This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Neutral Citation Number: [2024] EWHC 365 (Fam)

Case No: FD22P00321

**IN THE HIGH COURT OF JUSTICE**
**FAMILY DIVISION**
**Sitting at Newcastle upon Tyne**

**The Children Act 1989**
**The Senior Courts Act 1981**

Date: 22 February 2024

**Before** :

**Mr Justice Peel**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

**Z**

**Applicant**

**- and -**

**(1) V**

**(2) THE CHILDREN**
**(by their Children's Guardian**

**Respondents**

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**James Holmes** (instructed by **Ben Hoare Bell LLP**) for the **Applicant**
**Charlotte Worsley KC and Kate Fenwick** (instructed by **Prism Family Law**) for the **2nd Respondent children**

Hearing dates: 19 and 20 February 2024

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 22 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE PEEL

**Mr Justice Peel :**

1. The Mother ("M") seeks a variety of orders designed to prevent the Father ("F") from abducting their two youngest children ("J" and "K"), aged 8 and 4, to Nigeria. There are two older children, aged 14 and 13, in respect of whom M does not seek safeguarding orders as they are thought to be of a sufficient age to self-protect against wrongful removal by F. The suite of orders sought by M includes:

    i) Continuation of wardship until the children are mature enough to self-protect, which M suggests is when they reach 11 years old.

    ii) A port alert for a similar period.

    iii) A s91(14) restriction against F to prevent him from bringing proceedings in respect of the children without leave of the court, again until they reach the age of 11.

    iv) Prohibited Steps Orders ("PSO") preventing F from removing the children from this jurisdiction, or from the care of M, or from the children's schools, or from the care of a third party to whom the care of the children is entrusted by M.

    v) Authorisation under a Specific Issue Order ("SIO") to M not to disclose to F the address of the children, their schools and their GPs.

    vi) A PSO preventing F from acquiring passports for the children, together with an order to HMPO preventing him from obtaining UK passports for the children, and a request to the Nigerian consulate or other appropriate authorities that he be prevented from applying for Nigerian passports or Emergency Travel Documents.

    vii) A SIO for M to hold the children's passports.

2. F did not attend. I am satisfied he was aware of the hearing, and the various orders sought. It is not entirely surprising as he has effectively disengaged from the proceedings since September 2023. He is aware, not least because of the terms of an order dated 14 September 2023 made at a hearing which he attended, that should he not appear at this final hearing, the court may make final orders in his absence. It is possible that he is currently in Nigeria (he intimated as much to M's solicitors) but, if so, he made no application to join remotely. His general stance is clear; he has in the past indicated he opposes all the orders sought.

3. The Guardian opposes the continuation of wardship orders. She agreed the various other proposed orders in principle, subject to appropriate time limits.

## The evidence

The essential factual background has already been determined by HHJ Henley, sitting as a s9 judge, who conducted a comprehensive fact-finding hearing in public law proceedings at which M and F were present and gave evidence. A number of findings highly adverse to F were made. There was no appeal against those findings. All relevant factual material for this hearing before me is now established by reason of HHJ Henley's careful and thorough judgment. Since then, M has put in a short statement

which adds nothing material, reiterating her profound concern that F may seek to abduct the children to Nigeria. F has put in a five-line statement rejecting everything M has said in the past as "fiction" to which he chooses not to respond. It was not necessary to hear any oral evidence as all material facts have already been established. This case is now about an evaluation of the correct orders to make in order to meet the, as I find, clear risk of abduction.

## The factual background

4. The family are all Nigerian. F came to the UK in 2012 on a student visa; he obtained a Phd and is employed as a lecturer. M and the three older children joined him here in 2014.

5. In 2016 all the children were accommodated in local authority foster care following allegations of physical harm inflicted by M which were, in part, admitted by her. After a positive assessment, the children were placed in F's care in September 2016. Three months later he took them to Nigeria and left them there to be cared for by relatives. They lived in Nigeria from December 2016 to December 2018, being visited by F only about twice a year in that time. In December 2018, by when the parents had reconciled, the children returned to this country with both parents, and in 2019 K was born.

6. In November 2021, M and F separated as a result of F's domestic abuse perpetrated upon M and the children. They remained under the same roof until January 2022 when M secured her own accommodation.

7. On 16 March 2022, M went to Nigeria with the two oldest children for a family member's memorial service. She left the two younger children in the care of family friends.

8. Three days later, on 19 March 2022, without M's knowledge or consent, F, while exercising an agreed contact period, abducted the two younger children to Nigeria on emergency travel documents. The judge found that he did so out of spite and as a punishment to M, over whom he had been a malignant, controlling and domineering force.

9. On 24 March 2022, M reported the abduction to the UK police. On 8 April 2022, M applied to the Family Division for relief, and on 14 April 2022 obtained (i) wardship orders, (ii) a return order, and (iii) protective Tipstaff Orders.

10. F in fact only spent two days with the younger children in Nigeria, before returning to England, and did not see them again while they were in Nigeria. They were abandoned with third party carers of his determination, deprived of the society of M, F and their siblings. He did not comply with the High Court return order until 8 September 2022 when the children returned to this country and were placed in M's care. During their seven months in Nigeria living with members of F's family, they had been subjected to sustained physical and emotional abuse, and were gravely neglected.

11. The proceedings were transferred from the Royal Courts of Justice to the local family court.

12. On 21 December 2022, the Local Authority issued public law care proceedings. The children remained with M on an interim basis. The proceedings concluded after a contested hearing before HHJ Henley in June 2023, during which the judge found M to be credible and genuine in her evidence, whereas F was "deeply unimpressive".

13. I do not propose to repeat in detail the damning findings made against F which are recorded in the judgment and accompanying order. In summary, the judge found:

    i) F had abducted the children to Nigeria.

    ii) Whilst in Nigeria the children suffered significant physical and emotional harm and neglect at the hands of their purported carers.

    iii) All the children have been emotionally harmed by F's actions in wrongfully removing them to Nigeria, and deserting them there. The impact on them was "traumatic" to quote the judge, and they remain profoundly affected by it. They were "collateral damage" in F's determination to punish M.

    iv) The children have been physically abused by F. He has been cruel and authoritarian towards them.

    v) F has threatened to take the children back to Nigeria.

    vi) F lacks insight into his behaviour and its impact on the children.

    vii) F is likely to use, or allow others to use, physical chastisement on the children.

    viii) F perpetrated extensive domestic abuse upon M.

14. M was not completely free of criticism for she was found to have physically chastised the children in 2016.

15. The judge made the following orders:

    i) A 12-month supervision order.

    ii) A Child Arrangements Order under which all four children shall live with M.

    iii) There be no contact as between F and the children, and F should undergo a risk assessment before contact can take place.

16. The judge adjourned for further consideration of the wardship orders, Tipstaff Orders and any other orders required to prevent re-abduction. She clearly thought (correctly, in my view) that continuation of wardship and Tipstaff orders for an extensive period of time was disproportionate, and a significant incursion to the children's freedom, but adjourned for further submissions.

17. The Local Authority were discharged from the proceedings on 14 September 2023.

18. It is of note that since the children returned to this country in September 2022, F has not made any private law children's applications. Nor, as counsel for M confirmed to me in response to my specific inquiry, has he made contact with M or the children,

attended at their home or schools or in any other way disturbed or harassed them. That is not to say he will not do so in the future, but as things stand there has been a period of relative calm for the children.

## The law

19. In respect of wardship and inherent jurisdiction deployed for the protection of minors, I have been referred to a number of authorities, including **Re A [2020] EWHC 451**, **A City Council v LS [2019] 1384 (Fam**), **Re M [2015] EWHC 1433 (Fam)**, **Re M and N [1990] 1 AER 205**, **Re J [1991] (Fam) 33**, **Re B [2016] UKSC 4** and **Re M [2020] EWCA Civ 922**.

20. From these authorities I distil the following propositions:

i) The inherent jurisdiction derives from the Royal Prerogative, as parens patriae, to take care of those who cannot take care of themselves, and, when exercised in respect of children, is governed by reference to the child's best interests; **A City Council v LS (supra)** at 35.

ii) Wardship is a manifestation of the inherent jurisdiction or, to put it another way, an example of its use; **A City Council v LS (supra)** at 36.

iii) The distinguishing characteristic of wardship is that custody of the child is vested in the court, such that no important step can be taken in the child's life without the court's consent; **A City Council v LS (supra)** at 36. The ultimate welfare decision rests with the court.

iv) The inherent jurisdiction is strikingly versatile, and in theory boundless (**Re M and N (supra)** and **Re M (supra)),** but should be approached with caution and circumspection.

v) The inherent jurisdiction should not be deployed to cut across statutory powers designed to protect children: **Re B (supra)** at 85.

vi) The inherent jurisdiction may be invoked, either:

a) Where the requirements of s1-3 of the Family Law Act 1986 are fulfilled, which in summary are (a) that the child is habitually resident in England and Wales at the relevant time (which is defined as the date of the application by s7(c) of the Act), or (b) the child is present in England and Wales and is not habitually resident in any part of the United Kingdom; or

b) Where the child is a British national.

vii) The use of the parens patriae jurisdiction based on nationality is generally only applicable where the child is neither habitually resident nor physically present in England and Wales, and in particular where there is no statutory jurisdictional basis for making a return order or other welfare order; **Re M (supra)**.

viii) The court's inherent jurisdiction in respect of a child may be invoked without wardship. One example is cases of serious medical treatment. Another example

is where the court decides to make an inward return order in respect of a child who has been abducted to another country (typically a non 1980 Hague Convention country) without making the child a ward of court. That said, it is commonplace for applicants in such circumstances to apply for a wardship order, and, in my experience, commonplace for the court to make such an order as part of a suite of orders designed to safeguard the child, including a return order.

ix) The exercise of the inherent jurisdiction to seek the return of a child from a non-Hague Convention country is not, or may not be, strictly necessary; see in **Re NY [2019] UKSC 49** and in particular paragraph 44 of the judgment of Lord Wilson:

> "The application for the return order may be framed either as a claim for a specific issue order under section 8 of the Children Act 1989 or for an order pursuant to the inherent power of the High Court. However, the latter course should only be invoked exceptionally. Exceptionality may be demonstrated by reasons of urgency, complexity or the need for particular judicial expertise."

21. As for port alerts there are two types of such orders:

i) A port alert made in the exercise of the inherent jurisdiction by a judge or deputy judge of the Family Division of the High Court and addressed to the Tipstaff to implement; and

ii) A free-standing port alert (**A v B [2021] EWHC 1716 (Fam)**) which may be made in the Family Court but should, absent good reason, be ordered by a judge of circuit judge level (para 45).

22. Port alerts, it should be emphasised, are made ancillary to substantive relief, for example an order preventing a party from removing a child from the jurisdiction. They are (like Collection Orders, Location Orders and Passport Orders which can only be made by a judge of High Court level) designed to meet an imminent risk to the child and should be tightly controlled for they represent a considerable interference in liberty and the right to a private life; see, for example, the dicta on the use of Passport Orders in **Re K [2020] EWCA Civ 19** and **Re P [2020] EWHC 3009 (Fam).** Orders of this nature are intended to be interim protective measures. At para 67 of **Re K (supra)**, Sir Andrew McFarlane P said:

> "[67] … an open-ended passport Order and travel ban should only be imposed in the most exceptional of cases and where the Court can look sufficiently far into the future to be satisfied that highly restrictive orders of that nature will be required indefinitely. In all other cases, the Court should impose a time-limit when making such Orders. The time limit will vary from case to case and, like all other elements, be a bespoke provision imposing restriction only in so far as that is justified on the facts as found. Unless the Court can see with clarity that there will be no need for any continuing Order after a particular date, for example when it is clear that the circumstances will change so that the risk is removed, the appropriate course will be for the Court to list the matter for further review a short time before the passport and/or travel ban will otherwise expire."

23. The authorities on these measures generally concern orders made against the abducting, or potentially abducting, parent, preventing their travel and/or impounding their passport in circumstances where there is evidence that they may be about to remove the children. Typically, such orders encompass the details of the children and the relevant parent/carer. Here, by contrast, there is no suggestion of such orders being made in respect of preventing F from travelling, whether by seizing his passport or making a port alert against him. The orders, if made, will be in respect only of the children's freedom of movement. That said, any such order is plainly an interference with their human rights and must be justifiable and proportionate. They should ordinarily be carefully time limited, albeit with the opportunity of application for renewal at the end of the term.

24. Restrictions on the use of parental responsibility may be authorised by means of a Prohibited Steps Order. S8(1) of the Children Act 1989 provides that a Prohibited Steps Order:

"means an Order that no step which could be taken by a parent in meeting his general parental responsibility for a child, and which is of a kind specified in the Order, shall be taken by any person without the consent of the Court."

25. In **D v E and another [2021] EWHC 37** MacDonald J approved the use of Specific Issue and Prohibited Steps Orders in circumstances where not to make orders "would enable the father to jeopardise the safety, security and stability of the children".

26. In respect of s91(14) the principles can be collected from **Re P [2000] Fam 15** and **Re A [2021] EWCA Civ 1749**. King LJ in the latter case referred to the previous reluctance of judges to make s91(14) orders in the absence of a history of excessive applications. She pointed out that there is no such rule to that effect, although it is plainly a relevant consideration. Nor is there a requirement for exceptionality. Nor is there a requirement for the potential of serious or significant harm to the chid if a s91(14) order is not made. That said, the insertion of s91A by s67 of the Domestic Abuse Act 2021 requires the court to take into account the risk of harm to the child or another individual (typically a parent) of applications under the Children Act 1989; **A Local Authority v F and Others [2022] EWFC 127** at para 56.

27. The correct approach is therefore as set out in **Re P (supra)**:

"In suitable circumstances (and on clear evidence), a court may impose the leave restriction in cases where the welfare of the child requires it, although there is no past history of making unreasonable applications."

Accordingly, in evaluating the child's welfare, the court should have regard to the dicta in **Re P and Re A**, and the provisions of s91A.

## Analysis

28. I am satisfied that there is a real risk of abduction by F. F previously acted out of spite and the litigation of the past two years will have done nothing to reduce his sense of anger towards M; his short statement confirms he does not accept a word she says. F

has no respect for this court, the court process and court orders. There is absolutely no reason to think he will abide by, for example, a PSO. He does not accept the findings of HHJ Henley. He shows no insight into his behaviour, would willingly punish M, and would have no compunction about the impact on the children. He is economically mobile and has extensive family in Nigeria who have aided and abetted him. The children are, in my judgment, at risk of abduction if F is given a free hand and, were that to come to pass, the impact upon them would be little short of devastating. They do not want to see F or have anything to do with him, and their past lived experiences of abduction have been traumatising.

29. Evidence from an expert in Nigerian law states that orders in relation to children's welfare made in England and Wales are (save for adoption) not enforceable in Nigeria, and that there is no mechanism for the recognition and enforcement of such orders. If F were able to abduct the children, there is in practical terms very little M could do in Nigeria; legal proceedings in Nigeria would be protracted and expensive. In short, if F were able to achieve an abduction of the children, there is little expectation that a swift return could be achieved without F's agreement. Thus, the magnitude of the potential consequences seems to me to be set at a very high level given (i) the difficulty in securing return and (ii) the likely traumatic impact on the children.

30. To some degree, the risk of abduction is mitigated by a number of factors:

    i) The previous abduction took place while M was in Nigeria, whereas she is now in England, and is highly unlikely to go to Nigeria leaving the children behind, as she did before.

    ii) No attempt to abduct the children has been made since they returned here in 2022, nor has F contacted either M or the children in that time.

    iii) M has professional support, and the children are very visible to the Local Authority.

    iv) The expert in Nigerian law reports that it would be very difficult for F to obtain Nigerian passports and Emergency Travel Documents for the children, whether in Nigeria or here, because (i) the children would have to attend a processing centre to have their biometric details captured and (ii) the consent of both parents is required. However, this apparently mitigating factor is undermined by his ability to obtain Emergency Travel Documents to effect the abduction in 2022 without M's knowledge or agreement.

    v) M is much more attuned to the risk, and is likely to be highly conscious of the need to safeguard the children. She is more vigilant and aware.

    vi) It would be logistically and practically difficult for F to abduct the children in such circumstances.

31. Despite these factors, the overall risk of abduction is, in my judgment, tangible, and, as I have indicated, the consequences for the children if such risk were to materialise would be severely detrimental.

32. The question is what steps are justifiable and proportionate to safeguard the children form this undoubted risk.

33. I am clear that the wardship orders should be discharged for two reasons:

    i) They add nothing to the protective measures which I propose to make by way of Port Alert and PSOs. Counsel for M was unable to point to a single concrete benefit on the ground which wardship can provide to prevent abduction in these circumstances. Nor could counsel point to any authority where wardship was continued for the duration of the children's minority, or a substantial part thereof, in order to prevent abduction from this country.

    ii) They represent a serious intrusion into the children's right to a private life. Why should the court continue to exercise a supervisory role over the children when it has decided that they should continue to live with M under a Child Arrangements Order? This seems to me to a prime example of use of wardship potentially cutting across statutory jurisdiction. And it seems to me to be highly undesirable that, at least in theory, M would have to apply back to court in the event of her wishing to take any major step in their lives.

    In short, such orders are not necessary, justifiable or proportionate.

34. A Child Arrangements Order for the children to live with M has already been made. So too, an order preventing contact between F and the children. Further, the court has already made PSOs preventing F from removing the children from M's care, or from their schools, or from any third party to whom M has entrusted the care of the children. I consider it sensible to enlarge these orders so that F is prohibited from attending at the schools or contacting the schools. I will make an order that F is prohibited from applying for UK and/or Nigerian passports and travel documents. I do not propose to place a time limit on these orders. They will therefore continue during the children's minority, unless varied or discharged sooner by the court. New orders reflecting these matters should be drawn up so that (i) it will be simpler to have regard to one order only and (ii) the warning notice can be prominently placed at the front of the order.

35. The existing Tipstaff Orders should be discharged. A free-standing port alert should be made for a period of 18 months. It is for M to apply for a further port alert if there is an evidential justification.

36. I will make the orders sought to HMPO not to issue passports and travel documents for the children on any application by F without M's consent, and a request to the Nigerian Consulate and other relevant Nigerian authorities in like form.

37. I will make a Specific Issue Order for M to hold the children's passports and travel documents.

38. I will make a further Specific Issue Order authorising M not to inform F of any change of home for the children in the next 12 months; I am minded to make this order because I am told that M has to move home in the near future, and because of the abduction risk.

39. I refuse the application to authorise her not to inform F of the children's schools and GP should they move to new ones. F knows where they are currently at school, and

who their doctor is. There is no evidence that he has interfered either at their schools or at the medical practice, nor that it is intended they will move in the near future. The school will be aware that F is not permitted to attend, and in the circumstances the risk of abduction from school (or GP) seems to me to be very circumscribed. M can apply for a similar authorisation in the future if justified. It seems to me that these orders as sought are not proportionate, nor are they necessary to prevent abduction which is the primary concern of M.

40. A S91(14) order is justified here. F has not made private law children applications. But the children have been subject to appalling behaviour by F, and legal proceedings have lasted nearly two years. The children do not want to see F. They have been traumatised by his conduct. They, and M, need time free of potential litigation. Further litigation would be highly detrimental to their welfare, in my judgment. The s91(14) order shall be for a period of 18 months.