

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/07/2009

Before :

SIR CHRISTOPHER SUMNER

Between :

DS
- and -
RS

Applicant

Respondent

Mr Matthew Stott (instructed by **Cohen Cramer**) for the **Applicant**
Ms Joan Connell (instructed by **Desor & Co**) for the **Respondent**

Hearing dates: 29th June 2009

Judgment

This judgment is being handed down in private on 3rd July, 2009 It consists of seven pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Sir Christopher Sumner:

Introduction

1. The Applicant father is 28-year-old DS , who was brought up and lives in Leeds. The Respondent mother is 26-year-old RS. She was born and brought up in India. She came to England when she married the father in June 2004 where she has remained. Their son Jayden was born on 9 September 2005 and is now 3 1/2 years old.
2. The mother was living with the paternal grandparents in Leeds when she took Jayden to India with the father's consent on 20 October 2008 for her sister's engagement. She was due to return on 10 November. She did not return with Jayden until 10 December and then went to live in London with him. She now lives in a flat which is privately rented at Hayes, Middlesex.
3. On 16 December 2008 the father applied without notice to the Leeds County Court seeking a residence order, the return of Jayden to him, and an order preventing the mother from removing Jayden from England and returning to India without his consent. On that date District Judge Flanagan made an order prohibited the mother from removing Jayden from the jurisdiction of the court until further order. He listed the matter for directions on 23 December.
4. On 6 January 2009 the application was transferred to the Uxbridge County Court. On 27 March 2009 an order was made about contact arrangements. Provision was made for that court to determine on 12 June an issue raised by the mother about taking Jayden to India for her sister's wedding in September 2009. On 12 June District Judge Banks transferred that issue to the High Court.
5. It came before me on 29 June. The father was represented by Mr Stott and the mother by Ms Connell. I heard evidence from the mother and the father. With other matters in the list, evidence did not conclude until the end of the day. Accordingly counsel agreed to forward their final submissions in writing, for which I am grateful.

The issue

6. The mother wishes to take Jayden to India for the purpose of attending her youngest sister's wedding on 5 October 2009. She would propose to fly out on 15 September and return on 15 October. The issue is whether the mother has proved that such a trip is in his best interests in the light of all the evidence that I have heard. An important part of that is my findings about the mother's last trip to India between October and December

2008. In particular I have to assess the risk of the mother failing to return Jayden to the UK at the end of her visit and the potential consequences of such a failure.

The written evidence

7. In his statement in support of his original application, the father said that had been involved in the day to day care of Jayden since his birth. On the day before he was due to return in November 2008, the paternal grandfather told the maternal grandmother that the mother would not be returning to Leeds but would be staying with them from now on. He had no further contact with the mother after 6 December 2008 though she did contact the paternal grandmother. They heard from the mother's sister that she had returned to London. He was not aware of any problems in his marriage until recently.
8. The mother filed a short statement on 17 April, which did not deal fully with the issues. She said that it had never been our intention not to return to the UK, she had been decided to extend her stay given that she needed time to think what was she was going to do i.e. return to the applicant or leave him and issue divorce proceedings. It was a very difficult time for her.
9. In his statement of 30 April 2009 the father dealt with matters of contact. He then said that he and the mother were communicating better, but he did not feel able to fully trust in the light of the events of last year. Jayden would be starting school in September 2009 (in fact 2010). It was too soon for him to travel again to India, and he could not give his consent.
10. The father had some concerns about the mother's immigration status, were she to leave the UK once more. Her solicitor looked at the mother's passport which was in her office. She reported that in December 2007 the mother had been given indefinite leave to remain. It would seem there should be no difficulties.

The mother's oral evidence

11. The mother said that she had been to India with Jayden on three previous occasions. In January 2005 she had taken him for six weeks, for three months from August to November 2007, and for two months from October 2008. On each occasion it had been with the father's agreement save for the extension of time on the last occasion. She had first mentioned this proposed visit in court in December 2008.
12. The background was not as the father said. The father had left her twice for a period of some six months each time to live with another woman. She remained living with Jayden at the paternal grandparent's home until she left for India in September 2008.
13. She said that when she was in India during the agreed time in October/November 2008, she had decided not to go back to the father. She needed time to discuss it with the family. Also, she had nowhere to go. She did not speak to the father because he would persuade her to go back.
14. On Saturday October 2008, some 10 days before she was due to return, she wrote a letter which she produced. She sent it to the Metropolitan Police, the Home Office, Wetherby Police and Women's Aid. It is not completely clear why she did so.

Probably it was because she wanted people in authority to know she was not returning at the time she said. In general it was an account of the problems she had had in her marriage.

15. She set out the pressure that she felt under living with the father's family and the many accusations they made against her. She was losing her self-confidence.
16. She continued recounting how the father left home on 26 June 2006, but returned for two weeks in September as the maternal grandfather was visiting. He then left again taking most of his possessions. She started taking Jayden to the father's place of work, trying to persuade him to come back. He finally came back in 2007. This was a week before she was due to leave for India in August for three months. He told her to go so he could put his head together.
17. The father apologised in front of the paternal grandfather, and the maternal grandmother - the mother had to apologise for sharing her sorrows. The father soon reverted to his former way is. He was not rude, though he did ask to go back to India and said that if they separated Jayden would be given to him. She ended the letter by setting out details of how badly the father's family had treated her. She had extended her ticket to 10 December and gave the address where she would be staying at her uncle's address in Middlesex. He is a friend of her father's.

The mother's oral evidence

18. She told me that he always intended to come back. It was good that Jayden was here. The father always knew where she was. She could not go back to her family in Delhi; it would bring shame on them. If she did go on this occasion she would take him for a hair ceremony in Punjab, where her in-laws are.
19. When the father was away for the second period of six months, she took Jayden to see his father first two months or so. The father never came to see him though she was living with his parents.
20. When she decided not to go back it was because she needed time to discuss matters, and she had nowhere to go and live. Because of the extended family on both sides he knew where she is. She always intended comeback, it was good for Jade to be here where he was born. She was presently working three days a week at Debenhams.
21. She could not return, all her family was in Delhi, it would bring shame on them. She would never go back, except for holidays. She explained the cultural significance of all family members and children being at a wedding, and how the ceremonies went on for some time.
22. It was her father-in-law, not her father, who wanted Jade and in India. She described herself as 26 years old and independent.
23. The father did speak to Jayden on the majority of occasions when he rang him in India. She had not prepared to leave, and any change in banking was only because of sharing her mother-in-law's surname and initial.

24. She had taken Jayden and to see his father, about three times a week for a few months when he for the second time. It was to try and get him back.

The father's oral evidence

25. When the mother was in India he only spoke to Jayden once. After she said she was not coming back, her clothes were packed, her jewellery was gone, and her bank account closed. The nursery told him that Jayden was not coming back.
26. He had heard rumours that one of her uncles was saying that Jayden was going to India and attending a boarding school there. He did want to have the sole residence of Jayden.
27. He had separated from the mother for the time mentioned by the mother. He did not see that to say that he had the day-to-day care of Jayden since his birth in his first statement might be misleading when he had been away for a year. Equally, to say that he last spoke to the mother on 6 December 2008 was not correct, they did communicate until 10 December. He had mentioned the uncle wanting to put Jayden in boarding school to his solicitor, but it was not in his statements.

Conclusions

28. I have preferred the evidence of the mother to that of the father where they conflict. He has not been open and straightforward with the court. He gave a false impression in his first statement about the extent of his involvement with Jayden and omitted to say that there had been serious problems in the marriage, which had led him recently to be away in total for about a year. That he is putting forward a claim sole residence to Jayden in the light of his departure and apparent lack of interest in seeing his son is, to say the least, surprising.
29. The mother has given an explanation for how she extended her previous stay in India which I accept. Her family kept in touch with the father's family. The most important matter was deciding whether she would or would not return to the father. She had a genuine fear that he might talk into reconciliation, something which in the end she did not want. She should have ensured he was told when she was returning and the area where she was living
30. I accept that she has no family here, she is working part-time and has a rented flat. However, I have had an opportunity of assessing her in the witness box. I consider that she is genuine in saying that she would return after her sister's wedding with Jayden, and that she sees Jayden and her life in this country, though separated from the father.
31. She notified the father of an early stage that she wanted to go to the wedding, where the presence of the whole family and children is of particular cultural significance. Keeping Jayden away from school is not a concern. Bearing that in mind, the father's failure to keep in touch with his son and his willingness in the past to let him go to

India for the same or longer periods, I see no disadvantage for Jayden staying for the time proposed by the mother and some advantages.

32. She has already been with Jayden to India on three occasions and returned. The last time she extended the time agreed with the father. It was at a time when, judging from the letter she sent which I accept is genuine and correct, the pressures on her were high, yet she came back, a factor in her favour.
33. There has been an investigation to see whether some form of surety could be provided. Her parents have a valuable freehold home in India. They have volunteered to send the title deeds. When I asked the mother whether they would be prepared to swear before a Hindu priest, that they would do their best to ensure that Jayden was returned after the wedding, the mother said she believed that they would.
34. In *Re S (Leave to Remove from the Jurisdiction: Securing Return from Holiday)* (2001) 2 FLR 507 Hogg J considered a similar request by an Indian mother wishing to take 2 young children to India for a holiday. The father was fearful of that the children would be returned to this country. She had no family here, she was not in employment, there have been difficulties about contact, she had no money, whereas in India and she had a support system.
35. The mother had offered a series of undertakings. The learned Judge suggested a declaration that the boys were actually resident in this country and British citizens. There were affidavits from her grandfather and brother in India in which they agreed not to impede the mother and grandson in being free to enter and leave India.
36. She said –

“I have to consider the likely effect on them, if the mother were to be dishonourable and retain the children in India. There would be without doubt a dramatic change in the children's lifestyles. In my view, it would cause significant harm to them, permanent separation from the country of their birth, of which they are citizens, and from which where they had been brought up and educated. They speak English. They understand a little Punjabi, but cannot speak it. Their friends are here, their father and his family are here and there would be a permanent separation from them. There is a clear desirability that these children should remain living permanently living and residing here...

I have considered, obviously, the dangers and the magnitude of the dangers of the children not being returned, and I have accepted the mother's evidence in this regard, and on that basis, I feel it would be appropriate that I should give her leave. However, there will be safeguards ...”

37. She went on to consider the nature of the safeguards, including the declaration and various undertakings by the mother. I mention the case as I accept that the magnitude of the harm likely to be caused to Jayden were the mother to keep him in India would be of a comparable order to that described above, and because I have adopted a similar approach in reaching my conclusion.
38. I then have to determine the risk of a breach. I have accepted the mother's evidence. I consider the risk to be very low indeed. I appreciate the lack of support she has here,

no money, and a legacy of difficulty with the father and his family. Those are relevant matters. I do not accept that there has been any discussion of Jayden boarding in India.

39. After much thought I have reached the clear conclusion that there is no reason to doubt that the mother will return Jayden. She has brought Jayden back on the previous three occasions. I shall grant her leave as the trip is in Jayden's best interest.
40. She is unable to provide financial guarantees, though the offer by her parents to lodge their title deeds with this court is evidence of their good faith. There will be a declaration at the start. It will be that Jayden is a British citizen and habitually resident here. There will be permission to the mother's solicitors to release her and Jayden's passports on 10th September 2009
41. I will also ask the mother to obtain from her parents a statement signed by them. It will be the effect that they are aware that Jayden is a British citizen, that he is habitually resident in Great Britain, and that this court has given the mother permission to take him to India from 15 September 2009 until 16 October 2009 and no longer. They should further state that they will do nothing to encourage the mother to stay longer with Jayden, and they will do their best to ensure that he returns to this country not later than 15 October 2009. If it is obtained as I hope, a copy should be sent to the father at least 2 weeks before Jayden leaves.
42. As a term of her leave to go, I shall ask the mother to sign a form giving the following undertakings. They are –
 - i) She will return Jayden to this country on or before 15 October 2009 and notify the father immediately on her return.
 - ii) She will provide the father with copies of the return tickets and a full itinerary of where Jayden will be staying by 1 September 2009.
 - iii) She will not seek to obtain an Indian passport for Jayden at any time without giving the father at least two months notice of her intention.
 - iv) If Jayden requires a tourist visa, it shall be the shortest period compatible with the time that she is going and she will show the father of copy not less than three weeks before departure.
 - v) She will not permit Jayden to return to India on any future occasion without the father's consent or the court's approval.
 - vi) She will return the passports to her solicitors by 20th October 2009.
 - vii) She will not take any proceedings in any court in respect of Jayden save for this High Court until after he has returned from India.
43. These undertakings have not been discussed in detail. They are within the general scope of those offered on behalf of the mother. I have considered the father's alternatives. Any difficulties can be referred to me by email via the Clerk of the Rules if I am not sitting.

SIR CHRISTOPHER SUMNER
Approved Judgment

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