Neutral Citation Number: [2020] EWFC 35

Case No: FD20P00217

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/05/2020

Before:

MR JUSTICE MOSTYN

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Between:

IN	**Applicant**
- and -	
DK	**Respondent**

- -
- -

Aysha Miah (instructed by The International Family Law Group LLP) for the applicant father
The respondent mother appeared in person from Greece

Hearing date: 28 April 2020
The hearing was conducted by Zoom

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MOSTYN

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. In any report this judgment should be referred to as **Re N (a child).**

Mr Justice Mostyn:

1. Routinely the court is asked to exercise its powers to order the return of a child to another place under the 1980 Hague Convention (as incorporated by the Child Abduction and Custody Act 1985). But the court is sometimes asked to make a summary return order either pursuant to the Children Act 1989 or under its inherent powers. There are two kinds of return order. There is the outward return order where the court orders the child to be returned to another place. This kind of order was the subject of recent consideration by the Supreme Court in *Re NY (A Child)* [2019] UKSC 49. Then there is the inward return order where the court orders a child to be returned from another place to England and Wales.

2. In this case the father applies for an inward return order.

3. There are no reasons why different principles should apply to the two kinds of order. They are subject to the same substantive law, and to the same procedural law.

4. In *Re NY (A Child)* Lord Wilson stipulated the following principles for an outward return order:

    i) The application for the return order may be framed either as a claim for a specific issue order under section 8 of the Children Act 1989 or for an order pursuant to the inherent power of the High Court. However, the latter course should only be invoked exceptionally. Exceptionality may be demonstrated by reasons of urgency, complexity or the need for particular judicial expertise: [44].

    ii) Notwithstanding that the application is for a summary return order, the court must nonetheless conduct a proper welfare enquiry pursuant to section 1 of the Children Act 1989. The evidence must be sufficiently complete and up-to-date to justify the making of a return order. In the welfare enquiry the child's interests will be the paramount consideration. The court must specifically consider all the matters mentioned in section 1(3), the first of which, of course, is the ascertainable wishes and feelings of the child concerned: [51 -53], [56], [57], [58].

    iii) The respondent must be given sufficient notice of the application to seek a return order: [54].

    iv) Where there are contested allegations of domestic abuse the court must specifically consider whether any enquiries should be conducted into them and, if so, how extensive that enquiry should be: [59].

    v) The court must be satisfied by evidence as to the living arrangements for the child if a return order were to be made: [60].

    vi) The court must specifically consider whether the parties should give oral evidence at the hearing and if so on what aspects and to what extent: [61].

vii) The court must consider whether a Cafcass officer should be directed to prepare a report, and if so, what aspects and what extent. It will be important in this way to establish the child's wishes and feelings: [62].

viii) The court will need to consider the ability of the court in the other place to reach a swift resolution of the issues between the parents in relation to the child: [63].

5. In *Re S (Abduction: Hague Convention or BIIa)* [2018] EWCA Civ 1226 Moylan LJ made the following important statements in relation to inward return orders, where the child has been taken to an EU member state:

> "47. The situation in this case is not the same as that in *In re A*. I do not, therefore, consider that a "particularly compelling reason" would be required before it would be appropriate for a court to make a return order summarily at the outset of proceedings. However, having regard to the matters set out above, I consider that, absent a good reason to the contrary, the better course is for the court to defer making a return order until an application under the 1980 Convention has been determined in the other Member State. As Black LJ said this is how the return of a child is "expected to be dealt with". Once such a determination has been made the court can then decide what order to make pursuant to Article 11(8) of BIIa.
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> 48. Apart from this being the "expected" route, it has certain real advantages. First, a higher degree of direct assistance is likely to be provided by the authorities in the requested state to a party bringing an application under the 1980 Convention than in respect of an application for the enforcement of an order. Secondly, there is a specific obligation on states to determine applications under the 1980 Convention within 6 weeks. There is no such specific requirement in respect of the enforcement of parental responsibility orders. Thirdly, Article 11 provides what is to happen if a non-return order is made. There is, therefore, a tailor-made procedure through which the courts of the respective Member States engage with the case and engage with each other. Additionally, any subsequent return order has an expedited enforcement procedure under Chapter III, Section 4 and, to repeat, "without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with" Article 42(2). The making of a summary return order does not necessarily lead to the expeditious return of a child.
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> 49. The advantages of an application being made under the 1980 Convention as against making a summary return order are evident from the circumstances of this case. Having obtained a summary return order, the mother found herself unable effectively to apply for its enforcement. It is not, therefore, known whether she might have encountered other difficulties

> under Article 23, for example on the issue of whether the voice of the child had been heard. Although there were some delays in the mother's application under the 1980 Convention being progressed, once she engaged with the process required in the Netherlands to progress an application under the 1980 Convention, the court there dealt with the application with expedition. That such applications are dealt with expeditiously can be seen from the information provided in its Annual Report for 2017 by the Dutch Office of the Liaison Judge for International Child Protection (BLIK). This is not to say that a return order would be made but that the process was more likely to be expedited by making an application under the 1980 Convention than seeking to enforce a summary return order by means of BIIa."

6. Therefore, there is a burden on an applicant for an inward return order to justify why the better course of deferring the application until the conclusion of Hague proceedings in the other place should not apply.

7. It is noteworthy that in *Re S (Abduction: Hague Convention or BIIa)* the applicant mother commenced her 1980 Hague Convention application in the Netherlands four months after she had applied in England for a summary inward return order. Nonetheless, the inward return order that she had obtained was discharged, leaving her application in the Netherlands to take its course.

8. In addition to the practical reasons identified by Moylan LJ there are, in my judgment powerful reasons of principle why the left-behind parent should be expected to make an election as to which form of relief, and in which forum, he or she wishes to litigate. It cannot be right for such a parent to be free to litigate in multiple forums seeking different forms of specific relief. The parent surely must choose. An unfettered freedom to litigate gives rise to the risk of tensions between, and inconsistent judgments from, the two jurisdictions. Under the 1980 Hague Convention the best interests of the child are not the court's paramount consideration, although they are highly relevant. If the removal or retention has been wrongful there will be an order for return unless the guilty parent can establish one of the specified defences. In contrast, an application for a summary return order will be judged from first to last by reference to the paramount consideration of the best interests of the child. It is a markedly different forensic process.

9. I have referred above to the need to establish exceptionality if the path chosen is an application to the High Court under its inherent powers. It is hard to conceive of circumstances where this would be justified. The matters referred to by Lord Wilson, namely urgency, complexity or judicial expertise can be fully accommodated by allocating the matter upwards within the Family Court, if necessary to High Court judge level. That is what has happened in this case.

10. Therefore, whether the application is for an inward return order or an outward return order it is almost invariably going to be framed as an application for a specific issue order pursuant to section 8 of the Children Act 1989. That is what has happened in this case. Such applications are the subject of clear procedural requirements under the Family Procedure Rules. The rules are there for a purpose. They are designed to

ensure equal justice between the parties and to promote a reasonable and proportionate use of the court's resources.

11. An application for a section 8 order cannot be made until there has been a Mediation Information and Assessment Meeting (MIAM) – see FPR rule 3.6. The MIAM requirement can be dispensed with in certain circumstances pursuant to rule 3.8. These include delay, the risk of harm to the child and the risk of unlawful removal to, or retention of a child in, another place. In many cross-border cases where a return order is sought such an exception would apply; but this should not be regarded as automatic or invariable.

12. The application once issued will be regulated by the Child Arrangements Programme set out in FPR PD12B. This provides that the application will be first considered substantively at a First Hearing Dispute Resolution Appointment (FHDRA) about five weeks after issue of the application. The respondent should normally be given 14 days' notice of the hearing. At that hearing the court will have the applicant's application, the respondent's response, and, importantly, a safeguarding document from Cafcass or Cafcass Cymru. At the hearing the parties will be spoken to by the Cafcass officer. They will be guided by the Cafcass officer and the court to see they can reach an agreement. If an agreement is reached the court will make orders by consent.

13. Again, the urgency attending an application for a return order, whether inward or outward, may well dictate that the timescales in the Child Arrangements Programme should be abridged, and the FHDRA dispensed with. However, again, this should not be regarded as an automatic or invariable step. It would be unfortunate if there were one procedural scheme for domestic section 8 applications and a completely different scheme for international ones.

14. I now turn to the facts of this case.

15. The parties are Greek. They were married in 2008 and their son, N, was born on 2 January 2009. He is therefore 11 years old. The parties' relationship broke down 2017. Divorce proceedings were commenced but were never completed. Within those uncompleted proceedings it was agreed that N would live with his mother. The father came to London in 2017. The mother and N followed in January 2018. Although the mother and father lived under the same roof, they did not resume their emotional relationship. N became fully integrated into London life, attending school here and otherwise becoming fully socially assimilated. Plainly, by 20 March 2020 N had established his habitual residence here in London.

16. By 20 March 2020 the coronavirus pandemic had taken grip here. On that day, which was three days before the Prime Minister announced the national lockdown, the mother unilaterally removed N to her mother's home on the island of Paros. She did so in the belief that she and N would be much safer from the virus there. That may well have been a valid view, it being common knowledge that by virtue of pre-emptive action Greece has a much lower rate of infection and mortality than this country. However, that does not justify, in the slightest, what was a wrongful removal of N from the place of his habitual residence and, more importantly, from his father.

17. The father promptly approached ICACU and instructed solicitors. He also instructed a lawyer in Greece. An application under the 1980 Hague Convention has already been sent to Greece by email. Although it is scarcely credible, I have been told that the Greek Central Authority is asking for a hard, posted, copy before it will take matters forward.

18. On 9 April 2020, during the Easter vacation, the father made an emergency application, without notice to the mother, to the High Court out of hours/vacation judge seeking a range of orders under section 8 the Children Act 1989 including an immediate inward return order. His application, witness statement and exhibits comprised 82 pages of documents. That judge happened to be me. I ruled that the application should be heard on notice to the mother within the Family Court at High Court judge level on the first available date in the next legal term.

19. For reasons that were not explained to me the mother was not served with the father's application by email until 17 April 2020.

20. The father's application was fixed for 28 April 2020, for directions, with a time estimate of one hour. I had directed that it should be heard by Zoom. The mother attended with complete clarity from Paros. She was assisted by a Greek interpreter in London who also attended the Zoom meeting. There is no doubt that the mother was able to participate far more fully, effectively and fairly by means of the hearing proceeding by Zoom than if it had been a traditional attended hearing in court in London. She would not have been able to attend such a hearing other than, perhaps, by telephone or by (often malfunctioning) video in court (assuming that a Skype bridge to the court equipment could be established).

21. Notwithstanding that the hearing was explicitly for directions the father sought the following substantive orders, which would have largely disposed of his application:

    i) a declaration that the child, N, is habitually resident in England and Wales and was on the 21 March 2020;

    ii) a specific issue order for the mother to return the child to England forthwith;

    iii) a prohibited steps order preventing the mother from removing the child from England once he returned to England and Wales, until the conclusion of these proceedings;

    iv) a specific issue order requiring the mother to lodge the child's passport and travel documents with the father's solicitors, until the conclusion of these proceedings;

    v) a prohibited steps order preventing the mother from applying for a travel document or passport with the Greek embassy in England and Wales; and

    vi) a Child Arrangements Order for the child to live with the father till the conclusion of these proceedings.

22. On the morning of the hearing on 28 April 2020 a witness statement from the father's Greek lawyer was produced. This was dated 12 April 2020. The lawyer explained that

a declaration that N was on 21 March 2020 habitually resident in England and Wales, and that he so remains, would be "very helpful for the Greek procedure and will increase the chances of this application to be granted". He explained that in normal circumstances a Hague application in Greece would take about four months to be concluded at first instance, with a possible further three months were there to be an appeal. However, as a result of the coronavirus crisis there will inevitably be a backlog and so further delays may ensue.

23. In paragraph 9 of his witness statement the lawyer stated:

> "On the basis of temporary protection, we are going to pursue gaining an order before the 20th of April preventing the opponent from flying away from the place where the child is being kept (except for England). Given the present conditions, we may not be able to gain the judge's permission regarding the urgent nature of the matter and thus, not be able to secure a hearing, rather than one confirming that there is no urgent need for temporary protection."

24. The father duly applied for such an order and on 16 April 2020 the mother was served with a 27-page court application seeking the above-mentioned relief giving a date for the hearing of 28 May 2020. This clearly shows that the courts in Greece are functioning relatively efficiently.

25. The mother has not instructed lawyers or prepared a formal response to the father's substantial witness statement. She did send an email to the father's solicitors on 24 April 2020 in which she set out her position. In that email, which is in fact written in very good English, she states:

> "I made it clear to [the father] right at the beginning that I do not intend to stay in Greece permanently – the main reason that I have come to Greece is that I am very afraid of the coronavirus and I want to do whatever I can to keep N (and me) safe from it. The small Greek island where my mother lives, where N and I are now staying with her, is naturally isolated from the mainland and has its own medical facilities. It is absolutely safe for until now there were zero (0) incidents of corona virus contamination. I believe that it is a much safer place to be for us than the much more densely populated area of Barking / outskirts of London, given the numbers of people affected and die in London on a daily basis.
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> …
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> I do not know exactly when we will return, but that is because the whole situation is moving so quickly and no-one knows what things will be like in two weeks let alone a month. When I arrived in Greece it was not in complete lockdown, since we got here they have closed the borders and traveling is banned completely and I don't think that I could even return now to England if I wanted to – which I do not at this time as I believe

> staying in Greece gives N a much better chance in this pandemic."

Obviously, the mother had no opportunity to respond to the witness statement from the father's Greek lawyer.

26. In the light of this email I would be surprised if the Greek court hearing the father's Hague application (assuming it got to a final hearing) would not readily conclude that the mother should, in principle, return N to England. However, the Greek court would want to be satisfied, when fixing a date for return, that it was completely safe for mother and child to travel and that they would be safe on arrival back here.

27. Should I pre-empt the decision of the Greek court and myself determine the father's application? Or should I adopt the better course mandated in *Re S* and defer my decision until the conclusion of the Greek proceedings under the 1980 Hague Convention?

28. I am quite clear that I should follow that better course. It is clear that the Greek court, even in this time of crisis, is functioning relatively efficiently. The Greek court should consider any defences under the 1980 Hague Convention that are available to the mother. Should they be rejected, and an order made for return to this country, once it is safe to do so, that court is the only court with the actual power to enforce it.

29. I cannot discern any good reason for me to depart from the guidance given by the Court of Appeal.

30. However, I do accede to the father's application for a declaration. This was not seriously opposed by the mother, nor could it have been. I will therefore declare that on 21 March 2020 N was habitually resident in England and Wales and has remained so ever since.

31. If I had reached a different conclusion on whether I should follow the Court of Appeal's guidance I would nonetheless not have made at this point the substantive orders sought by the father. That would have been grossly unfair in procedural terms to the mother. She has a right to a fair trial of the father's application. For it to have been dealt with without her having filed any formal evidence at a one-hour directions appointment would have been a travesty of justice. I would have given her 21 days to file a witness statement in response and I would have directed that a High Court Cafcass officer should undertake safeguarding enquiries and interview N by Zoom to establish his wishes and feelings, a factor that has been conspicuously absent in the father's evidence.

32. The proposal that at a one-hour directions hearing I should have not only ordered summarily the return of N to this jurisdiction, but thereafter ordered that he should live with his father, is extraordinary.

33. I would have directed that the father's application be fixed before me in early June 2020.

34. However, the order I make is that I will make the declaration sought but that otherwise the father's application will stand adjourned until the conclusion of his Hague 1980 proceedings in Greece.

35. That is my judgment.
