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, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Case No: 2017/0098

Neutral Citation Number: [2017] EWHC 2034 (Fam)

IN THE HIGH COURT OF JUSTICE

**FAMILY DIVISION**

**On appeal from the Central Family Court**

**HH Judge Tolson QC**

**BT15P00090**

**IN THE MATTER OF THE CHILDREN ACT 1989**

**AND IN THE MATTER OF MM AND RM (TEMPORARY RELOCATION)**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 1st August 2017

**Before** :

THE HONOURABLE MR JUSTICE BAKER

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**Between :**

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| --- | --- | --- |
|  | **AM** | Appellant |
|  | **- and -** |  |
|  | **DF** | Respondent |

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**Seema Kansal** (instructed by **Traymans LLP**) for the **Appellant father**

**Helen Nettleship** (instructed by **MW Solicitors**) for the **Respondent mother**

Hearing dates: 26th and 27th July 2017

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Judgment

**MR JUSTICE BAKER :**

1. On 27th July 2017, I gave permission to appeal and allowed the appeal by a father against the decision of HH Judge Tolson QC dated 9th May 2017 by which he varied a prohibited steps order so as to permit the respondent mother to take the parties’ two children to Iraq for four weeks this summer. This judgment sets out the reasons for my decision.

**Background**

1. The parties both come from Iraq. The father asserts that he came to this country in 1999 to escape political persecution. In 2007, the parties married in Iraq and in 2008 they came to live in this country and have remained living here ever since. They have two children, a boy, MM, born in 2009, and a girl, RM, born in 2011.
2. It is the mother’s case that the father was violent and verbally abusive throughout the relationship. In 2014, the parties visited the mother’s family in Iraq. In 2015, their relationship broke down, and in July the mother left the family home with the children. The father alleges that she then attempted to leave the country until prevented by the police. She then made allegations about his behaviour towards her and as a result he was arrested and then bailed on condition that he did not contact her directly or indirectly. The father in turn alleged that he had been harassed and threatened by members of her family.
3. The father then applied for a prohibited steps order to prevent the mother removing the children from the country. On 17th December 2015, HH Judge Brasse gave directions in the application, and made a prohibited steps order prohibiting the father from removing the children from the jurisdiction pending further order. It is the father’s case that the mother then took the children to the Netherlands for a short period in breach of that order. So far as I know, that allegation has never been determined by a court.
4. At a further hearing on 29th February 2016, Deputy District Judge Gibbons, as she then was, made an order reciting an agreement that the children should live for the time being with the mother and have supervised contact with the father. The order recorded that the outstanding issues included the child arrangements, and also whether it was safe for the children to travel to Erbil in Iraq, given the instability in the region and the attack by Isis in a nearby town in 2014, and whether the prohibited steps order should continue after the final hearing. The judge gave various case management directions and ordered that the prohibited steps order should remain in force. Contact then resumed in accordance with the agreement, but there were cross-allegations of violent and threatening behaviour. The father obtained a non-molestation order against the mother, and she in turn told the father that she would not make the children available for contact, leading him to file another application for a child arrangements order. At a FHDRA, Judge Tolson gave directions leading to a final hearing listed for August 2016. Hair strand tests suggested that the father had a chronic drink problem. A Cafcass report recommended that contact should be supervised in the interim.
5. At the hearing on 22nd August 2016, District Judge Gibbons (as she had now become) ordered contact as recommended by Cafcass and further directed that the father should undergo more alcohol testing. The mother having indicated that she wanted to take the children to Iraq in December 2016, the judge listed a hearing in November to determine that issue, with appropriate case management directions. The order included recitals that the court was not satisfied that there was sufficient information about the mother’s travel plans, and also that the father accepted that there was no issue of radicalisation in the case, but that his concerns were the plans and safety of the children whilst in Iraq and whether they would be returned to this country. The directions included an order that the mother should file a statement by 25th October 2016 setting out the following matters: “(1) reciprocal arrangements with Iraq (2) full details of any plans (3) how she intends to travel (4) when she intends to travel (5) whom she intends to stay with (6) her proposed travel itinerary (7) what steps she intends to take to ensure the safety of her and the children (8) Home Office information.”. The father was ordered to file a statement in response. In addition to the hearing in November, the judge listed a hearing on 6th January 2017 to deal with the issue of child arrangements.
6. In the event, the mother subsequently indicated that she no longer intended to travel to Iraq with the children in December but instead wished to take them there in the Summer 2017. By a further order dated 28th October, District Judge Gibbons vacated the hearing in November but stated in her order that the court would still require the information set out above at the hearing listed on 6th January. Meanwhile there were further difficulties around contact, and a Cafcass report recommended that there should be no further contact until the father had completed a domestic violence programme.
7. The hearing on 6th January took place before Judge Tolson. The court ordered that the father be referred to a domestic violence perpetrators programme. The order recited that the mother had asked the court to make a child arrangements order in her favour and to discharge the prohibited steps order at the hearing, but further recited that the court considered that it would not do so but that the decision should be made at a later hearing. In the interim, the court ordered that the children should live with the mother and that, for avoidance of doubt, the prohibited steps order dated 17th December 2015 should remain in place. The order added, however, that the mother had permission “to email HHJ Tolson QC directly if she has any travel plans in the interim and seeks to vary the PSO”. The order provided that the parties should “file and serve any final evidence on which they seek to rely in relation to child arrangements … and the prohibitive [sic] steps order … by 4pm on 3rd July 2017”.
8. The mother subsequently decided to take up Judge Tolson’s suggestion that she should email him about travel plans. There then ensued an exchange of emails between the parties’ solicitors and the judge. On 22 March 2017, the mother’s solicitor emailed the judge (not copying in the father’s solicitor), stating:

“I write further to your order dated 6 January 2017 (attached) to outline the mother’s proposed travel plans to Iraq. The mother wishes to take the children to Iraq over the school summer holidays so that the children can spend time with their maternal grandparents. The children have not seen their maternal grandparents for some three years now. The maternal grandmother is very ill and has recently suffered a heart attack.”

The email proceeded to give the dates on which the mother wished to travel, and the address where she and the children would be staying. The solicitor added that, although the final hearing was listed on 10 July 2017, this would not give sufficient time for the mother to purchase flight tickets for the proposed dates on which she wished to travel.

1. Later that afternoon, the judge replied, stating that the sealed order attached to the solicitor’s email was not in the terms he had approved. He added

“I am not quite sure what has gone wrong. Nor do I understand why I need to know details of the proposed trip. I am afraid I will have to ask you to explain.”

A few minutes later, the mother’s solicitor replied, addressing the confusion over the draft order (which is not relevant to this appeal), and explaining:

“my client gave an indication at the hearing on 6 January 2017 that she planned to take the children to Iraq during the school summer holidays but did not have the relevant travel information at court on 6 January 2017. My client was consequently given permission to email you directly with the travel plans so you could consider whether to grant leave for the proposed removal.”

The judge then replied:

“thank you. Can you please obtain the father’s position on the proposed application by forwarding this email and the chain to him?”

1. The following morning at 9.24, the mother’s solicitor complied with this direction, but redacted the grandparents’ address in Iraq. Sixteen minutes later, the father’s solicitor sent an email to the judge, (copying in the mother’s solicitor) stating:

“my client’s position is and always has been that he remains entirely opposed to the children travelling to Iraq. He does not consider it safe for the children and has continued fears that the mother would fail to return to the UK with the children. It may be that the court will consider the matter ought to be listed before the court and evidence filed addressing the following matters.”

She then set out verbatim the eight matters identified in District Judge Gibbons’ order of 22 August 2016. Fifteen minutes later, the mother’s solicitor emailed the judge, copying in the father’s solicitor, pointing out that her email of the previous afternoon had set out the mother’s travel plans, repeating that the court had been informed on 6 January 2017 that the mother wanted take the children to Iraq in the school summer holidays and that the father had objected to this request, and continuing:

“my note from counsel states that you would consider any email sent directly to you by the mother through me once my client had concrete proposals for the proposed holiday to Iraq. My counsel’s note further states that you commented that it was in the children’s interest to see their maternal grandmother and wider maternal family.”

She submitted that a further hearing was unnecessary, pointing out that legal aid would not be available for the mother at any hearing.

1. Later that day, the father’s solicitor wrote to the judge, stating:

“We confirm that our client remains entirely opposed to the mother removing the children to Iraq. He does not consider that it is safe for the children to travel there when there remains a high degree of conflict in the region. He has ongoing concerns that the mother intends to permanently remove the children from the jurisdiction.

The court should be aware that the Foreign and Commonwealth Office advice is currently against all travel in Erbil province, south of Road 80, and within 10 km of the border with Ninewah province between Road 80 and Road 2 and against all but essential travel to Iraq more generally ….

We do not consider that the mother has provided details of her proposed travel plans when she has provided no address where she and the children will be staying, no proposed flight itinerary or tickets and no detailed itinerary for the proposed activities of the children while in Iraq.

We note that when the mother last made a concrete proposal to travel to Iraq prior to the hearing in this matter which took place in October 2016, the court ordered that evidence should be filed by both parties and that the mother should address the concerns the father has about the safety of the children in Iraq and about the risk that they would not be returned. She has not yet addressed these concerns.

While our client has sympathy for the mother in her wish to see her own mother who is reported to be in ill health, he is also aware that she remains free to travel to Iraq on her own, which would avoid any risk to the children….

Our client remains very deeply concerned about this proposal on the part of the mother and the court should be aware that we will be very likely to be instructed to seek permission to appeal an order of the court made granting the mother permission to remove the children to Iraq as proposed made without a fully contested hearing.”

1. Following receipt of this letter, Judge Tolson sent an email to the parties, stating “having reviewed the correspondence from both sides I have determined that a formal application for permission to travel to Iraq will be required.”
2. Meanwhile, the father’s first meeting with an assessor from the domestic violence perpetrators programme did not proceed smoothly. No interpreter was present and, it is alleged, the father behaved in an aggressive way and appeared to be under the influence of alcohol. Following that meeting, the Cafcass officer wrote to the court asking for the matter to be listed for further directions. As a result, the court directed that the matter be re-listed for a further direction hearings on 9 May 2017, time estimate one hour.
3. A full transcript of the hearing on that May is available for this court. Excluding judgment, it runs to some 7 ½ pages. Having dealt briefly with the problem that had arisen on the domestic violence perpetrators programme, the judge then asked the father’s counsel (Mr Davis): “where is father on travel to Iraq?” Mr Davis replied that he was “against that in the strongest terms” and referred to the Foreign and Commonwealth Office guidance. The judge asked whether it was common ground that the mother had travelled to Iraq frequently in the past with the children. Having taken instructions, the father’s counsel replied that the last visit had been in 2013/14. He reminded the court that, when the matter had been raised before, the court had ordered that evidence be filed by both parties and that the mother should address the father’s concerns. He then alluded to the email exchange, and reminded the judge that his view had been that there needed to be a formal application. The judge replied: “I think I needed to see people in court. I am not too bothered about the formal application.”
4. The judge then turned to the mother’s counsel, Ms Youngs, and, after an exchange about the contact problems, said “tell me about Iraq”. Ms Youngs gave details of the proposed trip, and, in response to further questions from the judge, gave further information about the previous visit in 2013/14, stated that the mother had travelled there with the children three or four times, and outlined the problems with the grandmother’s health. The judge then asked the father’s counsel whether it was in dispute that the children have been a total of 3 to 4 times to Iraq. The hearing concluded with this exchange between the judge and counsel:

“Mr Davis: My instructions, your Honour, is 2010 and 2013, but in fact it was to Kurdistan, which the father says is safe and that it was with his family, not with mother’s family. So that they travelled in 2010 …

Judge: Not to Kurdistan.

Mr Davis: That is what I have been told, Sulaymaniyah, Kurdistan.

Ms Youngs: My instructions are that Erbil is in Kurdistan.

Judge: I was aware the Kurdish area of Iraq was in the North, I did not know it was actually called Kurdistan, but that is my ignorance. Thank you.”

1. The judge then delivered a short judgment. The first half considered the problem that has arisen with contact, and directed that a further hair strand test be carried out on the father. The judgment continued as follows:

“8. One reason why this hearing was convened was in response to a letter from [the Cafcass officer] indicating the developing difficulties in respect of contact. The other aspect of the case was the mother’s desire to travel to Iraq with the children. Specifically, to Erbil, in the North for a month between the 30th July and the 28th August. Father objected strenuously to this. His argument is based on two concerns, the first that Iraq is not a safe occasion for the children at the present time. The second is said to be a flight risk.

9. Mr Davis points to the fact that the Foreign and Commonwealth Office recommends against any but essential travel to Iraq. In my judgment, the position in that respect stands differently when, as here, the mother is visiting close family members. The position of these children is not to be compared with a foreigner entering the country. The mother and her family are well placed to make necessary judgements concerning the children’s safety.

10. On the same issue but more especially as to the flight risk, it is of importance to note that on at least two previous occasions, probably more, the children have travelled to Iraq to the same area. They have returned, and returned safely, and, as I understand it, on time. There is no reason or evidence, in my judgment, to believe that there will be anything different this time round.

11. Moreover, there are particular reasons to make the trip at the moment as, unfortunately, the maternal grandmother has suffered ill health recently. She is anxious to see the children, and the mother is anxious that she should see the children.

12. Accordingly, I will today give permission for the removal of the children from the jurisdiction between the dates stated for the purposes of travel to Erbil in Iraq. That completes this short judgment.”

1. On 5th June, the father filed a notice of appeal to this court (slightly out of time) against the judge’s decision to allow the mother to take the children to Iraq. In the grounds of appeal, it was asserted that the judge failed to take adequate account of the welfare checklist set out in s.1 of the Children Act 1989, in particular the risk of harm. It was further asserted that the judge had (1) failed to provide detailed reasons as to why the mother’s family was in a better position to determine the risk of children travelling to and residing in Iraq than the most recent FCO guidance; (2) relied on the mother’s reason for wanting to take the children to Iraq without proper scrutiny or detailed arguments; (3) failed to explain why the children’s past travel to Iraq was relevant, or more relevant when compared with the up-to-date guidance; (4) failed to explain why travel to Iraq was “essential”; (5) failed to consider the alternatives to the children’s travel – for example whether the mother could travel without the children, and (6) failed to give any or any adequate reasons why, with a final hearing approaching in July 2017, the prohibited steps order issue could not be considered then when detailed submissions could be presented to the court. On 14th June, I directed that the question of permission to appeal be referred to me once the transcript of the judgment of 9th May was available. On 10th July, the transcript was filed with the Family Division Appeals Office. On the following day I listed the application for permission to appeal for an oral hearing, with the appeal to follow immediately if permission was granted. I directed that, pending the hearing, the paragraph of the order of 9th May which varied the prohibited steps order should be stayed.
2. Meanwhile, the proceedings in the family court continued and the hearing listed on 10th July duly took place before Judge Tolson. Having heard further evidence and argument concerning the issues surrounding contact, which included further alcohol testing showing no evidence that the father had consumed excessive alcohol, the judge on 13th July made an order for interim supervised contact with a review hearing in the autumn. He also discharged the prohibited steps order preventing the mother from removing the children from the jurisdiction. It seems that there was relatively little evidence and argument about this latter issue. The judge noted that his earlier order giving the mother permission to take the children to Iraq was the subject of an application for permission to appeal to be heard by this court a few weeks later. I have only seen two draft notes of the judgment delivered following this hearing. Those notes are neither approved nor, indeed, agreed by counsel, although they are substantially the same. Although a transcript of the judgment was ordered, it has not yet been approved or produced. Ideally, I would wish to see that transcript but, in view of the mother’s imminent departure to Iraq if permitted to do so, no further adjournment of this appeal is possible. I understand from the unapproved notes of judgment that the judge referred briefly to the evidence he had heard from the mother about her past travel to Iraq with the family, which he stated he accepted in its entirety.

**Submissions**

1. In presenting the case on behalf of the Appellant, Ms Kansal submitted that the judge had been wrong to determine the issue of the proposed trip to Iraq at a directions hearing, without any evidence, having previously indicated that a formal application was required. She also submitted that the judge had failed to apply the well-established legal principles concerning applications for temporary removal of children from the jurisdiction.
2. In considering the submissions advanced on the half of the mother in response, it is important to acknowledge that legal aid funding was only confirmed on the day before the hearing which gave very little opportunity for Ms Nettleship, who had not appeared before Judge C, to prepare her argument. I am satisfied, however, that she was able to put forward all relevant arguments and commend her for the admirable way in which she prepared and presented the case. She contended that, in all respects, the appeal was devoid of merit and should be dismissed
3. Ms Nettleship observed that on 13 July Judge Tolson discharged the prohibited steps order in its entirety. He had also made a child arrangements order in the mother’s favour, thereby allowing her to take the children out of the jurisdiction for periods of up to 28 days. She pointed out that, to date, there had been no application for permission to appeal against the order of 13th July. She therefore submitted that pursuing an appeal against the variation of an order which no longer exists was plainly perverse.
4. Ms Nettleship further argued on behalf the father that, fundamentally, the judge had not erred in law in deciding to allow the mother to take the children on holiday to see their grandmother and extended family. The two welfare issues put before the judge – the children’s safety and flight risk – were considered by the judge after hearing submissions. Mr Nettleship further pointed out that the children had had a similar holiday with the mother to Iraq as recently as 2014 which had been sanctioned by the father. She submitted that the mother had good reason to want to take the children to Iraq, namely for them to see their grandmother, and that the judge had been persuaded that this was a pressing reason for the visit. She further submitted that there was no compelling evidence of flight risk as the children are well settled in this country where they are attending schools. The judge had been aware of the guidance concerning safe travel to Iraq when reaching his decision. Ms Nettleship stated that the holiday had been arranged at great expense to the mother and that the children were looking forward to seeing their extended family. For that reason, it would be a great shame if for any reason the holiday could not go ahead.

**Discussion and conclusion**

1. The approach to be applied by courts when determining an application for the temporary removal of children from the jurisdiction has been considered by the Court of Appeal in a number of cases, notably *Re K (Removal from Jurisdiction: Practice)* [1999] 2 FLR 1084, *Re M (Removal from Jurisdiction: Adjournment)* [2010] EWCA Civ 888, *Re R (A Child)* [2013] EWCA Civ 1115 and *Re H (A Child)* [2014] EWCA Civ 989. None of these cases, or the principles derived from the cases, were cited by the judge in the present case.
2. The approach is set out by Patten LJ in *Re R* at paragraphs 23 and 25:

“25. The overriding consideration for the Court in deciding whether to allow a parent to take a child to a non-Hague Convention country is whether the making of that order would be in the best interests of the child. Where (as in most cases) there is some risk of abduction and an obvious detriment to the child if that risk were to materialise, the Court has to be positively satisfied that the advantages to the child of her visiting that country outweigh the risks to her welfare which the visit will entail. This will therefore routinely involve the Court in investigating what safeguards can be put in place to minimise the risk of retention and to secure the chart’s return if that transpires. Those safeguards should be capable of having a real and tangible effect in the jurisdiction in which they are to operate and be capable of being easily accessed by the UK-based parent. Although, in common with Black LJ in *Re M*, we do not say that no application of this category can proceed in the absence of expert evidence, we consider that there is a need in most cases for the effectiveness of any suggested safeguard to be established by competent and complete expert evidence which deals specifically and in detail with that issue. If in doubt the Court should err on the side of caution and refuse to make the order. If the judge decides to proceed in the absence of expert evidence, then very clear reasons are required to justify such a course.

 ….

 25. ….[A]pplications for temporary removal to a non-Convention country will inevitably involve consideration of three related elements: (a) the magnitude of the risk of breach of the order if permission is given; (b) the magnitude of the consequences of breach if it occurs; and (c) the level of security that may be achieved by building in to the arrangements all of the available safeguards. It is necessary for the judge considering such an application to ensure that all three elements are in focus at all times when making the ultimate welfare determination of whether or not to grant leave.”

1. In *Re H*, Ryder LJ, at paragraph 12 of his judgment, observed:

“When dealing with the risk element in cases such as this, it is important to take into account not just the facts as they appear from the evidence of the parties but also the opinions of those agencies that provide assistance to courts and to individuals when asked to do so.”

 He cited in particular the FCO guidance available in that case. At paragraph 14, he reiterated the need for “rigorous scrutiny” of the three factors identified in paragraph 25 of Patten LJ’s judgment in *Re R*.

1. Judges dealing with children’s cases are entitled – indeed, required – to make case management decisions as to how the proceedings should be litigated. In appropriate circumstances, it is within the scope of a judge’s case management powers to make substantive decisions about child arrangements on a summary basis. Appellate courts give a wide discretion to judges at first instance over the exercise of case management powers in this way. I understand Judge Tolson’s wish to resolve private family law issues such as this application as expeditiously as possible. It was plainly desirable to determine the mother’s application promptly so that, if permission was granted to take the children to Iraq, there was sufficient time for planning and preparation. But I regret to say that, in pursuing that laudable aim, the judge’s decision on this occasion to deal with this issue in a summary fashion was inappropriate and irregular in several respects.
2. First, as the Court of Appeal has repeatedly emphasised, not least in the two passages quoted above, a disputed issue concerning the temporary removal of children to a non-Hague country calls for careful analysis – in Ryder LJ’s words, “rigorous scrutiny”. Particular care is required when dealing with an application to remove children to a country where there is social and political instability. At present, Iraq is manifestly one such country. In this case, the judge had little if any information upon which to make the careful and objective assessment required in such a case. The judge was provided with the FCO guidance recommending against any but essential travel to Iraq. He chose not to follow that guidance on the grounds that the mother was visiting close family members so that the position of the children in this case was “not to be compared with a foreigner entering the country”. His assessment was that the mother and her family were well placed to make necessary judgements concerning the children’s safety. But he had no evidence on which to base that assessment. On the issue of flight risk, the judge noted that the children had been taken to Iraq on at least two previous occasions and returned safely and on time. He stated that there was no reason or evidence to believe that anything would be different this time round. But again, he had no evidence on which to reach that conclusion.
3. In fact, the judge had no up-to-date evidence at all. It is true, as Ms Nettleship pointed out, that, in an earlier statement filed nearly a year previously in 2016, the mother had addressed some issues about proposed travel to Iraq. She had not, however, complied with the direction given by District Judge Gibbons in August 2016, which identified with some precision the topics on which evidence would be required. That direction had been given pursuant to the mother’s application to take the children to Iraq in December 2016. In the event, that application was withdrawn and thus no statement was filed. In January 2017, Judge Tolson had given a more general direction for the filing of evidence in preparation for the hearing in July 2017 at which it was anticipated the court would determine the application for the discharge of the prohibited steps order. Again, no evidence was filed in compliance with this direction. In March 2016, as summarised above, the mother informed the judge by email that she wished to pursue her application to take the children to Iraq in the summer. After the exchange of emails as set out above, Judge Tolson indicated that this should be pursued by way of a formal application. By that, he plainly meant a notice of application, accompanied by written evidence. No such application, nor any evidence, was filed before the hearing on 9th May.
4. Secondly, the father was given no opportunity to put forward any evidence or argument in response to the mother’s proposal. In the light of the judge’s unequivocal direction in March 2017, in his email at the conclusion of the exchange of emails quoted above, that the mother should file a formal application, the father was entitled to assume that the matter would not be pursued or determined without a notice of application and evidence filed by the mother, to which he will be given a reasonable opportunity to respond. Instead, he and his legal representatives were taken almost completely by surprise. On the morning of the hearing on 9th May - which it will be recalled had been listed as a directions hearing - the mother’s counsel raised the question of the proposed trip in her position statement. I do not criticise her for doing so, although the mother had failed to comply with the judge’s informal but clear direction to file a formal notice of application. Of greater concern, however, is the judge’s decision to go against his earlier direction and determine the issue summarily at the directions hearing. The father and his representatives had no adequate notice that the judge would take this course, nor did they have any opportunity to file any evidence. Indeed, as demonstrated by the quotation from the transcript of the hearing set out above, the father and his representatives had no real opportunity to put forward any arguments at all.
5. Thirdly, with respect to the judge, the analysis in his brief judgment does not contain the rigorous scrutiny of the issues which the Court of Appeal has emphasised is necessary in such cases. Brevity in a judgment is of course commendable but to deal with this issue in 250 words is plainly insufficient. There was no adequate assessment of the magnitude of the risk of breach of the order if permission were granted. There was no consideration of the magnitude of the consequences of any breach if it occurred. There was no assessment of whether the advantages to the children of visiting Iraq outweighed the risks to their welfare which the visit would entail. There was no investigation of the safeguards which could be put in place to minimise the risk of retention and secure the children’s return if that transpired. There was no consideration of whether expert evidence was required, and consequently no exposition of the reasons for proceeding without such evidence.
6. As a result of these various irregularities, I reached the clear conclusion that the judge’s decision to vary the prohibited steps order to allow the mother and children to travel to Iraq in the summer 2017 was unjust.
7. As Ms Nettleship pointed out, however, in one respect this has been overtaken by the subsequent hearing in July. At the conclusion of that hearing, the judge, in addition to making a child arrangements order providing the children should live with the mother and have interim supervised contact with the father, discharged the prohibited steps order altogether. It followed that, if the order of 9th May is simply set aside, the mother would nonetheless be entitled to take the children to Iraq for four weeks by virtue of s.13(2) of the Children Act. As Ms Nettleship acknowledged, however, the merits of the Iraq trip were not really considered at all during the recent hearing in July. It was recognised that this had been decided at the hearing on 9th May and that the decision was the subject of this imminent appeal. Although I do not have a transcript of the judgment delivered on 13th July, it is plain to me from counsels’ respective notes of the judgment that nothing occurred at that hearing to remedy the injustices of the hearing and decision of 9th May.
8. It is regrettable that the father’s representatives did not file a notice of appeal against the discharge of the prohibited steps order at the hearing on 13th July prior to the hearing of this appeal against the order of 9th May. It may be that they assumed that the issue would be considered by this court in any event. In the circumstances, however, I concluded that the fair course was to accept an undertaking on behalf the father to file a notice of appeal against the discharge of the prohibited steps order by 4 pm on 28th July, and, on the basis of that undertaking, to stay the order discharging the prohibited steps order pending that appeal.
9. I therefore made the following orders at the conclusion of the appeal hearing

(1) the father is granted permission to appeal against the order dated 9 May 2017 varying the prohibited steps order dated 17 December 2015 allowing the mother to travel to Erbil, Iraq with the children between 30 July 2017 to 28 August 2017 inclusive;

(2) the father’s appeal against the order dated 9th May 2017 is allowed;

(3) upon the father’s undertaking through his legal representatives to file a notice of appeal against the order dated 30 July 2017 discharging the prohibited steps order by 4 pm on 28 July 2017, the order discharging the prohibited steps order is stayed pending determination of the application for permission to appeal against that order.

1. It follows that the mother is not permitted to take the children to Iraq this summer. I accept that this outcome will be a great disappointment to the mother and in all probability for the children as well, but of greater importance is the injustice to the father that would be perpetrated were the order of 9 May 2017 allowed to stand.