

EC-L v DM (CHILD ABDUCTION: COSTS)
[2005] EWHC 588 (Fam)

Family Division

Ryder J

11 April 2005

Child abduction – Costs – Whether costs could be awarded against publicly funded plaintiff in child abduction case

The plaintiff mother issued, and subsequently withdrew, an originating summons claiming relief against the defendant father under the Child Abduction and Custody Act 1985. The mother had been found to have unreasonably conducted her case by reason of her persistent pursuit of uncorroborated false allegations against the father. The father sought costs against the mother, who was publicly funded.

Held – making an order for costs against the plaintiff –

(1) The general statutory power to make costs orders extended to family proceedings including child abduction proceedings under the Child Abduction and Custody Act 1985 or in the inherent jurisdiction. There was no requirement to interpret Art 26 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Convention) as excluding the power to make costs orders against plaintiffs. There was nothing inimical to the operation of the Convention in the application of ordinary public funding costs principles against an unsuccessful plaintiff (see paras [19], [31], [35]).

(2) The court was required to construe Art 26 so as to ensure that the parties were broadly on an equal footing. To remove the possibility of obtaining costs from a plaintiff in all cases where a defendant had been successful would be incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 in that it would tend to deter genuine defendants from pursuing their Art 8 rights (see para [47]).

(3) It was not inimical to the objects of the Convention to exercise the costs jurisdiction against a plaintiff where there had been no impropriety on the part of the plaintiff's lawyers, and neither was there any basis for fettering the court's jurisdiction in this way. Just as there was a public interest in not deterring genuine applicants, there was also a public interest in not deterring the genuine defendant in whom rights of custody and access may repose (see paras [48], [51], [66]).

(4) It should be the expectation in child abduction cases that the usual orders would be no order as to costs, but where a party's conduct had been unreasonable or where there was a disparity of means then the court could consider whether to exercise its discretion in accordance with the normal civil principles. Applying those principles to the conduct of the plaintiff in this case, there was no doubt that this was an exceptional case where a costs order should be made against a funded plaintiff. Detailed assessment as to the amount of costs to be adjourned to the costs judge (see paras [68]–[70]).

Statutory provisions considered

Supreme Court Act 1981, Sch 1

Matrimonial and Family Proceedings Act 1984, s 32

Child Abduction and Custody Act 1985, ss 1(2), 3, 4, 10, 11

Children Act 1989

Human Rights Act 1998, s 3

Access to Justice Act 1999, s 11

Rules of the Supreme Court 1965 (SI 1965/1776), Ord 15, r 4

Family Proceedings Rules 1991 (SI 1991/1247), Part VI, rr 1.3(1), 6.5, 10.27(1)(b)

Civil Procedure Rules 1998 (SI 1998/3132), Part 1, r 1.2, Parts 43, 44, r 44.3, Parts 47, 48
 Family Proceedings (Miscellaneous Amendments) Rules 1999 (SI 1999/1012), r 4(1)
 Community Legal Service (Costs) Regulations 2000 (SI 2000/441), reg 9
 Community Legal Service (Costs Protection) Regulations 2000 (SI 2000/824), reg 5
 European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Arts 6, 8
 Hague Convention on the Civil Aspects of International Child Abduction 1980, Arts 1, 3, 4, 7, 19, 20, 26, 27, 42

Cases referred to in judgment

Airey v Ireland (No 1) (Application No 6289/73) (1979–80) 2 EHRR 305, ECHR
D (A Minor) (Child Abduction), Re, Note [1989] 1 FLR 97
De Haes v Belgium (1998) 25 EHRR 1, ECHR
Dombo Beheer BV v The Netherlands (1993) 18 EHRR 213, ECHR
G (Costs: Child Case), Re [1999] 2 FLR 250, CA
H (A Minor) (Abduction: Rights of Custody), Re [2000] 2 AC 291, [2000] 2 WLR 337, [2000] 1 FLR 374, [2000] 2 All ER 1, HL
Kiam v MGN Ltd (No 2) [2002] EWCA Civ 66, [2002] 2 All ER 242, CA
P, C and S v United Kingdom (Application No 56547/00) (2002) 35 EHRR 31, [2002] 2 FLR 631, ECHR
R v Secretary of State for the Home Department, ex parte Gunn; R (Kelly) v Secretary of State for the Home Department; R (Khan) v Secretary of State for the Home Department [2001] EWCA Civ 891, [2001] 1 WLR 1634, [2001] 3 All ER 481, CA
Reid Minty (A Firm) v Taylor [2001] EWCA Civ 1723, [2002] 2 All ER 150, CA
Steel and Morris v United Kingdom (Application No 68416/01) (unreported) 15 February 2005, ECHR
Sutton London Borough Council v Davis (No 2) [1994] 1 WLR 1317, [1994] 2 FLR 569, [1995] 1 All ER 65, FD

Debbie Taylor for the plaintiff
Richard Harrison for the defendant
Jeremy Rosenblatt for the Central Authority

Cur adv vult

RYDER J:

Introduction

[1] On 15 November 2004 I gave permission to the plaintiff, EC-L, to withdraw an originating summons claiming relief against the defendant, DM, under the Child Abduction and Custody Act 1985 (the 1985 Act). The proceedings concern the parties' child, and his alleged abduction by the defendant, his father.

[2] The application to withdraw the originating summons was made following an indication by the court about the cogency of the evidence that supported each party's case. The reasons for the indication are encapsulated in the findings I made for the assistance of the costs judge in his future determinations, which are as follows:

'The mother was unreasonable in the conduct of her case by reason of her persistent pursuit of uncorroborated, false allegations as follows:

- (a) The allegations made against the father were very serious: he was accused of kidnapping his child and serious dishonesty involving the forgery of documents.
- (b) The evidence filed in the proceedings permitted of only one likely conclusion, namely that the child's mother was responsible for presenting a false case to the court.
- (c) Faced with compelling documentary evidence, the mother persisted until the final hearing in maintaining her allegations against the father, including allegations of forgery (in particular after the Portuguese Embassy confirmed that her marriage certificate was genuine and not, as she asserted, a forgery).
- (d) The mother misled the court at the initial without notice hearing: apart from presenting a likely false case, she failed to disclose the telephone call that the father had made to her a few days before.
- (e) The mother failed to co-operate with the court's inquiries in that she did not comply with paragraph 4 of the court's order of 22 October 2004 to file corroborative evidence in support of her case.
- (f) The mother refused to agree to an adjournment of the final hearing when the Children and Family Court Advisory and Support Service (CAFCASS) said that it could not file its report in time.
- (g) The consequences of the mother succeeding in a false claim would have been very serious for the father and extremely disruptive and damaging to the welfare of the child.
- (h) The father is a man of limited means who is bringing up the parties' child on his own without any financial support from the mother: he has had to incur substantial costs in defending the proceedings.
- (i) The father has been wholly successful in the outcome of the proceedings.
- (j) The mother has been wholly unsuccessful and withdrew her application following a judicial indication.
- (k) The mother's withdrawal occurred at such a late stage in the process that the parties' litigation preparation and expenditure was complete, briefs had been delivered and everyone was in court for the final hearing.'

[3] At the conclusion of the hearing the defendant asked for his costs against the publicly funded plaintiff. The parties agreed to provide written submissions on costs for determination by the court. Very full submissions were filed on behalf of the defendant on 18 November 2004 and what were described as draft submissions on behalf of the plaintiff on 19 November 2004. It was said that further submissions would be provided after the conclusion of the next Hague Convention conference when counsel would have had the opportunity to discuss this issue with other delegates at the conference.

[4] Despite the court's inquiries, no further submissions were received and the only further communication was from the plaintiff's solicitors on

1 December 2004 indicating that their client was impecunious and that in consequence upon their lack of instructions their public funding certificate had been discharged. The solicitors argued that the Legal Services Commission (LSC) would refuse to pay their costs and those of counsel if the court made a costs order against the plaintiff.

[5] It should be noted that the plaintiff does not oppose in submissions or otherwise the costs findings I have made. For the avoidance of doubt, I record the fact that they were disclosed to her in draft by the defendant in a document accompanying his submissions, to which she has had more than one opportunity of reply. At least the first of those opportunities was prior to the discharge of her certificate.

[6] The parties' submit as follows:

- (a) The plaintiff says that there should be no order as to costs as a matter of public policy so as not to deter genuine abduction applicants or the acceptance of instructions by solicitors from the Child Abduction Unit.
- (b) The defendant says that costs should follow the event and that, in effect, an order should be made against the LSC.

The public policy point

[7] The plaintiff argues that a Hague Convention (Hague Convention on the Civil Aspects of International Child Abduction 1980) applicant should be insulated from the threat of costs:

- (a) so as not to deter applications;
- (b) so as not to surprise applicants from jurisdictions that have no concept of paying a successful opponent's costs;
- (c) because of the terms of Art 26 of the Hague Convention.

[8] In light of the provisional nature of the plaintiff's submissions on the public policy point, the following issue was settled and submissions were invited from the UK's Central Authority through the Child Abduction Unit at the Official Solicitor's office:

'Whether there is power in the court and if so whether and how that power should be exercised to make a costs order against a person who makes an application with the benefit of a public funding certificate for relief under the provisions of the Child Abduction and Custody Act 1985 and the Convention on the Civil Aspects of International Child Abduction (the Hague Convention) having regard, inter alia, to any relevant public policy questions, section 11 of the Act and Article 26 of the Convention and the reservation thereto.'

[9] Both parties were offered a right of reply to the Central Authority's submissions: the defendant provided further detailed submissions and the plaintiff's counsel confirmed that she was content to await the court's judgment. I am grateful to the deputy Official Solicitor for his expedition in instructing counsel to act on behalf of the Central Authority and to develop submissions on the public policy point. Final submissions were in the hands of the court on 31 January 2005.

[10] The Central Authority asked to be joined as a party for the purpose of making submissions on the costs issue, the defendant objected. Defendants to child abduction applications under the 1985 Act are specified in FPR r 6.5. Neither the Central Authority nor the Child Abduction Unit fall within the specified descriptions. By FPR r 1.3(1) and r 4(1) of the Family Proceedings (Miscellaneous Amendments) Rules 1999 (FP(MA)R) the RSC in force immediately before the 26 April 1999 continue to apply to family proceedings in the High Court subject to the provisions of the FPR where the CPR do not directly apply.

[11] The rules relating to the joinder of parties are thus contained in RSC Ord 15, r 4. Although there is a common question of law in which the parties and the Central Authority have a theoretical interest, there is no issue in law or in fact as between the Central Authority and either of the parties, nor is joinder necessary to dispose of an issue in the case. The Central Authority has no right to relief and asks for none. The deputy Official Solicitor has provided his advice as the Advocate of the Court but on the express basis that the court wished to be appraised of the public policy issues from the perspective of the Central Authority's Child Abduction Unit. No costs application is made by or against the Official Solicitor or the Authority. Accordingly, although I bear in mind that the advice I have been given is, as asked, from a particular perspective, there is no need for the Central Authority to be made a party for that advice to be given and received.

[12] By way of some preliminary remarks, I make it clear that no one suggests that there has been any impropriety by the plaintiff's lawyers in the pursuit of the plaintiff's claim or in the application to withdraw the summons. I am not asked to consider whether an application to withdraw could have been made any earlier, nor do I have sufficient material for the court to independently pursue such a possibility. Accordingly, no circumstances are known to the court which would have justified a wasted costs investigation.

[13] I make no comment about the duties and reporting obligations of publicly funded parties and lawyers to the LSC, for example under paras C42–C44, s 12 of Part B *The Funding Code: Procedures, The LSC Manual*, vol 3, at 3B–072–3B–074, as no one has raised the question, there is no evidence before me of breach of the duties therein set out (in that there is no evidence that the plaintiff's inaccurate and misleading case was admitted to be so before the court began its own inquiry) and no one suggests that the plaintiff's non-means tested and non-merits based public funding certificate could or would have been discharged prior to the final hearing. Indeed, I am told by the Central Authority in submissions that the policy unit of the LSC considers that it would not be in the public interest for a costs order to be made against a publicly funded plaintiff unless those with conduct of the proceedings have behaved improperly.

[14] I note in passing that having regard to the statutory scheme for costs determinations to which I shall refer in due course, if there ought to be any congruence between the grounds for the withdrawal of funding by the LSC and the grounds for the imposition of costs against a funded party, then s 14 of Part A *The Funding Code: Criteria* and s 15 of Part B *The Funding Code: Procedures, The LSC Manual*, vol 3 (at 3A–077–3A–081 and 3B–081–3B–083) demonstrate a broader and far more sophisticated approach than is apparent from the submission made on its behalf. That is hardly surprising, not least because of the human rights implications in the

withdrawal of non-merits based public funding (see, for example, *P, C and S v United Kingdom* (2002) 35 EHRR 31, [2002] 2 FLR 631). Accordingly, I have considered the proposition made on behalf of the LSC but have not taken it to be their only position on the point and have instead relied upon the published text of their manual.

[15] Finally, by way of preliminary remarks, on the prima facie case made known to them, I do not believe that this is an application that the Central Authority would have been entitled to reject under the limited abuse of process provisions contained in Art 27 of the Hague Convention, as it is no function of the Authority or the Unit to adjudicate on the merits of applications properly referred to them.

General principles and the power to order costs

[16] Neither the plaintiff nor the Central Authority put in issue the general costs principles that would obtain were there to be no substance in the settled question. These are as follows. The power to order costs in family proceedings in the High Court is governed by CPR, Part 44 as applied by the provisions of the FPR. Child abduction proceedings under the 1985 Act and in the inherent jurisdiction are proceedings assigned to the Family Division of the High Court by Sch 1 to the Supreme Court Act 1981. They are family proceedings by reason of s 32 of the Matrimonial and Family Proceedings Act 1984.

[17] By r 4(1)(b) FP(MA)R, FPR r 10.27(1)(b) provides that CPR r 44.3(2) shall not apply to family proceedings, ie the general rule in civil proceedings that the unsuccessful party pays the successful party's costs. Otherwise, CPR Parts 43, 44, 47 and 48 (save for questions irrelevant to this judgment) do apply and, in particular, absent other considerations, the general principles set out in CPR Part 44.3 are relevant to costs decisions in family proceedings.

[18] CPR r 44.3(4) provides that in deciding what order to make about costs the court must have regard to all the circumstances including: (a) the conduct of the parties; and (b) whether a party has succeeded on part of his case, even if he has not been wholly successful. Rule 44.3(5) provides a partial definition of 'the conduct of the parties'.

[19] It is clear, therefore, that the general statutory power to make costs orders extends to family proceedings including child abduction proceedings under the 1985 Act or in the inherent jurisdiction.

Costs and the Child Abduction and Custody Act 1985

[20] The Central Authority accepts that there is nothing in the permissive language of s 10 of the 1985 Act, which confers the power to make rules of court relating to Hague Convention proceedings under the 1985 Act, that excludes in whole or in part the general costs powers to which I have referred. Quite the contrary, the Authority submits that the section operates so as to incorporate and apply to Hague Convention proceedings the general costs powers provided for in the rules relating to family proceedings. For the avoidance of doubt, the specific rules that have been made pursuant to s 10 and which are contained in FPR Part VI do not relate to costs and are not relevant to the settled question.

[21] The first limb of the submission made by the plaintiff and the Central Authority rests upon the construction of s 11 of the 1985 Act and Art 26 of the Hague Convention. The plaintiff and the Authority submit that the general

statutory power is restricted by the provisions of the final (sic) paragraph of Art 26 of the Convention which by s 1(2) of the 1985 Act has the force of law. Article 26 reads as follows:

‘Each Central Authority shall bear its own costs in applying this Convention. Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of the returning child.’

[22] Having regard to the principle that international conventions are intended to be applied under a variety of systems of law and that they must be given a ‘purposive construction in order to make as effective as possible the machinery set up under it (sic)’ (see, for example: *Re H (A Minor) (Abduction: Rights of Custody)* [2000] 2 AC 291, [2000] 1 FLR 374), I have kept the following in mind.

[23] Hague Convention proceedings are summary proceedings that are not governed by the principle that the welfare of the child concerned is paramount. The objects of the Convention are to secure the prompt return to the jurisdiction of their habitual residence of children under 16 who have been wrongfully removed to or retained in any Contracting State and to ensure that rights of custody and access under the law of one Contracting State are respected in the other Contracting States. The overall scheme provides for a summary process within which defences can be raised and proved, arrangements can be required to ensure that the child’s return is safe and fundamental human rights are respected (see Arts 1, 3, 4, 7, 19 and, 20).

[24] On any construction of Art 26, the first paragraph sets out the principle that each Central Authority must bear its own costs and expenses, ie it cannot claim them from another Central Authority but it can, having regard to the last clause of the first paragraph and the final paragraph of Art 26, require that the expenses to be incurred in implementing the return of a child be met by a plaintiff (despite his or her success) or the person who removed or retained the child.

[25] Save for the express power to require the expenses of return to be paid by a plaintiff, the first paragraph of Art 26 enshrines in law the principle that Central Authorities and other public services of Contracting States shall not impose charges or (legal) costs upon a plaintiff. In this jurisdiction non-merits based, non-means tested public funding is provided for plaintiffs whose application is made via the central Authority (para 11.13, Part A *The Funding Code: Criteria* and para 20.24, Part C *The Funding Code: Guidance, The LSC Manual*, vol 3, at 3A-067 and 3C-210).

[26] Set against this backdrop, the final paragraph of Art 26 provides a power in judicial and administrative authorities to impose charges, including legal costs, against a defendant in the circumstances referred to. It should be noted, and I have regard to the fact, that the existence of such a power arises out of the text of the Convention rather than the 1985 Act, ie there is there set out a universal principle and mechanism for all Contracting States, including those that do not have any domestic concept of the unsuccessful party paying the successful party's costs or any system of public funding similar to our own, to obtain compliance with the remainder of Art 26.

[27] For the avoidance of doubt, I note that it is not submitted by the Central Authority that the first paragraph of Art 26 should be construed to be a prohibition against judicial authorities making costs orders against a plaintiff, but rather that the absence of an express power in the final paragraph of that Article to award costs against a plaintiff is determinative, having regard to the context of the whole Article.

[28] I have come to the conclusion that it is inconsistent to say on the one hand that the rules generally and the costs rules in particular apply to the 1985 Act but that they shall not have effect because the power to make a costs order against a plaintiff is not expressly set out on the face of the Convention. Having regard to the effect of s 1(2) of the 1985 Act that is the same as saying that, in respect of an enactment to which rules of court apply, one part of those rules, namely the costs rules, shall not apply unless there is an express provision in the Act for them to do so. Were that to be right, the costs provisions of the applicable rules would be rendered ineffective across whole statutory codes.

[29] To make out the first limb of their submission the plaintiff and the Central Authority have to go further. They have to argue that the absence of an express costs provision is to be read in the context of the prohibition in Art 26 against the Central Authority and other public services imposing charges on plaintiffs, ie that the prohibition extends to judicial authorities so as to abrogate the effect of the costs rules that would otherwise apply.

[30] The prohibition on the imposition of charges including legal costs is expressly directed to the 'Central Authority and other public services' of the Contracting State. Central Authorities are defined at s 3 of the 1985 Act and judicial authorities at s 4. Other public services are not defined or otherwise referred to in the Act or the Convention. The Articles of the Convention are carefully drafted to distinguish the 'judicial and administrative authorities' of Contracting States (as the decision-making forum) from any other body that provides public services.

[31] I do not accept that a purposive construction of the text of Art 26 requires the same to be read and given effect so as to exclude the power to make costs orders against plaintiffs. It is not necessary to do so to make effective the objects of the Convention, nor is it necessary to do so to give

effect to the prohibition in the first paragraph of Art 26, ie there is nothing inimical to the operation of the Convention in the application of ordinary public funding costs principles against an unsuccessful plaintiff. This is particularly so where the Convention has specifically provided for the integrity of Contracting State's legal systems and public funding systems to be protected, provided the plaintiff is not subject to charges from the Central Authority or the State's other public services for the publicly funded services that she has received.

[32] No one submits that I should artificially conflate public services with judicial authorities so as to bring the latter within the undefined ambit of the former. Had Parliament intended that the prohibition in Art 26 be extended to the judiciary it could have said so.

[33] The defendant submits that Art 26 has always been seen to be controversial and in support of that submission the explanatory report of Professor Elisa Perez Vera, at paras 134 and 135, was cited:

'Article 26 – Costs arising out of the Convention's application

134 The principle enunciated in the first paragraph, under which each Central Authority bears its own costs in applying the Convention, met no opposition. Quite simply, it means that a Central Authority cannot claim costs from another Central Authority. It must however be admitted that the costs envisaged will depend on the actual services provided by each Central Authority, according to the freedom of action conferred upon it by the internal law of the State concerned.

135 On the other hand, the second paragraph refers to one of the most controversial matters dealt with by the Fourteenth Session, a matter which in the end had to be resolved by accepting the reservation in the third paragraph of the same article. In fact, the argument between those delegations which wanted the applicant to be exempt from all costs arising out of the application of the Convention (including exemption from all costs and expenses not covered by the legal aid and advice system such as those which arise out of legal proceedings or, where applicable, the participation of counsel or legal advisers), and those which favoured the opposite solution adopted by the preliminary draft Convention, was resolved only by including a reservation favouring the latter's point of view. The reason for this was that, since different criteria for the granting of legal aid were rooted in the very structure of the legal systems concerned, any attempt to make one approach prevail absolutely over the others would have led to the automatic exclusion of certain States from the Convention, a result which no one wanted. However, there was total agreement as regards the rule contained in the last sentence of the second paragraph, authorizing the Central Authorities to "require payment of the expenses incurred or to be incurred in implementing the return of the child".'

[34] Although not an aide to construction of the 1985 Act, I am reassured by that commentary that there was no express intention to inhibit the powers of judicial authorities to make costs orders in accordance with their own legal systems and public funding criteria. Specifically, the reservation that has been made by the UK under Art 42 is designed to ensure that as a Contracting State the UK does not have to assume the legal costs of the plaintiff other than in

accordance with its system of legal aid and advice. That, in itself, demonstrates the limits upon the costs protection that a plaintiff has where the reservation has been made.

[35] Accordingly I decline to hold that on any proper construction of Art 26 the power under the rules for the court to make a costs order against a plaintiff is abrogated, ie there is jurisdiction in the court to make a costs order against a plaintiff in proceedings under the 1985 Act.

Human rights and the equality of arms

[36] I am supported in the conclusion I have reached by the separate human rights argument relied upon by the defendant. Let me emphasise that the defendant in this case has not found it necessary to ask this court to take any step to make effective the exercise of his Art 6 and Art 8 rights under the European Convention (the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950). By whatever means, he has temporarily or permanently raised the private funding necessary to discharge the burden of instructing specialist solicitors and counsel to help him respond to the plaintiff's allegations and applications. He has not received public funding and has not been entitled to receive non-merits based, non-means tested public funding.

[37] The significance of the argument relied upon is that by reason of s 3 of the Human Rights Act 1998 I am required to read and give effect to the 1985 Act so far as is possible in a manner which is compatible with the European Convention.

[38] The defendant submits that were this court, as a matter of policy, to exclude the power to make costs orders against plaintiffs or fetter its discretion so that in practice it would never be exercised, then such a construction would be incompatible with Art 6 of the European Convention.

[39] There is no apparent issue between the parties that Arts 6 and 8 of the European Convention are engaged in child abduction proceedings which are concerned with the determination of civil rights and obligations. An aspect of the right to a fair trial under Art 6 is the principle of 'equality of arms': *Dombo Beheer BV v The Netherlands* (1993) 18 EHRR 213 at para 33 and *De Haes v Belgium* (1998) 25 EHRR 1 at para 53:

'The court reiterates that the principle of the equality of arms – a component of the broader concept of a fair trial – requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial advantage vis-à-vis his opponent.'

[40] The court's scrutiny is all the more significant here because there is no absolute right to public funding for the defendant and yet there is for the plaintiff.

[41] Article 6(1) of the European Convention imposes no obligation on the State to provide public funding to all parties regardless of merits or means in civil (including family) cases. What has to be afforded as a component of the right to a fair hearing is effective access to the court (*Airey v Ireland (No 1)* (1979–80) 2 EHRR 305 at para 26). A party is not to be denied the opportunity to present his or her case effectively and he or she is to be able to enjoy equality of arms with the opposing side. The State does not have to

ensure total equality as long as there is a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the opponent (recently reiterated in *Steel and Morris v United Kingdom* (Application No 68416/01) (unreported) 15 February 2005 at paras 59–62).

[42] The defendant does not make a case for the extension of automatic public funding but rather that, in light of s 3 of the Human Rights Act 1998 and the Strasbourg jurisprudence cited, Art 26 should not be construed to abrogate the court's costs power thereby placing all defendants who do not qualify for public funding at a substantial disadvantage.

[43] I bear in mind that if an abduction application is made through the Central Authority, a plaintiff receives automatic public funding, the services of a specialist firm of solicitors from the panel operated by the Child Abduction Unit and the services, where necessary, of an interpreter and specialist counsel. The court has available to it an array of investigative orders (many initially obtained on behalf of plaintiffs by the use of 'without notice' procedures) which are expensive to implement and which are likewise automatically funded and the services of the Tipstaff which are not re-charged.

[44] In contrast, a defendant will not receive public funding unless he or she satisfies both the means and merits tests. The LSC's *Funding Code: Guidance* makes it clear that a defendant has to satisfy the ordinary private law funding criteria set out at s 11 of the Code, ie as to prospects of success (para 11.11.5 at 3A–065) and the cost benefit criterion (para 11.11.6). The *LSC Manual* states that this means that the defence of the proceedings has to be justified in all the circumstances of the case, the prospects of success have to be at least borderline (ie better than poor) and the likely benefits to be gained from the proceedings for the defendant have to justify the costs such that a reasonable private-paying client would be prepared to defend the proceedings in all the circumstances. Public funding may also be refused in the absence of reasonable attempts at settlement or resolution (para 20.24 at 3C–210).

[45] It is likely that if there is to be a successful response to a plaintiff's application and the interim orders that are the commonplace of these proceedings, a defendant will have to instruct and put in funds a firm of solicitors that is able to respond rapidly to the timetable that the court will set and with knowledge of how to obtain information that might be necessary, eg as to the validity and meaning of court orders and documents of record that originate in other jurisdictions.

[46] While I do not accept the submission that Hague Convention proceedings are necessarily complicated or technical, they need not be and indeed for the most part should not be: it is inconceivable that a defendant, let alone one with poor or no knowledge of the English language, should be expected to meet a false case presented by a funded plaintiff without the benefit of legal representation.

[47] Having regard to the practical consequences, I accept that the court is required to construe Art 26 of the Hague Convention so as to ensure that the parties are broadly on an equal footing. To remove the possibility of obtaining costs from a plaintiff in all cases where a defendant has been successful would, in my judgment, be incompatible with the European Convention in that it would tend to deter genuine defendants from pursuing their Art 8 rights and their rights of custody and access.

The exercise of discretion

[48] The second limb of the submission of the plaintiff and the Central Authority is that the court's costs jurisdiction should not be exercised as a matter of public policy unless there has been impropriety on the part of the plaintiff's lawyers. To exercise the court's discretion in any other circumstances, it is said, would be inimical to the objects of the Convention. Although it might appear that there is little distinction between the matters that can be prayed in aid of a purposive construction and those that are relied upon as circumscribing the court's discretion, the latter deserves careful analysis.

[49] The particulars relied upon are that there is an imperative not to deter genuine applicants, including those from jurisdictions that do not have a costs environment. I accept that the court should strive to avoid any barrier, be it one of principle or mechanism, being placed in the path of a genuine applicant or of the effective operation of the Hague Convention.

[50] Despite the summary nature of the procedure under the 1985 Act, the parties' positions, both in law and on the facts, can be, and frequently are, argued with sophistication, skill and force. It is trite but nevertheless accurate to observe that there are both grounds of application and defence that are marginal and even occasionally novel, neither of which means that a plaintiff's or defendant's position is any the less genuine. There is an obvious risk that the availability of orders for costs might deter a meritorious application, for it must not be assumed that the order will fall to be paid by the LSC, but it must also be said that the same risk presently faces a defendant, whether publicly funded or not, and he or she may equally have a genuine position to put before the court.

[51] If there is a public interest in not deterring genuine applicants, then from the child's perspective and having regard to the objects of the Convention, there is also a public interest in not deterring the genuine defendant in whom rights of custody and access may repose.

[52] Having decided that the power to order costs is available, questions relating to the exercise of the court's discretion must be considered from first principles. There is both a statutory scheme and an overriding objective to which the court must seek to give effect in the exercise of its costs powers. The scheme for costs in funded cases is set out in s 11 of the Access to Justice Act 1999 (the 1999 Act). Section 11(1) provides:

'Except in prescribed circumstances, costs ordered against an individual in relation to any proceedings or part of proceedings funded for him shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including—

- (a) the financial resources of all the parties to the proceedings, and
- (b) their conduct in connection with the dispute to which the proceedings relate;

and for this purpose proceedings, or a part of proceedings, are funded for an individual if services relating to the proceedings or part are funded for him by the Commission as part of the Community Legal Service.'

[53] Sections 11(3) and(4) provide that:

‘(3) [...] regulations may make provision about costs in relation to proceedings in which services are funded by the Commission for any of the parties as part of the Community Legal Service.

(4) The Regulations may, in particular, make provision—

- (a) specifying the principles to be applied in determining the amount of any costs to be awarded against a party for whom services are funded by the Commission as part of the Community Legal Service,
- (b) limiting the circumstances in which, or extent to which, an order for costs may be enforced against such a party,
- (c) [...]
- (d) requiring the payment by the Commission of the whole or part of any costs incurred by a party for whom services are not funded by the Commission as part of the Community Legal Service,
- (e) specifying the principles to be applied in determining the amount of any costs which may be awarded to a party for whom services are so funded,
- (f) [...]
- (g) as to the court, tribunal or other person or body by whom the amount of any costs is to be determined and the extent to which any determination of that amount is to be final.’

[54] The relevant regulations are the Community Legal Service (Costs) Regulations 2000 (CLS(C)R) and the Community Legal Service (Costs Protection) Regulations 2000 (CLS(CP)R).

[55] Regulation 9 of the CLS(C)R sets out the procedure for making a costs order against a funded party or the LSC. It provides:

‘(1) where the court is considering whether to make a section 11(1) costs order, it shall consider whether, but for costs protection, it would have made a costs order against the client and, if so, whether it would, on making the costs order, have specified the amount to be paid under that order.

(2) If the court considers that it would have made a costs order against the client, but that it would not have specified the amount to be paid under it, the court shall, when making the section 11(1) costs order—

- (a) specify the amount (if any) that the client is to pay under that order if, but only if:
 - (i) it considers that it has sufficient information before it to decide what amount is, in that case, a reasonable amount for the client to pay, in accordance with section 11(1) of the Act; and
 - (ii) it is satisfied that, if it were to determine the full costs at that time, they would exceed the amount referred to in sub-paragraph (i);

- (b) otherwise, it shall not specify the amount the client is to pay under the costs order.
- (3) If the court considers that it would have made a costs order against the client, and that it would have specified the amount to be paid under it, the court shall, when making the section 11(1) costs order—
- (a) specify the amount (if any) that the client is to pay under that order if, but only if, it considers that it has sufficient information before it to decide what amount is, in that case, a reasonable amount for the client to pay, in accordance with section 11(1) of the Act;
 - (b) otherwise, it shall not specify the amount the client is to pay under the costs order.
- (4) Any order made under paragraph (3) shall state the amount of the full costs.
- (5) The amount (if any) to be paid by the client under an order made under paragraph (2)(b) or paragraph (3)(b), and any application for a costs order against the Commission, shall be determined in accordance with regulation 10, and at any such determination following an order made under paragraph (2)(b), the amount of the full costs shall also be assessed.
- (6) Where the court makes a section 11(1) costs order that does not specify the amount which the client is to pay under it, it may also make findings of fact, as to the parties' conduct in the proceedings or otherwise, relevant to the determination of that amount, and those findings shall be taken into consideration in that determination.'

[56] Accordingly, the scheme requires the following sequence of decisions:

- (a) Whether, but for the costs protection, a costs order would have been made against the funded party (ie should the plaintiff be liable to pay).
- (b) If so, whether the amount to be paid under the order would have been specified.
- (c) If the amount to be paid under the order would not have been specified, whether the amount that the funded party is to pay would have been specified.
- (d) Where the liability to pay is decided, but not the amount, whether there are findings of fact relevant to the determination of the amount to be paid.

[57] Only if the court that decides that in principle the plaintiff should be liable to pay has sufficient information to decide what is a reasonable amount for the funded party to pay should it specify the amount to be paid. Otherwise it must not do so. I shall come back to the decisions that are to be made on the facts of this case in due course.

[58] In addition to the above, and although not referred to by any party in submission, there are obligations imposed on the court by CPR Part 1. The court must seek to give effect to the overriding objective (enabling the court

to deal with cases justly) when it exercises any power given to it by the rules or interprets any rule (CPR r 1.2). By rr 1.2(a), (c) and (d) I am, so far as is practicable, to ensure that the parties are on an equal footing, deal with the proceedings in ways which are proportionate to their importance, the complexity of the issues and the financial positions of each party and ensure that the case is dealt with expeditiously and fairly.

[59] Despite the broad extent of the power to make regulations under the 1999 Act, the only public policy relating to the power to impose costs on a funded plaintiff are the conditions that are clearly set out in s 11. Where the statutory scheme is so clear with the decision-making criteria so plainly set out in the text of the same, it might be thought inadvisable to interpolate extraneous public policy limits to the court's discretion ie there is a sequence of decisions for the court to make in every case and just as in other civil proceedings the court can make its costs decision in a family proceedings application having regard to the terms of s 11 of the 1999 Act. Despite this, and having regard to the Central Authority's submissions, I agree that it would be helpful for the court to go on to consider whether in family proceedings there is or ought to be a 'usual order' and if so, why and whether that order should be applied or varied for child abduction proceedings.

[60] The defendant submits that assistance can be gained from the application of public policy imperatives to costs decisions in other family proceedings. A decision to award costs in family proceedings is discretionary and, aside from the principles set out in CPR r 44.3 in the exercise of that discretion, the family courts have inevitably had regard to the effect of costs orders on the parties' and thenceforth on their child. In family proceedings which concern the welfare of a child it is exceptional to make an order for costs unless there has been unreasonable conduct by one party or there is a disparity of means between the parties. The reason for this was explained by Wilson J in *Sutton London Borough Council v Davis (No 2)* [1994] 1 WLR 1317, [1994] 2 FLR 569 at 1319 and 570 respectively:

'Where the debate surrounds the future of a child, the proceedings are partly inquisitorial and the aspiration is that in their outcome the child is the winner and indeed the only winner. The court does not wish the spectre of an order for costs to discourage those with a proper interest in the child from participating in the debate. Nor does it wish to reduce the chance of their co-operation around the future life of the child by casting one as the successful party entitled to his costs and another as the unsuccessful party obliged to pay them. The proposition applies in its fullest form to proceedings between parents and other relations; but it also applies to proceedings to which a local authority is a party. Thus, even when a local authority's application for a care order is dismissed, it is unusual to order them to pay the costs of the other parties. But the proposition is not applied where, for example, the conduct of a party has been reprehensible or the party's stance has been beyond the band of what is reasonable: *Havering London Borough Council v S* [1986] 1 FLR 489 and *Gojkovic v Gojkovic (No 2)* (above) at pp 60C-D and 240A respectively.'

[61] Wilson J's conclusion was, of course, a statement of practice relating to the scheme of legal aid that existed prior to the implementation of s 11 of

the 1999 Act but, if I may say so, it succinctly encapsulates the practice that continues to be applied to children proceedings whether or not non-merits based, non-means tested public funding is available, ie to both public law Children Act 1989 proceedings involving a local authority where parents are entitled to funding and private law proceedings where one or more of the parents may not be in receipt of funding.

[62] There are many similar expressions of the reasons for and the existence of the practice of a usual order in children proceedings. Perhaps one distinction of the policy that is applied is important enough to repeat: in *Re G (Costs: Child Case)* [1999] 2 FLR 250 the Court of Appeal distinguished unreasonable conduct from the pursuit of a hopeless case, holding that the latter would not justify a costs order in family children proceedings unless and until its pursuit became unreasonable. That such a course is unusual was emphasised by the need to give reasons for the departure from normal practice (per Butler-Sloss LJ at 253).

[63] It was argued that child abduction proceedings are, in whole or in part, adversarial rather than inquisitorial. Even if the proceedings can be categorised in the manner suggested, the outcome however perceived by the strength of the parties' antagonism, should not be considered to be victory for one party and defeat for the other. The parties remain, however distant, the parents of the child. Accordingly, I do not think that anything turns on the distinction for these purposes.

[64] The plaintiff and the Central Authority finally submit that an order for costs in Hague Convention proceedings is almost unknown. An example of an order being made against an unsuccessful defendant father and in favour of the publicly funded mother can be found in the decision of Wood J in *Note: Re D (A Minor) (Child Abduction)* [1989] 1 FLR 97 which proceeded on the footing that there was power to award costs and no reason (I interpolate on the facts or as a matter of legal policy) not to do so. There is also acknowledged to be at least one unreported costs decision against a publicly funded plaintiff although the judgment is not yet available. I accept that adverse costs decisions appear to have been very rare.

[65] It has come to the conclusion that it would be difficult to argue that Wilson J's rationale for exercising the court's discretion is any less relevant to: (a) Hague Convention proceedings than other children proceedings whether or not welfare is in issue; and (b) the statutory scheme of the 1999 Act. In consequence I respectfully adopt and adapt the reasons formulated by Wilson J in *Sutton London Borough Council v Davis (No 2)* [1994] 1 WLR 1317, [1994] 2 FLR 569 as follows:

- (a) the aspiration is that in the outcome of child abduction proceedings the child is the only winner because the objects of the Hague Convention have been satisfied thereby discouraging parents from engaging in self-help and secondary abduction;
- (b) the spectre of an order for costs should not discourage those with a proper interest in the child from participating either in the Convention proceedings themselves or the domestic proceedings that often follow;
- (c) neither the court nor the Convention should, as a matter of practice, characterise one party as the successful party entitled to costs and/or funding and the other party as the unsuccessful party

who is not entitled to costs and/or funding nor should there be any difference in treatment as to the risk of a costs order which is solely dependent upon the party's status as plaintiff or defendant.

[66] There would appear to be no basis in the statutory scheme, the rules or the regulations to fetter the court's costs discretion in the manner apparently suggested by the Central Authority, the LSC and the plaintiff, ie there is no basis for the court's discretion only to be exercised when a funded party's lawyer has acted improperly. Unreasonable conduct is not confined to the conduct of the party's lawyers, although in an appropriate case it would certainly include that feature. It should include the deliberate and persistent falsification of a case in an attempt to deprive a child of his or her habitual residence, or otherwise by those falsehoods, an attempt to deny or render ineffective the rights of custody and access and the Art 8 rights of both the child and the other parent. I am unimpressed by the submission that many cases involve serious falsehoods: the court is not in the business of excusing, let alone encouraging, false applications relating to the international movement of children, whereas it ought not to inhibit genuine applications or genuine responses.

[67] I do not believe that it would be wise upon the material presented to this court to create a new category of family proceedings for costs purposes or for new costs principles to be plucked from thin air. If a valid distinction is to be made as between children proceedings generally and Hague Convention proceedings then that will necessitate the formulation by others of new public policy criteria.

[68] Accordingly, in each case where a costs application is made there should be a costs inquiry on the merits, having regard to the statutory test in s 11(1) of the 1999 Act. It should be the expectation in child abduction cases that the usual order will be no order as to costs, but where a party's conduct has been unreasonable or there is a disparity of means then the court can consider whether to exercise its discretion in accordance with normal civil principles.

[69] Applying those principles to the conduct of the plaintiff as described in the costs findings I have made and having regard to CPR r 44.3(5), I have no doubt that this is an exceptional case where a costs order should be made against a funded plaintiff. I am unable from the information provided to me to make a summary assessment against the plaintiff. All that I have been told, though no evidence has been filed, is that the plaintiff is impecunious and resident overseas. I am not able to decide what it is reasonable for the plaintiff to pay and the plaintiff did not descend to any submissions on the costs bill filed on the defendant's behalf.

[70] Having regard to the statutory scheme it is inappropriate for this court to do otherwise than make an order for costs against the plaintiff and adjourn detailed assessment to the costs judge. It was submitted that it would be a proper exercise of the court's discretion in making an order for costs against the plaintiff to go on and assess her liability under s 11 of the 1999 Act at nil, thereby prefacing an application for an order against the LSC. While that discretionary exercise may well be appropriate on the facts of a particular case, I would not wish it to be thought to be a 'usual course' and I have not accepted the invitation on this occasion.

[71] Finally, I must consider the basis upon which costs are to be paid. The plaintiff's conduct was unreasonable but she offered, albeit at a late stage, to withdraw. Unreasonable conduct justifying an indemnity costs award does not necessarily involve moral condemnation or a lack of moral probity (*Reid Minty (A Firm) v Taylor* [2001] EWCA Civ 1723, [2002] 2 All ER 150) but is nevertheless unreasonable to a high degree, not merely wrong or misguided in hindsight (*Kiam v MGN Ltd (No 2)* [2002] EWCA Civ 66, [2002] 2 All ER 242). The difference between the bases is the burden of proof in respect of any doubt as to reasonableness. In the overall context of the conduct of the proceedings, costs on the standard basis mark the unreasonableness while giving scope in an appropriate case where the unreasonable conduct persists through a contested hearing to be marked by indemnity costs.

Orders for costs against a publicly funded litigant and the LSC

[72] In the circumstance that I have not determined the amount to be paid by the plaintiff, the defendant must make his arguments to the costs judge. In the event as may be likely the costs judge is faced with a plaintiff who is impecunious and resident overseas, the question will arise as to whether an order can be made against the LSC.

[73] Regulation 5 of CLS(CP)R deals with the making of costs against the LSC. Regulation 5(2) provides that the court may make an order for costs against the LSC and reg 5(3) sets out the conditions that must be met:

‘An order under paragraph (2) may only be made if all the conditions set out in subparagraphs (a), (b), (c) and (d) are satisfied—

- (a) a section 11(1) costs order is made against the client in the proceedings, and the amount (if any) which the client is required to pay under that costs order is less than the amount of the full costs;
- (b) unless there is a good reason for the delay, the non-funded party makes a request under regulation 10(2) of the Community Legal Service (Costs) Regulations 2000 within 3 months of the making of the section 11(1) costs order;
- (c) as regards costs incurred in a court of first instance, the proceedings were instituted by the client, the non-funded party is an individual, and the court is satisfied that the non-funded party will suffer financial hardship unless the order is made; and
- (d) in any case, the court is satisfied that it is just and equitable in the circumstances that provision for the costs should be made out of public funds.’

[74] Regulation 5(3A)(b) provides that an order for the payment of costs by the LSC in relation to proceedings in the High Court may be made by a costs judge or a district judge. In order to obtain an order against the LSC the procedure in reg 10 must be followed. This provides that the party seeking an order for costs must, within 3 months of the date of the costs order, request a hearing to determine the costs payable to him. The court's functions under this regulation are to be exercised by a costs judge or a district judge.

[75] Having regard to the decision of the Court of Appeal in *R v Secretary of State for the Home Department, ex parte Gunn*; *R (Kelly) v Secretary of State for the Home Department*; *R (Khan) v Secretary of State for the Home Department* [2001] EWCA Civ 891, [2001] 1 WLR 1634 per Lord Phillips of Worth Matravers MR at paras [29] and [34], this court's costs jurisdiction is limited to determining the lay client's liability (if any). It is not permissible to decide whether it is just and equitable to make a costs order against the LSC.

[76] The decision of this court is accordingly to make an order for costs against the plaintiff to be assessed on the standard basis and for detailed assessment to be adjourned to the costs judge.

Order accordingly.

Solicitors: *Osmond Gaunt & Rose* for the plaintiff
Dawson Cornwell for the defendant
Official Solicitor

ALISON PERRY
Law Reporter