

THE HIGH COURT

[2016 2 HLC]

IN THE MATTER OF A CHILD ABDUCTION AND IN THE MATTER OF KP (A MINOR)

PP

APPLICANT

AND

PK

RESPONDENT

JUDGMENT of Ms. Justice O'Hanlon delivered on the 27th day of January, 2016

Background to the Case

1. The applicant sought ex-parte orders before Mr. Justice Humphreys on the 8th January, 2016. On that date, having heard the application the Court ordered, pursuant to the inherent jurisdiction of the Court and s. 11 of the Guardianship of Infants Act, 1964 that the respondent, her servants or agents or any person having notice of the making of the order be restrained from removing the minor, namely KP, from this State pending further order of the Court.
 2. Significantly, the Court ordered the respondent to surrender both the Thai and Irish passports of KP and the respondent's own passport to the respondent's solicitors within one hour of being notified of the making of the order. The Court further directed the respondent to disclose her current address to the applicant within one hour of being notified by text message of the making of these orders. Directions were also given regarding service of documents and the respondent was directed to file a replying affidavit by 5pm on Tuesday the 12th January, 2016.
 3. Significantly, the applicant was granted sole custody of the minor KP pending further order of the Court. Mr Justice Humphreys noted that such custody would be exercised by the applicant personally or by the applicant's sister on his behalf at "T" in Co. K. The Court stated that the mother was only allowed supervised access with her child pending further order. Further protective orders were set out in paras. 9-12 inclusive of the order of Mr Justice Humphreys.
 4. On Wednesday the 13th January, 2016 this Court varied the order at para. 9 slightly and stayed the portion of para. 9 which directed that the applicant's solicitor to be at liberty to inform the United Arab Emirates Authorities of the making of these orders pending further order. The respondent also surrendered the passports at this time. On the 20th of January 2016 the Court ordered that an interim assessment and report into the best interests of the child be completed. The parties were amenable to the Court applying the principles of the new section 3 of the Guardianship of Infants Act 1964 as inserted by the Children and Family Relationships Act 2015 regarding the welfare test to be applied in this case. This section was commenced by Commencement Order SI 12 of 2016 and is in force since the 18th of January 2016.
- Evidence before the Court**
5. The parties met in Ireland in 2008 and they married in this jurisdiction on the 18th day of December, 2009. The applicant has worked in the UAE since 2009. The infant was born in the United Arab Emirates on the 27th August, 2012. She holds joint Irish and Thai passports. The child was attending school in Abu Dhabi since the 1st September, 2015. The parties had, at all material times, lived together as a family where the father and the mother were both exercising rights of custody prior to the alleged wrongful retention of this child.
 6. The case came before this Court again on the 25th of January 2016. The Court clarified at the start of the hearing that the immediate aim was to put arrangements in place for the interim care of this child in her best welfare interests, pending full hearing.
 7. Dr. Byrne Lynch gave evidence that both parents seemed determined in their belief of what would be in the child's best interest. The father believes that return with him to the UAE where KP has lived up to this point and where she goes to school would be best. The doctor recorded the mother's fear of a return to the UAE and her feeling that her legal position would be subject to the decisions of her husband and the court system in the UAE. The doctor pointed to the fact that the mother gave up the opportunity to see her child over Christmas because to do so she would have had to forfeit the passports and she had refused to do this, such was her fear that if she handed over the passports the child would be returned to the UAE.
 8. Dr. Anne Byrne Lynch felt that, after basic questions of safety are satisfied, priority should be given by the Court to the emotional security needs of this child and that needs of education, socialisation and stability in her living situation were less pressing. Dr. Byrne Lynch felt that there were no interim options open to the Court which do not involve this child having to negotiate further changes and transitions in her life. At para. 3 of Dr. Byrne Lynch's report and as she explained in her evidence her recommendation was, if safety considerations do not prevent it, to return the child temporarily to the care of her mother. This could be done either for a stated period to rebuild their relationship prior to a return to her father's care in Abu Dhabi or to remain in her care for the whole of the interim period until the court makes its final determination. As appears from para. 4 of Dr Byrne Lynch's recommendations, she did feel that the respondent presented as a competent woman, highly motivated and committed to her child and that it should be within her capabilities to have appropriate living arrangements worked out with educational and recreational arrangements for the child. Dr. Byrne Lynch suggested that Skype access be available to the parent who does not have KP in his or her care.
 9. Dr. Byrne Lynch praised both parents for their love and care towards their daughter and she accepted that both were prioritising their daughter but they believed that different things would be in her best interest. Dr. Byrne Lynch indicated that there was no major safety risk to the child being in her mother's care although she did accept that there was a background issue to do with the previous removal to Thailand by the mother of the child in November 2015. Dr. Byrne Lynch wished to reserve her opinion in relation to this incident as she did not know the full facts of what happened. Essentially, this Court takes the view that in November 2015 there was a previous issue between the parties as to what appeared to be an over holding situation by the respondent of the child in Thailand, where the child's grandmother lives.
 10. Dr. Byrne Lynch found that each parent respected and acknowledged the role that the other parent must play in the child's life. However, she questioned the capacity of each to engage the other in the child's life depending on the decision of the court.

Interestingly, Dr. Byrne Lynch noted that the child was already experiencing a separation from her mother and that this loss could be exacerbated and felt more acutely if she were to return to the UAE and her familiar circumstances without her mother. She felt that the relationship between mother and daughter must be consolidated and recommended that if the Court orders the return of the child to the UAE the child should spend at least two months with her mother beforehand. Dr. Byrne Lynch also emphasised that a continuing relationship and contact was essential between father and daughter but accepted the practicalities of the father's situation that he had to go back to the UAE to resume his work at this point.

11. The father explained that he had a very secure job with Abu Dhabi City Municipality and that that job finishes at 4.30pm in the afternoon. He explained that he gets between four and five weeks holidays each year. He further stated that he earns the equivalent of between €8,000 and €10,000 per month but he fears that his financial allowances will be reduced if he returns to the UAE without his child. The applicant's case is that he believes his wife to be in a risky state of mind noting her desire to live in three separate states over a matter of months. He noted that the respondent has no job in this jurisdiction and nowhere to live on her own in Ireland and he worries about the lack of stability for the child. The general tenor of the applicant's evidence on the 25th of January 2016 and on the previous occasion was that, in terms of stability and living standards, he was able to provide the child with a high standard of living and a good start in life.

12. The main thrust of the respondent's evidence was that her wish was to remain in Ireland and have her child educated in this country. In her testimony, she described seeking an apartment for herself and the child. She stated that she is willing to facilitate retention by her solicitor of her own and her child's passports. She assured the Court that she had no difficulty in facilitating Skype access between the child and the father. She also agreed to potential regular visits to the UAE with the child, to give the child an opportunity to spend time with her father although she said she wished to do so travelling on a UAE tourist visa rather than under the applicant's sponsorship. Her complaint was that she had no freedom in the UAE and that the applicant was very controlling of her. She stated to the Court that if the child was returned to the UAE by the Court she would not travel there as she was very fearful of returning there.

13. In relation to her removal of the child KP to Thailand of the child in November 2015, the respondent said that she had done this because her mother was ill and it was an emergency and she had not informed the father as to her plan to go to Thailand. She stated that she phoned the father upon their arrival in Thailand. The respondent testified that she believed upon her return from Thailand that she and the child would be permanently returning to Ireland and that this was what she had always desired. She stated that she believed that the father had agreed to an arrangement where he could remain working in the UAE and she would remain in Ireland with the child although this evidence is disputed. The respondent felt that she could not trust the applicant and agreed to return flights at Christmas but never intended to return to the UAE on her own evidence.

14. This Court accepts the evidence of Dr. Byrne Lynch and confirmed by the parties that they both dearly love their child and accept that both are competent parents and highly motivated. However, this Court has decided to take a cautious approach to this case. One of the factors concerning the Court at this stage is the fact that the mother admitted under oath to having told lies in relation to this case. Her excuse both for not returning to the UAE and for telling untruths is that she is fearful of the UAE authorities and she is absolutely resolute that she will not return to Abu Dhabi even if the child is returned.

15. It is the considered view of this Court that a period of strong reflection is required for both parties in relation to the future care of this child. Fear in itself is not an excuse for breaching court orders or breaching trust with one's spouse. The respondent knew that she was supposed to hand in her passport and those of the child to her own solicitor on foot of the order of the 8th of January 2016 but failed, refused and neglected to do this as directed by Mr. Justice Humphreys at the ex-parte stage. Her excuse that she was fearful of the applicant taking the child away is not believable because he had invoked the jurisdiction of this Court and was awaiting therefore further orders of the Court. The fact that the applicant had to get orders in order to find out where precisely his child was does not bode well for future cooperation by the respondent with any scheme of arrangement which would suit this child. This Court noted the comments at the very beginning of Dr. Byrne Lynch's evidence when she said that it would be difficult for this child going forward given that her parents were resolutely determined to live in two different countries.

16. This Court is very concerned that the respondent doesn't really have a clear idea of where she wants to live in fact. On the one hand she has convinced her husband to assist with the purchase of a house in Thailand for her mother who is ill, she is the only remaining child of her mother who is widowed, on her recent visit to Thailand in November she accepts that she bought an expensive car and left it in Thailand for her mother's use even though the funds for this car was taken out of the joint funds of the parties. She seems to have done this without notice or the consent of her husband.

17. On the part of the applicant, he claims to have good moral values and sees himself as having been a very high achiever. Significantly he did point out to the Court on a previous occasion that his own mother had died when he was two years old and that he was brought up by his father and older siblings and that he never wanted to see his own child being brought up without her mother. There is absolutely no doubt but that he is completely committed to her child's care and upbringing.

18. Allegation and counter allegation was made each by the other in terms of their behaviour between them as a couple. These matters will not be resolved at this stage of the proceedings but give a flavour of a rather tempestuous marriage and breakup. The facts are undisputed that on the 14th of December, 2015 the respondent and the child flew from the UAE to Ireland for the purpose of spending the Christmas holidays in Ireland with the applicant's family. This was prearranged and the applicant was to follow on the 19th December, 2015 and the agreement between the parties was that they were to return to the UAE at the end of the holiday on the 30th December, 2015. All the necessary travel documents were given to her to assist her travelling to Ireland for this agreed period of time. The child holds an Irish passport, the respondent has a Thai passport and was present in Ireland on a multiple re-entry 90 day visa when she arrived in Ireland in December.

19. The respondent however refused to meet the applicant and advised him that she was not going to spend Christmas with his family, this happened on the 19th December, 2015. It appeared to the Court that she had made this clear in an e-mail to him the day before that she did not want to return to the UAE in the New Year and that her intention was to remain in Ireland with the child. On the 22nd December, 2015 the respondent served a summons to appear in Limerick District Court on the applicant and she purportedly made an application for sole custody of the child. When the matter came before the District Court in Limerick on the 4th January, 2016 Judge Larkin declined jurisdiction.

20. It is quite clear to this Court that there has been a wrongful retention of this child within this jurisdiction.

The Law

21. Both parties filed legal submissions with regard to the jurisdiction issues in particular and both parties filed Affidavits of the Laws of the United Arab Emirates.

22. The applicant accepts in submissions that the UAE is not party to the Hague Convention on the Civil Aspects of International Child Abduction. The applicant's submissions are to the effect that the legal principles in respect of a non-convention country are set out in a number of authorities and refers to *Re: S (Wardship Summary Return Non-Convention Country)* [2015] EWHC 176 and in *Re: J (Child Custody Rights: Jurisdiction)* [2005] UKHL 40. The applicant accepts that the Hague Convention Rules are not applied by analogy to this particular type of case and that the welfare of the child is paramount.

23. It is the applicant's case that the child was habitually resident in the UAE until the respondent made a unilateral decision to remain in Ireland with the child.

24. The applicant claims that his domicile of choice is the UAE and that the respondent can not rely on his domicile of origin in order to claim jurisdiction in Ireland. The applicant further submits that the respondent does not have any ties to this jurisdiction, that she does not have a permanent address, employment or any family in Ireland.

25. The Court notes the position that the Court should take into account the Constitutional amendment on the Rights of the Child Article 42A and the best interest principles. The Court notes also that the UAE are not a signatory to the Hague Convention and that it was accepted by all the parties that the legal system in the UAE is considerably different to that of Ireland.

26. The respondent's submissions refer to the fact that the child is an Irish citizen present in the State and the respondent stated that this is sufficient to establish jurisdiction in relation to any relief concerning the child, relying on *C.M. v. Delegacion de Malaga* [1999] 2 IR 363. The respondent has stated, both orally to court and in her grounding affidavit, that she came to Ireland with the express intention of residing here permanently or indefinitely. The respondent argues that the father's domicile of origin is Ireland and that the domicile of origin does not change through life (citing *Re Joyce* [1946] IR 277). The respondent submits that the father's residency in the UAE is temporary and dependent on his continued work in the UAE and therefore his domicile of choice cannot become the UAE (citing *CM v TM* (No. 2) [1990] 2 IR 52). The respondent argues that the father does not contemplate living permanently and indefinitely in the UAE as his residency is work dependent.

27. It is the view of this Court that present interim arrangements must be based on the best interests principle. The Court is minded to follow the advice of the learned psychologist in this case who says that the child should reside with her mother for a two month period to consolidate their relationship if she is to be returned to the UAE. Given that this child is only three years and four months old this Court takes the view that it must follow the advice of the psychologist in this regard.

Conclusions

28. The welfare of the child is paramount in this case and therefore any decision of the Court must be in the child's best interests. It is the considered view of this Court that it is in the best interest in terms of this child's welfare that from today until the 31st of January 2016 the respondent shall have the child stay with her returning KP to her aunt, the applicant's sister at "T" in Co. K at 6pm. The respondent will collect the child from that address each week thereafter on Thursday evening at 6 pm, returning her to her aunt on Sunday at 6 pm. This is in line with the recommendation of Dr. Byrne Lynch that meaningful contact with the applicant's family would be an advantage for this child and minimises the effect of a full transition. This arrangement shall continue until a full hearing when the Court will review this matter again. A date will be fixed for this.

29. The child should see her dad in his sister's house prior to the child's departure with the mother and both parties should explain to the child jointly and the father is to explain that he is going off to work but that he will be back. They shall also explain the above new arrangement and that her mother will be working also. This arrangement gives the mother an opportunity to work out what she really wants in the longer term and it also gives her an opportunity to work during the week. The child is to sleep in a bed on her own during this period of time. The respondent is to keep her solicitor fully informed as to her exact address at all material times. The respondent's passports shall remain for safe keeping with her solicitors.

30. Both parties have been asked to give serious reflection on what their long term plans are. It is the preliminary view of this Court that the parenting of this child simply must be shared by the parties and they have been asked to consider how this can best be done. It is possible that the child might live with her father during school term and travel to Ireland for the long summer holiday and for most of her holiday periods of time from school. The alternative to that is that she will be schooled in Ireland and would spend at least eight weeks a year in Abu Dhabi with her father coming to Ireland for most bank holiday weekends to have fulltime access with her.

31. This child is to have Skype access with her father each evening during the next eight weeks. Such access arrangements for the child with her father can be expanded should he find himself in the position to travel back to Ireland in the intervening period. A further report is to be available from Dr. Byrne Lynch on the fuller picture in time for the full hearing. A consideration going forward will be which parent will more fully facilitate the other parent's access.

32. This Court continues the orders already made, in particular the order that the applicant retains custody of KP which may be exercised by him personally or by the applicant's sister on his behalf. The Irish High Court retains sole and exclusive jurisdiction of this case. Undertakings are sought from both parties that they will not institute proceedings in any other jurisdiction. This is to prevent a conflict of jurisdictions which would be contrary to the child KP's best interests.