

Neutral Citation Number: [2015] EWHC 3276 (Fam)

Case No. FD15P00528

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

Thursday, 29th October 2015

Before:

MR JUSTICE HOLMAN

(Sitting in public)

B E T W E E N :

KS

Applicant/father

- and -

MK

Respondent/mother

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Miss Jacqueline Renton appeared on behalf of the applicant/father, who was accompanied also by

Abogado Marta de la Mata from Spain

Miss Ruth Cabeza appeared on behalf of the respondent/mother

J U D G M E N T

MR JUSTICE HOLMAN:

- 1 This is a very unusual case. The application before the court is the father's application pursuant to the Hague Convention for an order for the return of his daughter forthwith to Spain.

- 2 As I said this morning, during the 20 years in which I have been a full-time judge I have heard literally hundreds of applications under the Hague Convention and made some hundreds of orders for the return of children to countries from which they have been abducted. Almost invariably in such situations, the abducting parent is, at best, reluctant to return to the other country. People do not abduct their children on a whim, and only do so for what seem to them to be good reasons. So it is hardly surprising if there is reluctance to return.

- 3 Although not unique to this case, it is, in my experience, extremely rare that the prospect of return induces in the abducting parent significant mental ill health to the point that that parent actually makes a serious attempt at suicide, as the mother has done in this case. That is why I say that this is a very unusual case.

- 4 As the father has made a brave and wise decision today to withdraw his application I need say very little; but I should say something as a record of the situation in this case and why it has resolved itself in the way that it has.
- 5 The mother is Polish. The father originates from Pakistan, but they lived together for a number of years in a non-marital relationship in Grenada in Southern Spain. From their relationship they have one daughter, who was born in December 2007 and is now aged nearly eight.
- 6 In her very detailed statement made in these proceedings, the mother gives an account of a stormy relationship between the parents, and does indeed make some very serious allegations against the father. He, by his statement, although it is drafted in the most general of terms, completely denies all the serious allegations that the mother has made.
- 7 There was an established pattern that in June of each year the mother travelled with the child to stay with her family in Poland, returning to Spain in September. She travelled to Poland with the full consent of the father in June 2014 but did not return with the child to Spain. Rather, she moved to Manchester and established a home there where the child and the mother's own mother joined her in September 2014. As a matter of fact, the father and daughter have not seen each other physically since June 2014.

8 In June 2015 the father issued his present application for the return of the child forthwith to Spain pursuant to the Hague Convention. There could have been a moot legal debate in this case as to the date upon which the mother wrongfully retained the child, and a debate as to whether the father's application was issued more or less than 12 months after that retention, so as to trigger the "settlement" defence under Article 12 of the Convention. Sensibly, that issue of mixed fact and law has not been pursued, and the only defences that were raised are those under Article 13(a) and (b) of the Convention, namely, that the child objected to return to Spain; and/or that the return of the child to Spain forthwith would expose the child to a grave risk of physical or psychological harm, or otherwise place her in an intolerable situation.

9 Because a defence was raised as to the child's objections, she was seen by a Family Court advisor of CAFCASS in mid August 2015. The Family Court advisor's report is available for any court or person with a proper interest in this matter to read and see. The advisor clearly had reservations as to whether the stated position of the child amounted to "objections in Convention terms", but did express concern about the presentation of the child as being a child who may have suffered trauma and who could be re-traumatised and damaged by a return to Spain. Meanwhile, the child had also been seen by a consultant child and adolescent psychiatrist called Dr Jasti. There was some somewhat inconclusive material from Dr Jasti.

10 The case was listed before me for final hearing on 22nd September 2015. On that date both parents were represented by the same counsel who appear today. On that occasion the mother was personally present. The father, who lives in Spain, was not.

11 Because the material from Dr Jasti was somewhat inconclusive, an e-mail was sent to him, at my direction, to which he promptly replied by an e-mail of 22nd September 2015. As a result of those exchanges, the order that I made on 22nd September 2015 recited, amongst other matters:

“The court considered that in light of that reply it is necessary for the just determination of the case, and in the welfare of the child, that Dr Jasti is asked to meet again with, and review the child ...”

12 As a result, the proceedings were adjourned part-heard until today, 29th October 2015, on the basis that in the meantime Dr Jasti would again see the child and prepare a report in answer to various questions that were put to him.

13 That has indeed now happened. Dr Jasti saw the child again on 3rd October 2015 and prepared a report actually dated 26th October 2015. Again, any future court or person with a proper interest in this matter can read that report. It does indicate a degree of psychological or emotional risk to the child if she was required to return to Spain. There would no doubt be scope for

considerable argument, as indeed is foreshadowed in the excellent written arguments of both counsel for this hearing, as to whether, so far as the psychological state of the child herself is concerned, those risks amount to a grave risk of psychological harm within the meaning of Article 13(b) of the Convention.

- 14 During the period of the adjournment, between 22nd September and today, there has been another very grave development. That is that there has clearly been a very serious decline in the mental health and wellbeing of the mother. She has been under the care of mental health authorities in Manchester since 24th September 2015. By a report dated 20th October 2015, her consultant psychiatrist, Dr Judy Harrison MD FRCPsych, reported that the mother:

“... has been extremely distressed and apprehensive about any prospect of returning to Spain because of the impact this would have on her child and herself. Her symptoms are in keeping with an acute adjustment disorder, which is caused by her social circumstances and would resolve if the threat of returning to Spain were no longer present ... She appears to be terrified of the prospect of she and her daughter returning to Spain ... My impression is that this would have a very negative effect ... for [the mother] ... and that her mental health would worsen if she were forced to return.”

15 Last Sunday, 25th October 2015, the mother was admitted to hospital having taken an overdose of paracetamol tablets with the intention of ending her life. A combination of the later report of Dr Harrison dated 28th October 2015, and also the agreed note of a telephone conversation between both counsel and Dr Harrison this morning, makes quite clear that this was a serious attempt by the mother to kill herself. In the telephone conversation this morning Dr Harrison said: “There can be no doubt she took an overdose, a serious one.”

16 The report of Dr Harrison of 28th October 2015 says that now the mother:

“...is presenting with acute levels of distress, anxiety and low mood.

These are directly related to her fears that the court will return her and/or her daughter to Spain ...”

17 The upshot at the moment is that the mother required a period of inpatient treatment physically to recover from the physical effects of the overdose upon her liver, and now needs a short period of inpatient psychiatric treatment to stabilise her mental health and assess any ongoing suicide risk.

18 In her report dated 28th October 2015 Dr Harrison continues:

“The lack of any clear outcome to the case on 29th October is also likely to result in ongoing distress to [the mother] ... and a worse long-term prognosis for [the mother’s] mental health condition.”

19 On the telephone this morning, the doctor was asked to proffer an opinion on the likely effect upon the mother if this hearing was adjourned again today. She replied: “Very difficult to say. I think the case was adjourned a few weeks ago. Slight delay improved for a while when immediate threat reduced, then as further court date came nearer, she became further depressed. I imagine that the same thing would happen. There might be a short term improvement, but as soon as next hearing approached she would be much more depressed and anxious again.”

20 As I have said, this, in my experience, is a very unusual although not unique situation. It was one that I would have to have thought about very carefully indeed, bearing in mind the words of the Supreme Court in paragraph 34 of the judgment of Lord Wilson of Culworth in *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, where that court said:

“If the court concludes that, on return, the mother will suffer such anxieties that their affect on her mental health will create a situation that is intolerable for the child, then the child should not be returned ...”

- 21 Patently, if the effect of proceedings of this kind, or an enforced return under the Hague Convention, would be at all likely to induce a mother actually to kill herself, the effect on the child, both immediately and frankly lifelong, could be devastating.
- 22 The mother is not present at this hearing today because she is still an inpatient, and it has not in fact been possible for her counsel, Miss Ruth Cabeza, to take any instructions from her. The father is personally present, having travelled from Spain for the purpose, together with his own Spanish lawyer, Abogado Marta de la Mata, whom it is a great privilege to have present in court today.
- 23 It is likely that the father came here with certainly the hope, and maybe a degree of expectation, that at this hearing today he would achieve the return of his child to Spain. Realistically, that would have been a return with her mother, with whom she has always lived, and with whom, rather than her father, she has been living for the last 16 months or so. I perfectly understand that today must have been a very difficult day indeed for the father. But he, just as I would have had to have done, has had to face up to the situation that now presents itself.
- 24 It is very much to the credit of the father that he has made the very difficult decision today now to abandon and withdraw his application for the return of his child to Spain. But he has available to him the medical evidence to which

I have referred; he has had legal advice of very great expertise from his counsel, Miss Jacqueline Renton; and he has voluntarily made a decision in the best interests of both the mother, who was his partner, and also of his child, to accept that the prospect of return to Spain is simply too big a hurdle for this particular mother. The result is that I have not had to adjudicate upon anything of substance today. Very responsibly and caringly indeed, the father withdraws his application. The child will remain living with her mother here in England.

25 Within the proceedings under the Hague Convention there is already an interim order for Skype contact twice a week. The father seeks that that order and provision continue. Accordingly, I have given permission today for the father to issue, as has now been done, a fresh, freestanding application for a child arrangements order under the provisions of the Children Act 1989. Within those new proceedings I will make an order that essentially repeats the existing order within the now withdrawn proceedings under the Hague Convention.

26 There has been some adjustment as to the actual precise time and days of the week for the Skype contact. That has been done without any communication with, or instructions from, the mother since she is incapacitated in hospital. But Miss Cabeza has been able to speak to the mother's partner, who was present in court and whom I recall from the hearing in September, and who has indeed generally played a supportive role in this case. There do not seem to be

any practical difficulties with regard to the substituted precise time and days of the week, and accordingly I will make an order under the Children Act for Skype contact on the days and at the times that the father now requests. As the mother has not had any input, she must, of course, have permission to apply to vary those times, or days, but I sincerely hope that it will not be necessary for her to do so.

27 The last year has clearly been a period of intense stress for this family. The father must have felt great despair when his child did not return to Spain in September 2014, as had been agreed. He was fully entitled to make, and perfectly justified in making, his application under the Hague Convention, in which the mother has admitted from the outset that there was a wrongful retention, or abduction, of the child by her. But clearly, also, the prospect of return to Spain has raised, in this particular mother, a degree of anxiety and, as Dr Harrison said, terror in the mother which goes way beyond normal reactions in a case such as this, and I am very glad indeed that the father has made the decision that he has made today.

28 I sincerely hope that once that is communicated to the mother she, and indeed the child, will rapidly recover from the anxieties and stresses which each of them, in their own ways, have felt, and that the outcome today can be a platform from which all members of this family can move forward and begin to repair the damage.
