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Case No: FD21P00961

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/07/2022

Before :

SIR ANDREW MCFARLANE (PRESIDENT OF THE FAMILY DIVISION)

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RE S (A Child) (Jurisdiction)

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Mr Edward Bennett (instructed by International Family Law Group LLP) for the **Applicant mother**
Mr Ben Boucher-Giles (instructed by Gregorian Emerson) for the **Respondent father**

Hearing dates: 25 May 2022

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Approved Judgment

I direct that 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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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.

Sir Andrew McFarlane P:

1. These proceedings concern S, a child born in Antigua in November 2020 and therefore now aged just over 18 months. Both of S' parents have dual British and Antiguan citizenship. They have lived together in Antigua since 2014 and were married there in October 2019. Save for 10 days in December 2021, during which S was in England following her covert removal from Antigua by her father, S has never left the island of Antigua. Since December 2021 matters concerning S' welfare have been before the High Court of Justice (Antigua and Barbuda) of the Eastern Caribbean Supreme Court.

2. On 15 December 2021, immediately following discovery that her husband had secretly removed her daughter from Antigua to England, the mother commenced proceedings under the inherent jurisdiction of the High Court in England and Wales seeking an order for S' immediate return home. On 16 December 2021, Sir Jonathan Cohen made a location order and directed that the proceedings be listed for further hearing on 23 December. In the event a collection order was made and executed on 22 December, following identification of the location at which the father and child were staying.

3. At a hearing before Ms Justice Russell the following day the court granted permission to the mother to return S immediately to Antigua on the basis that the mother undertook that she would return the child to the jurisdiction of England Wales if ordered to do so. The proceedings were adjourned until 21 January 2022 for a hearing at which the court planned to consider the question of its jurisdiction and whether the court should, at that stage, order the return of the mother and child to the jurisdiction of England and Wales. In the event, that hearing was postponed pending determination of an application made by the father for permission to appeal against the orders made by Russell J on 23 December. Permission to appeal was subsequently refused by Lord Justice Moylan. The matter therefore has returned to court primarily to consider what, if any, continuing jurisdiction the court in England and Wales may have with respect to this young child. Although the proceedings have thus far been conducted under the inherent jurisdiction, S is not a ward of court.

4. One further matter of detail is that, on 19 January 2022, the father issued an application for a "live with" order and a "spend time with" order with respect to his daughter.

5. On 10 May 2022, the mother issued an application seeking an order for the proceedings to be concluded and for the existing orders and undertakings to be discharged. The mother's application, which embodies the principal issue now before the court, is contested vigorously by the father who has had the benefit of being represented by counsel, Mr Ben Boucher-Giles, to whose submissions on jurisdiction I now turn.

6. It is accepted that S is not, and has never been, habitually resident in England. The father accepts that any jurisdiction to make orders in England and Wales with respect to her welfare must, therefore, be founded upon an alternative basis.

7. Following the UK's exit from the European Union, and the end of the transitional period, the Brussels IIR regulation no longer applies. Jurisdiction is now primarily

founded upon the 1996 Hague Convention and the Family Law Act 1986 ['FLA 1986'].

8. Mr Boucher-Giles accepts that Antigua is not a Contracting State to the 1996 Hague Convention and that there is no default jurisdiction granted to the UK arising from the UK being a signature but Antigua not having signed.

9. An order made under Children Act 1989, s 8 ['CA 1989'] with respect to the welfare of a child is a 'Part I order' and is governed by the terms of FLA 1986, Part I in accordance with FLA 1986, s 1(1)(a). Section 2(1) of the FLA 1986 (as amended), which makes provision with respect to jurisdiction, states:

> '(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 Hague Convention , or
>
> (b) the Hague Convention does not apply but—
>
> (i) the question of making the order arises in or in connection with matrimonial proceedings or civil partnership proceedings and the condition in section 2A of this Act is satisfied, or
>
> (ii) the condition in section 3 of this Act is satisfied.'

10. Mr Boucher-Giles accepts that neither the 1996 Hague Convention, nor the existence of 'matrimonial proceedings' apply here. Focus therefore turns to whether the condition in FLA 1986, s 3 is satisfied:

> '3 **Habitual residence or presence of child**
>
> (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,
>
> and, in either case, the jurisdiction of the court is not excluded by subsection (2) below.
>
> (2) For the purposes of subsection (1) above, the jurisdiction of the court is excluded if, on the relevant date, matrimonial proceedings or civil partnership proceedings are continuing in a court in Scotland or Northern Ireland in respect of the marriage or civil partnership of the parents of the child concerned.
>
> (3) Subsection (2) above shall not apply if the court in which the other proceedings there referred to are continuing has made—
>
> (a) an order under section 13(6) or 19A(4) of this Act (not being an order made by virtue of section 13(6)(a)(i)), or

(b) an order under section 14(2) or 22(2) of this Act which is recorded as made for the purpose of enabling Part I proceedings with respect to the child concerned to be taken in England and Wales, and that order is in force.'

11. By FLA 1986, s 7(c):

'"the relevant date" means, in relation to the making or variation of an order—

(i) where an application is made for an order to be made or varied, the date of the application (or first application, if two or more are determined together), and

(ii) where no such application is made, the date on which the court is considering whether to make or, as the case may be, vary the order.'

12. An order under the inherent jurisdiction of the High Court with respect to children is a 'Part 1 order' by FLA 1986, s 1(1)(d):

'(i) so far as it gives care of a child to any person or provides for contact with, or the education of, a child; but

(ii) excluding an order varying or revoking such an order'

FLA 1986, s 2(3) provides that

'A court in England and Wales shall not make a section 1(1)(d) order unless—

(a) it has jurisdiction under the Hague Convention, or

(b) the Hague Convention 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.'

13. Oddly, whilst FLA 1986, s 2(3)(b)(i) refers to a 'condition in section 3', there is no reference within FLA 1986, s 3 (which is set out in full above at paragraph 10) to an order under s 1(1)(d). It may be that this hanging reference to s 3 was inadvertently left following amendments made to the 1986 Act by CA 1989. Mr Boucher-Giles, who concedes that whilst there is, therefore, no relevant 'condition in section 3' and that s 2(3)(b)(ii) does not apply, observes that within any inherent jurisdiction proceedings the High Court nevertheless has jurisdiction to make orders under CA 1989, s 8 and the provisions relevant to making a s 8 order would therefore apply in those circumstances.

14. During the oral hearing, Mr Boucher-Giles conceded that, whilst consideration of the position under the inherent jurisdiction was of interest, it was not ultimately important in this case. If the father fails with respect to his submissions relating to s 8, it is unlikely that he will succeed in identifying a separate basis for proceeding under the

inherent jurisdiction. Alternatively, if he succeeds under s 8, the need to rely upon the inherent jurisdiction will not in reality arise.

15. Turning to the application of these provisions to the present case, it is accepted that no formal application was issued by the father with respect to S whilst the child was physically present in England. Mr Boucher- Giles submits that there was no need to do so as the court retained power to make an order of its own motion under CA 1989, s 10(1)(b) 'where the court considers that the order should be made even though no such application has been made'.

16. Mr Boucher Giles claimed that, at the hearing on 23 December, counsel then instructed for the father made an oral application for direct contact between her client and his daughter. The court declined to order contact other than any contact which could be arranged and could be professionally supervised prior to the child's return to Antigua the following day.

17. The father's primary case is based on the assertion that an application made orally during a court hearing is nevertheless 'an application' within the terms of FLA 1986, s 7(c)(i) so that the date of that hearing will be 'the relevant date' for the purposes of s 3(1), with the consequence that, as S was present in England and Wales on that date, the court now retains jurisdiction to make further s 8 orders.

18. As a fall back position, the father's case is that, as the mother provided an undertaking to the court on 23 December to return S to the jurisdiction if so ordered, it remains open to the court to order the mother to return the child to England and Wales whereupon the court would have jurisdiction based upon S' presence here.

19. On behalf of the mother, Mr Edward Bennett did not accept that, at the hearing on 23 December, the court was seized of an application under CA 1989, s 8 and therefore one to which FLA 1986, s 1(1)(a) applied. The only reference to 'contact' in the father's counsel's Position Statement for 23 December is in the final sentence, which states that 'The father would wish to re-establish contact with her as soon as possible'. Mr Bennett submitted that neither that sentence, nor anything said during the hearing by counsel, could amount to an 'application' within s 7(c)(i). Further, Mr Bennett pointed to the order made by Russell J, which was drafted by counsel after the hearing, and which does not contain any recital or other reference to the father having made an application for contact. A transcript of the hearing was filed with the court on the day of the hearing.

20. In response, Mr Boucher-Giles pointed to two references in the court order of 23 December which refer to contact. Firstly, paragraph 9, which makes provision for the content of a statement to be filed by the father explaining his actions in removing S from Antigua and bringing her to England, and the plans for the future that he had had at that time, and in which paragraph 9(e) lists: 'His proposals to remain in England and promote contact for the infant with her mother'. Secondly, paragraph 10, which is in these terms:

> 'Pending the hearing before the High Court of Antigua and Barbuda on 29 December 2021, the mother is to make the child available for indirect contact to the respondent by video on times and dates as agreed between the parties. Any

agreed direct contact must be professionally supervised as [sic] a neutral and secure location.'

Discussion

21. A decision by a court on an issue of jurisdiction is plainly an important and significant matter. In a case where, as here, it is accepted that the child concerned is and has always been habitually resident in another jurisdiction and where the courts in that jurisdiction are fully engaged in substantive proceedings regarding the child's future welfare, the court in England and Wales will need to identify a clear and substantial basis upon which to found a decision that it continues to have some continuing ancillary jurisdiction with regard to that child's welfare. In the present case, the factual and legal bases upon which the father puts his claim that this court does, and should, retain jurisdiction are the very opposite of clear and substantial.

22. Firstly, on the material before the court, I am not satisfied that what was said about 'contact' in December 2021, while S was still in England, amounted to an oral application for an order under CA 1989, s 8. The only reference in the father's counsel's Position Statement is merely an expression of hope that he can re-establish contact in due course. There is no mention of a court order or any particulars of the 'contact' that he hopes to achieve. The transcript of the oral hearing shows that no oral application for contact was in fact made. The judge raised the immediate issue of contact in the 24 hours prior to departure and this was discussed. Other than counsel submitting that the child should remain in the jurisdiction and contact be considered at a later hearing, nothing else was said. Further, if a formal, albeit oral, application for contact had been made and was to be pursued at a later date, one would have anticipated that his counsel (a senior junior barrister who specialises in Family law) and/or the judge would have ensured that that would have been recorded in the court order. The profound weakness in the father's case on this key factual issue is further demonstrated by Mr Boucher-Giles only being able to rely, in response, on paragraphs 9 and 10 of the order. Paragraph 9 is clearly irrelevant and relates to what contact the father planned to afford to the mother if he had been able to retain S with him in England. Paragraph 10 was expressed to run only until the next hearing in Antigua on 29 December 2021 and is wholly at odds with the court understanding that it was now seized of an ongoing application for contact that had been made by the father and was to be determined at a later date by the English court.

23. The father's case therefore falls at the first hurdle, as it is not possible on the available evidence to find, on the balance of probability, that any oral application for a contact order was made during the 23 December hearing.

24. Secondly, although not now determinative of this issue, it is necessary to consider whether an oral application is 'an application' for the purposes of FLA 1986, s 7(c)(i). This point was not fully argued before me and, if raised in any subsequent case, it would merit greater consideration, but the following factors point to an oral application being outside s 7(c)(i):

a) FLA 1986, Part I is concerned with jurisdiction. The establishment of circumstances existing on 'the relevant date' is an important matter

with significant consequences the outcome of which is likely to determine whether the court in England and Wales does, or does not, have jurisdiction;

b) An oral application, without more (for example a direction from the court relieving the party of the need to file a formal application), has an altogether imprecise and unclear character in circumstances where the statutory provision requires the opposite in terms of clarity with regard to a specific single date and the child's physical presence in the jurisdiction;

c) Under the Family Procedure Rules 2010 ['FPR'], r 5.3, 'proceedings are started when a court officer issues an application at the request of the applicant' [r 5.3(1)] and 'an application is issued on the date entered in the application form by the court officer' [r 5.3(2)]. The commentary to these provisions in the Family Court Practice states: 'To commence any originating process an application form must be filed and must then be issued by a court officer'. No reference is made to an oral statement made in court being treated as an application.

25. In the circumstances, I have not been persuaded that, if the father's counsel had clearly applied orally for the judge to make a contact order, that step alone would be sufficient to establish 23 December 2021 as the 'relevant date' for the purposes of determining jurisdiction under FLA 1986, Part I.

26. Thirdly, in submitting that the father did not need to do more than ask the court orally to make an order, Mr Boucher-Giles relied upon CA 1989, s 10(1)(b) on the basis that the father did not need to do more because the court at all times has jurisdiction to make a s 8 order of its own motion. Whilst the reference to the content of s 10(1)(b) is clearly correct, it is, in my view, an error to confuse a request for the court to act of its own motion with a free-standing 'application' made by a party for such an order. In the event, subject to modest and limited provision covering the immediate 24 hour period, the court did not accede the request. In those circumstances it is not possible to say that the oral request, once made, has a procedural life of its own and remains live, as an undetermined formal application would. Such an oral request is, in contrast, a live matter during the hearing in which it is made, but unless some further provision is made to carry it forward, it will cease to be of relevance after the close of that hearing.

27. The father's primary case therefore fails and it is necessary to turn to his secondary case which simply amounts to a request for this court to call in the mother's undertaking and direct that she should return with S to England and Wales with the consequence, were she to do so, that this court would once again have jurisdiction based upon her presence here. Mr Boucher-Giles did not expand on this proposition and he was right not to do so. If this court had been required to consider S' welfare, either in terms of imposing a contact order upon the mother or requiring her to return with S to England, I would unhesitatingly have declined to do either. In this regard, the father's case is wholly devoid of any merit. The only connection that S has with this jurisdiction is that she was unilaterally brought here by her father and kept here for 10 days, some six months ago, when she was but a year old. Whilst there has not

been any investigation of the underlying facts within the court process, it is difficult to see the father's actions by bring S here in anything other than a negative light.

28. In any event, S is habitually resident in Antigua, the island that has been her home since birth. She is living with her mother there. Any issues between her parents concerning her future welfare are before the High Court of Justice (Antigua and Barbuda) of the Eastern Caribbean Supreme Court. Other than the fact that her father is in England and that he, understandably, wishes to see her and to be with her, it is not possible to identify any factor concerning S' welfare which might justify requiring her to be returned here or entitle the English court to impose a contact order on her mother and, indeed, counsel did not seek to identify any such factors.

Conclusion

29. Having held that this court no longer has jurisdiction with respect to any issue relating to the welfare of S, and having concluded that, even if the court did have jurisdiction, there are no welfare based grounds for exercising it, the mother must succeed in her application for these proceedings to conclude and for any existing orders and undertakings to be discharged.

30. I invite counsel to agree a form of order in those terms, subject to the court determining any outstanding issue as to costs.

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