and 6, on holiday to China for 21 days each year. There was chronic parental conflict. The father had petitioned for divorce, but the proceedings remained outstanding at the time of judgment. There had been applications to the Family Court in the preceding years, including F's application seeking to remove the children to Australia, where he was a dual national (this was later discontinued).

Mother's application was commenced on 5 November 2015. At the FHDRA the children were joined as parties and a r.16.4 guardian was appointed. Further case management directions were given, including a direction to instruct an expert in Chinese law. Matters were delayed and interim child arrangements orders made at a hearing in July 2016 following the father being charged with harassment (he later pleaded guilty to harassment of mother on two occasions) and updating recommendations having been made by the allocated social worker.

The matter was set down for Final Hearing in February 2017. The July 2016 order had left open two issues – (1) final child arrangements; and, (2) mother's application for permission to take the children on holiday to China. There had been a measure of agreement as to the first issue and neither party sought to argue for a substantive change in arrangements. The principal issue considered at the hearing was therefore the mother's temporary relocation application. The guardian also applied for a s.91(14) order for a period of 2 years.

Baker J sets out the relevant law regarding temporary relocation applications (the leading authority being *Re R (A Child)* [2013] EWCA Civ 1115) and s.91(14) applications between paragraphs 16 – 21 of his judgment.

Within the judgment, Baker J sets out the parties' written and oral evidence at length. He considered that

neither party was a wholly reliable witness and that in some respects each of them gave evidence which was, in his view, inaccurate and untruthful. The Guardian's view was that there was little evidence to suggest that the mother was planning to move permanently to China and that it was appropriate for the children to be able to explore their heritage and identity by visiting that country.

In addressing the three related elements set out in *Re R (A Child)* (above), Baker J concluded as follows:

(1) The magnitude of the risk of breach of the order if permission is given – Drawing together all of the threads of the evidence, Baker J concluded that there was a 'moderate risk', i.e. not an insignificant risk, that the mother would not return the children to England at the end of a holiday to China. Whilst the judge acknowledged that the Guardian had reached a different conclusion, he reaffirmed that it was the judge who was in the best position to carry out this assessment.

(2) The magnitude of the consequence of breach if it occurs – Baker J accepted the evidence of the Guardian that retention of the children in China would have devastating consequences for the boys.

(3) The level of security that may be achieved by building in to the arrangements all of the available safeguards – Baker J accepted the evidence of the expert instructed to advise on Chinese law. He found that there were no effective safeguards which could be put in place to prevent the children being retained in China if the mother so chooses. Baker J noted that China was not a signatory to the Hague Convention and that no bilateral arrangements existed between the UK and China. Further, the evidence showed that the Chinese court would not make a mirror order or otherwise give effect to any English order. Baker J accepted that it would be difficult for the father to access the court in China.

In bringing the analysis of these elements together and applying the overall welfare analysis, Baker J concluded that it would not be in the children's interests to be taken to China at this stage. The mother's application was therefore refused.

So far as the s.91(14) application was concerned, Baker J concluded that there was force in the submission that the focus of the hearing was on the relocation application and that the court may not therefore have had the evidential basis to decide whether to make such an order at this stage. Further, there had not been the history of the number of unmeritorious applications to the court which is usually, although not invariably, found in cases where a s.91(14) order is granted. Baker J refused the application, but in order to address the Guardian's concerns, Baker J directed that any future s.8 applications be allocated to him or, if he was not available, then to the DFJ.

In light of the mother having issued a further application for a prohibited steps order, Baker J was not minded to endorse the agreement concerning child arrangements until he had heard argument concerning the further developments, which would in turn enable him to decide whether the proposed order was indeed in the children's best interests.

**Permission**

 **Family Law Week**