Case No: FD13P00981

Neutral Citation Number: [2013] EWHC 2774 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/09/2013

Before :

THE HONOURABLE MR JUSTICE COBB

- -

Between :

N	**Applicant**
- and -	
K	**Respondent**

- -
- -

Mehvish Chaudhry (instructed by **Dawson Cornwell**) for the Applicant
The Respondent was neither present nor represented

Hearing dates: 9 September 2013

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Judgment

The Honourable Mr. Justice Cobb :

1. By this application, I am concerned with the welfare of one child, M. She was born on the 8 February 2001, so she is now 12 years 7 months old.

2. She is the only daughter of the Applicant (hereafter "the mother"), and the Respondent (hereafter "the father").

3. Both parents have made applications for orders in relation to M, as follows:

   i) the father's application was issued in the Circuit Court for the 14th Judicial Circuit for Bay County, Florida, in August 2012;

   ii) the mother's application was issued in the Principal Registry of the Family Division in London in May 2013.

4. The mother's application came before me on Monday 9 September. Miss Chaudhry represented the mother; the father had notice of the hearing but was neither present nor represented. I was invited at the hearing to determine whether the courts of England and Wales have jurisdiction to entertain the mother's applications. I heard representations from Miss Chaudhry at that time, but as I was the urgent applications judge (and additionally had a number of listed matters) I was unable to devote time to deliver this judgment at that time. This judgment is being delivered on the next available opportunity, 11 September.

Brief background history

5. The narrative account of the background history is lifted extensively from a neutral summary of the same prepared by the mother's London solicitors for the purposes of international judicial liaison.

6. M is a U.S. National. She was born in the United States of America on 8 February 2001. Both parents are also U.S. nationals. The father resides in Panama City Beach, Florida; the mother in Poole, Dorset. M has a maternal half-sister, aged 5.

7. The mother and father lived together at the time of M's birth, but did not marry. The parties separated in or around December 2003, and M remained living with the mother in Florida, enjoying contact with the father, as agreed between them. M also had substantial contact with the maternal and paternal grandparents.

8. In 2006, the mother met IN, a British national, with whom she formed a relationship, and who she married later the same year. At that time, the mother asked the father whether she could take M to the U.K. for a holiday. On 20 December 2006, by way of response to the mother's request, the father made an application for sole custody of M in the Circuit Court for the 14th Judicial Circuit for Bay County, Florida, and applied for an Order prohibiting M's removal from that jurisdiction. In May 2007, the mother cross-applied for permission to relocate with M to the jurisdiction of England and Wales for a period of 2 years.

9. A full custody hearing followed in Florida, and a final judgment was handed down on 27 August 2007. The Court, having taken into account evidence from Dr Brent Decker who provided a parental evaluation to the Court, ordered that the mother be granted permission to relocate to the jurisdiction of England and Wales for a period of two years, from 1 September 2007 to 1 September 2009. The parties were awarded shared parental responsibility of the child, with the mother being designated as the primary residential parent and the father as the secondary residential parent. A schedule of contact for the father and M was set out, both direct and indirect.

10. M and her mother came to England in September 2007, some six years ago, and – as will be apparent from the further background set out below – have lived here ever since.

11. Following the final judgment, the father made a further application to the Court for clarification of the Final Judgment, and further directions were made defining the contact on 20 March 2008.

12. In 2009, prior to the mother's scheduled return to the jurisdiction of the United States with M, the parties agreed to extend the period in which M could remain living in England with her mother. The parties entered into a contract for an extension to the Final Judgment, extending the date of the child's return to the USA by two years to September 2011. This extension provided for a review after one year, and gave the father the right to call for an early return after one year (2010) if there were "*substantial reason*". The contract makes clear that the 'final decision' on whether M should return in 2010 "*needs to be finalised at the Spring Break visitation to allow enough time for the mother to organise relocation*". The father did not call for M's return.

13. M subsequently had direct contact with the father in the USA in the summer of 2011 for 6 weeks. September 2011 came and went. The father maintains that he requested M's return. The mother disputes this.

14. M then travelled to the USA at Christmas 2011 for 2 weeks for contact with her father. Easter contact 2012 was cancelled at the father's request. M then spent 6 weeks in July/August 2012 with her father, and a further 2 weeks at Christmas/New Year 2012/2013. Notably, the father returned M to her home in England after each period of contact.

15. M has now lived in this country for nearly half of her life. She formerly attended OSM School but has now moved to PH School.

Recent Litigation History

16. It appears from the documents which I have read that the father issued proceedings on 1 August 2012 in the United States to enforce the 2007 Final Judgment of Paternity, and asked for an Order that M be returned to the jurisdiction of the USA. These proceedings were not served on the mother in August 2012. Indeed,

the mother did not apparently receive notice of the father's application (Motion to Enforce) until it was sent to her by e-mail in February 2013.

17. The mother instructed solicitors in the London in February 2013, on receipt of the Motion; her solicitors wrote to the father's American attorneys forthwith asking that they agree to an order confirming that M had now acquired habitual residence in England and Wales, that she would reside with the mother, and that the father's application in the American Courts be withdrawn. At that time, no hearing had been fixed in the Circuit Court for the 14th Judicial Circuit in and for Bay County Florida.

18. A hearing was later fixed in the Florida Court for 15 April 2013, and the mother received a Notice of hearing on 10 April 2013. The mother wrote to the Florida Court to advise them that she would not be able to attend at short notice. The mother then received a further Notice of Hearing, indicating that the matter would be heard on 17 June 2013 (PTR) and 21 August 2013 (final hearing). On 10 May 2013 the father's attorneys in the United States wrote to the mother's English solicitors stating that the father's position – namely that he did not consent to the entry of an Order granting England and Wales full jurisdiction in the matter, and that the State of Florida retained exclusive jurisdiction. The letter confirmed the hearing dates.

19. On 22 May 2013, the mother issued proceedings in the High Court of Justice, under the Inherent Jurisdiction of the Courts of England and Wales; she sought a residence order in respect of M and an order for the father to have defined contact. The matter was considered at a 'without notice' hearing before Mrs Justice Theis on 22 May 2013; by that time, the mother had filed a witness statement which was before the court, as indeed was the 10 May 2013 letter from the father's solicitors (referred to in §18 above). An Order was made providing for M to continue to reside with the mother until further order; the Judge set directions for the filing of evidence by the father, and listing the matter for a further hearing on 10 June 2013.

20. The father acknowledged service of the mother's application contesting the exercise of the English Court's jurisdiction, asserting that M "*is the subject of proceedings in the State of Florida*". The hearing on 10 June 2013 was adjourned to 24 June 2013, by order of Mr Justice Peter Jackson.

21. On 24 June 2013, Mr Justice Bodey extended the date for the filing of the father's statement to 1 July 2013, and set directions for judicial liaison to take place with the assistance of the Office of International Family Justice, then led by Lord Justice Thorpe. The matter was relisted for 22 July 2013. The solicitors for the mother were ordered to prepare and submit a neutral summary of the background to the proceedings to the Offices of International Family Justice to be used as the basis for judicial liaison.

22. In the meantime, the father filed a Statement setting out his 'Objection to Jurisdiction over person and subject matter' on 28 June 2013. This statement set out the father's position as to the proceedings in England; he confirmed that he contested the jurisdiction of the English High Court. The father requested that "*at the very least*" there be judicial liaison between the English High Court and Judge

Peter A Mallory, Circuit Court Judge in and for the 14th Judicial Circuit in and for Bay County, Florida.

23. The English proceedings were next listed before Mr. Justice Keehan on 22 July 2013; by that time there had been no effective judicial liaison and he adjourned the proceedings again in order for the Office of International Family Justice to pursue this.

24. Following that hearing, the American Network Judge e-mailed the Office of International Family Justice to apologise for the delay in achieving judicial liaison. Shortly thereafter the American Network Judge spoke with Judge Mallory, who indicated a willingness to liaise with the English High Court.

25. On 8 August 2013, the case was listed before Mr Justice Moylan. Following that hearing, Moylan J wrote to Judge Mallory inviting active judicial liaison over the proceedings, and sent Judge Mallory a copy of the neutral background summary.

26. On 26 August 2013, without there having been any actual liaison between the Judges, or indeed contact with the Office of International Family Justice, Judge Mallory in Florida granted the father's application to enforce final judgment of paternity in this case. His order directed the mother to return M to Bay County, Florida by September 1st 2013. The Order contains the following provision:

> "*The Court finds that England does not have jurisdiction over the Petitioner/Father nor the minor child. In fact, all parties to this proceeding including the Petitioner/Father, Respondent/mother and the minor child are citizens of the United States.*"

27. By notice issued by the Principal Registry on 4 September, the English proceedings were listed for further hearing on 9 September, before me. On 5 September, the Office of International Family Justice notified me of this prospective listing, and invited me to review the exchanges of e-mails between the Network Judges and the Office of International Family Justice. Having done so, I immediately caused a further enquiry to be made through the American network judge, of Judge Mallory, as to whether there could be urgent judicial liaison to resolve the unsatisfactory position of applications proceeding in two separate jurisdictions prior to the listed hearing on 9 September. Regrettably, I was informed on the morning of the 9 September that the American Network judge had been unable to make contact with Judge Mallory.

Judicial liaison

28. The Office of International Family Justice has, for some years now, functioned as a centre of expertise and a helpdesk for general enquiries in the field of international family law for the judiciary and practitioners in this jurisdiction and overseas. Its main role is to support and facilitate cross-border judicial collaboration and direct judicial communication and to enhance the expertise necessary for handling the large numbers of cases relating to aspects of private international law

29. This is, in my judgment, a paradigm case for international judicial liaison.

30. Although I have mentioned above some of the relevant communications between the Office of International Family Justice and the relevant Network Judge, I do not propose to set out here the further attempts made by the officials here, and the English Network Judges, to achieve judicial liaison in this case. No purpose would be served for this judgment in my doing so. I nonetheless hope very much that judicial liaison can yet be actively engaged. It is unfortunate that judicial liaison has not been achieved thus far, particularly as both parents wish for it to happen. The result is that, simultaneously in two jurisdictions, welfare-based decisions are being sought and made in respect of the child.

Jurisdiction of the English Court and Habitual residence

31. Jurisdiction in cases concerning children in England and Wales is governed by the *Family Law Act 1986* and by the *Council Regulation 2201/2003* (BIIR).

32. *Section 2* of the *Family Law Act 1986* contains the following provision:

> *(1) A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless – (a) it has jurisdiction under the Council Regulation, or (b) the Council Regulation does not apply but ... (ii) the condition in section 3 of this Act is satisfied. . . .*
>
> *(3) A court in England and Wales shall not make a section 1(1)(d) order unless – (a) it has jurisdiction under the Council Regulation, or (b) the Council Regulation does not apply, but (i) the condition in section 3 of this Act is satisfied, or (ii) the child concerned is present in England and Wales on the relevant date and the court considers that the immediate exercise of its powers is necessary for his protection*

33. A *section 1(1)(a)* order is an order under *section 8* of the *Children Act* 1989. A *section 1(1)(d)* order is an order made by the High Court in the exercise of its inherent jurisdiction with respect to children insofar as it gives care of a child to any person or provides for contact with a child.

34. *Section 3* of the *1986 Act* provides:

> *"(1) The condition referred to in section 2(1)(b)(ii) of this Act is that on the relevant date the child concerned – (a) is habitually resident in England and Wales, or (b) is present in England and Wales and is not habitually resident in any part of the United Kingdom, . . .*"

35. The general rule of jurisdiction is contained in *article 8* of BIIR:

> *"1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.*"

This is the test adopted regardless of whether the other country/ies concerned are themselves subject to the BIIR Regulation (see *Re I (A child)* [2009] UKSC 10 [2009] 3 WLR 1299, [2010] 1 FLR 361).

36. The Court is therefore enjoined, in order to determine jurisdiction under the *1986 Act*, to consider where M is habitually resident.

37. The concept of 'habitual residence' has been extensively, and profoundly analysed and discussed in judgments of the Court, and by jurists, over many years. As it happens, only a matter of hours before this case came into my list on 9 September 2013, the Supreme Court delivered its judgment in the case of *Re A (Children)* [2013] UKSC 60. In delivering the Judgment of the majority of the Court, Baroness Hale helpfully discussed the English Court's current approach to the determination of habitual residence. She observed that the common law definition (used for the purposes of the *1986 Act* and the Hague Convention on the Civil Aspects of International Child Abduction 1980) has been generally (though not entirely) thought to be different (in some respects) from the concept used by the Court of Justice for the European Union (CJEU). She, and the majority of her fellow justices, declared that it is highly desirable that there is a uniform test, and that if there is any doubt, for the purposes of applying the BIIR Regulation it should be that adopted by the Court of Justice for the European Union (§35).

38. The Supreme Court then considered two important cases in which the issue of habitual residence had been discussed by the CJEU (see §46-50). The first was *Proceedings brought by A* (Case C-523/07) [2010] Fam 42; the operative part of that judgment is as follows:

> *"2. The concept of 'habitual residence' under article 8(1) . . . must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.*"

39. The second case referred to was *Mercredi v Chaffe* (Case C-497/10 PPU) [2012] Fam 22, also a decision of the CJEU. The operative part of that judgment reads as follows:

"1 The concept of 'habitual residence' . . . must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a member state – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that member state and for the mother's move to that state and second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that member state."

40. Baroness Hale draws the threads of her analysis together (at §54) by declaring that:

i) *"All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents.*

ii) *It was the purpose of the 1986 Act to adopt a concept which was the same as that adopted in the Hague and European Conventions. The Regulation must also be interpreted consistently with those Conventions.*

iii) *The test adopted by the European Court is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned. This depends upon numerous factors, including the reasons for the family's stay in the country in question.*

iv) *It is now unlikely that that test would produce any different results from that hitherto adopted in the English courts under the 1986 Act and the Hague Child Abduction Convention.*

v) *In my view, the test adopted by the European Court is preferable to that earlier adopted by the English courts, being focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The test derived from R v Barnet London Borough Council, ex p Shah should be abandoned when deciding the habitual residence of a child.*

vi) *The social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.*

vii) *The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce*."

[emphasis added]

Conclusion

41. As I have indicated above (§10), M has lived in England now for over six years, nearly one half of her life. On the evidence presented to this court she appears thoroughly "*integrated*" here. Her mother has married a British national and they have made their family home here for many years; M's mother and step-father have full-time employment here. M has been at school here for the last six years, recently moving to a senior school. She excels at school, and has a huge range of extra-curricular pastimes. Her social life and friends are here; she is said to be popular among her peers. Her half-sister was born here and has lived all her life here with M in her family.

42. On the basis of the test outlined above (see §40, notably (iii)) I have no hesitation in concluding that M is habitually resident in England & Wales. She could not in my judgment be regarded as habitually resident in any other country.

43. It follows that the Court of England and Wales undoubtedly, in my judgment, has jurisdiction to entertain the mother's application for substantive welfare-based orders in respect of M. I do not accept the determination by the American Court (26 August 2013) that the English Court lacks jurisdiction (referred to in §26 above).

44. The competing determinations on jurisdiction plainly give rise to scope for international judicial liaison. Perhaps such liaison is needed now more than ever; it is obviously unsatisfactory for there to be competing judgments in two different jurisdictions. I have been invited by Ms Chaudhry to state that the English Court has 'exclusive' jurisdiction. I decline to do so, not presuming to determine the issue of jurisdiction in the Florida Court, without hearing further argument on that point. That said, I note that the Florida Court last made a welfare based decision in respect of M in March 2008; since that time, M has visited Florida only for the purposes of holidays with her father.

45. Given the extent of M's integration into all aspects of English life (i.e. social, academic and family), I very much hope that the father, and indeed the Florida Court, will acknowledge the value to M, and to the parties, in the proceedings being conducted in this jurisdiction. Any welfare-based enquiry focusing on M's best interests going forward, which would be likely to include the ascertainment of M's views given her age, would surely be best conducted in the country which has been her home for such a significant time, and in which she is, in my judgment, habitually resident.

46. For present purposes, I shall confirm the residence order, and shall adjourn the issue of defined contact.

47. I shall further arrange for this judgment to be sent directly to the Network Judge in the United States of America for onward transmission to Judge Mallory.

[end]