

HONG KONG / JUDGMENT

C v. R

[2021] HKCFI 2706

COURT

Court of First Instance

DECIDED

10 September 2021

CASE / FILE NUMBER

HCMP1080/2021

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[2021] HKCFI 2706

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO 1080 OF 2021

In the matter of an application under section 10 of the Child Abduction and Custody Ordinance (Cap 512) and Order 121 of the Rules of the High Court (Cap 4 sub leg A) in respect of a child, namely HD

BETWEEN

C

Applicant

and

R

Respondent

Before: Hon B Chu J in Chambers (Not Open to Public)

Date of Hearing: 8 September 2021

Date of Decision: 8 September 2021

Date of Reasons for Decision: 10 September 2021

REASONS FOR DECISION

Introduction

The applicant and the respondent in these proceedings are respectively the father and mother of their 3 year old daughter HD. HD was taken by the mother to United Kingdom (UK). The father made an application by an ex parte originating summons for a declaration under Article 15 of The Hague Convention on the Civil Aspects of International Child Abduction (“Convention”) and section 10 of the Child Abduction and Custody Ordinance, Cap 512 (“Ordinance”) that the removal of the child by the mother to UK was wrongful within the meaning of Article 3 of the Convention (“Article 15 Declaration”).

The application for the Article 15 Declaration first came before this Court on 16 August 2021 for a call over hearing. Although under Order 121 Rule 4 of the Rules of the High Court, Cap 4A, an application for an Article 15 declaration may be made ex parte, in light of her previously having apparently submitted to the jurisdiction of Hong Kong in the divorce proceedings issued by the father in the Family Court (“Family Court Proceedings”), this Court directed that the concurrent ex parte originating summons and supporting affirmation be served on the mother out of jurisdiction and further provided for time for the mother to file an opposition affirmation.

The father’s solicitors filed an affirmation of service on 31 August 2021, that the originating summons (only an ordinary copy and not the concurrent originating summons as directed) and supporting affirmation were sent by registered airmail, by ordinary airmail, and by FedEx Express to the address of the mother in UK, being her last known address stated on an envelope of a letter dated 20 March 2021 sent by the mother to the Family Court of Hong Kong. Further the relevant documents were sent to the mother by email. The various modes of service were effected between 17 - 20 August 2021. No acknowledgement of service had been filed by the mother to date. The mother was absent at the resumed hearing on 8 September 2021.

As all relevant documents had been sent by FedEx to the address provided by the mother to the Family Court, the present application should have come to the attention of the mother. At the hearing on 8 September 2021, this Court granted the Article 15 declaration as sought by the father. I set out the Court’s reasons hereinunder.

The relevant provisions

Article 15 of the Convention states that:

“The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.”

Under section 10 of the Ordinance, the Court may, on an application made for the purposes of Article 15 of the Convention by a person appearing to the Court to have an interest in the matter, make a declaration that the removal of a child from Hong Kong, or the retention of the child outside Hong Kong, was wrongful within the meaning of Article 3 of the Convention.

Article 3 of the Convention provides as follows:

“The removal or the retention of a child is to be considered wrongful where—

(a)

it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b)

at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.”

The brief background

According to what the father told the social work officer (“SWO”), he was born in Mainland China and he moved to Hong Kong in about 2000. He had worked as a program assistant in Hong Kong and in 2012, he started working as a police constable. The mother had also attended one interview arranged by the SWO. According to the father, the mother is a Palestinian. According to what the mother told the SWO, she was born and raised in Hong Kong, and that after completing her Form 7 in Hong Kong, she pursued tertiary education in UK. The mother returned to Hong Kong in about 2015 and was working as an English teacher between 2015 to 2020 at different schools or education centres.

The parties met in Hong Kong and married in January 2018, and after marriage, the father moved to reside with the mother and her maiden family in a public housing unit in the New Territories. Their daughter HD was born in July 2018 in Hong Kong. According to the father, after HD's birth, due to disputes over house chores, he was not allowed by the mother's father to stay in their unit any more, but he continued to visit the baby during daytime and at night before she went to bed, before returning to his own mother's place to sleep.

In September 2019, the father bought a flat with financial assistance from his sister and it was his intention to move into the new flat with the mother and HD. However, according to the father, in November 2019, he started to suspect the mother of having extramarital affairs and having confronted the mother, she then started to deny him access to HD.

Eventually on 5 June 2020, the father instructed his solicitors to file a divorce petition and commenced the Family Court Proceedings. In his petition, he seeks joint custody of HD with care and control to the mother. The mother applied for legal aid upon being served with the petition, and was assigned a firm of solicitors to represent her.

At a hearing on 14 September 2020 in the Family Court Proceedings which was attended by both parties and their respective solicitors, the father was granted interim access to HD to take place at the office of the SWO, and the judge further called for a social investigation report, which was later submitted by the SWO ("Interim Access Order"). The judge also ordered the father to pay interim maintenance for HD.

According to the father, the mother was in breach of the Interim Access Order. The father's solicitors sent a letter dated 29 October 2020 to the mother's then solicitors complaining of the denial of access by the mother. By a letter dated 5 November 2020, the mother's then solicitors wrote to inform the father that the mother was not able to bring HD for access on 27 October 2020 as they had to fly to UK on 26 October 2020 to visit the mother's father who was in a serious health condition in UK and the mother proposed the father to have access to HD by video call. The father was also informed that the mother and HD would return as soon as the mother's father's condition became stable.

In the meantime, the SWO reported that apart from attending one interview on 6 October 2020, the mother had not turned up for the interim access pursuant to the Interim Access Order. On 19 November 2020, the SWO wrote to the judge to report on the then situation.

On 24 November 2020, the father issued a summons seeking access and an undertaking from the mother of not to remove HD from Hong Kong without leave unless with written consent of the parties and to return HD to Hong Kong when called upon to do so. The summons was fixed for a hearing on 18 January 2021 which was later adjourned.

On 1 February 2021, the mother's then solicitors faxed a letter to the SWO that their firm no longer had instructions to represent the mother as her legal aid had been discharged. Thereafter, the mother sent a letter direct to the judge dated 20 March 2021 expressing her intention not to return to Hong Kong. In this letter, the mother explained the reason for her departure was

because her father was very ill. She had also said the father had refused to pay the interim maintenance for HD and that her reason of not coming back was due to the high risk of COVID-19 in UK and round the world and she could not afford the hotel quarantine and airline tickets. She ended by saying she was not sure as to when she would be able to be back.

The father applied for legal aid and contacted the Central Authority in Hong Kong for assistance. The father filed a request for return of HD under the Convention on 15 June 2021 (received by the Central Authority on 16 June 2021). The father's solicitors were later informed through an email on 23 June 2021 from the Central Authority of Hong Kong to seek an Article 15 Declaration.

Discussion

According to the evidence before this Court, the date of wrongful removal was 26 October 2020.

As held by Cheung JA in *JEK v LCYP* [2015] 4 HKLRD 798, habitual residence is a question of fact. In the present case, HD was born in Hong Kong of parents who hold Hong Kong Identity Cards and are permanent residents in Hong Kong. The mother holds a BNO passport. HD also holds a Hong Kong Identity Card and is a permanent resident here. The Court has no information as to what travel document HD has. Prior to 26 October 2020, HD was removed from Hong Kong on only one occasion during Christmas 2018 for one to two months.

On the present evidence available to the Court, I am of the view that HD was habitually resident in Hong Kong immediately before her removal on 26 October 2020.

HD was born within the marriage of the parties and is a child of the family. Under section 3(1)(b) of the Guardianship of Minors Ordinance, Cap 13, the father and the mother have equal parental rights and authority over HD.

In the father's affirmation, he stated that when he was living with the mother and HD at the mother's maiden home, he had made joint decisions with the mother over matters of HD including her vaccinations, her food, her activities and any other important decisions over HD. After he was not allowed to stay overnight in the mother's maiden home, he had continued to visit HD and that he and the mother had made joint decisions over HD and that they were both HD's caretakers. In fact, it was his plan that he and the mother and HD would move to the new flat he bought and that throughout that period he was exercising his rights of custody over HD. It was only since November 2019 that he was not able to enter the mother's maiden home to visit HD and that was why he contacted solicitors, and later issued the petition and he then applied for access.

At the moment, the father has interim access under the Interim Access Order. The father's proposal in his statement as to arrangements for the child was for HD to continue to reside with the mother. However, this does not mean that father has no rights of custody or that the mother can unilaterally remove HD from Hong Kong without his consent or without leave of the Court. In the divorce petition, the father is seeking joint custody of HD, and in paragraph 3.5 of the Children's Form (Form J), the father has stated that he would like to join the mother in in the decision of the child's schooling requirements and arrangements.

Prior to the removal, the father was pursuing his application for joint custody and he had attended interviews with the SWO. In the report submitted by the SWO on 24 March 2021, the SWO reported that the father said he would take care of HD with the assistance of his mother and he would employ a domestic helper and he planned to search a school placement for HD.

At this moment, there is no decision as to the final custody order, nor any final care or control order made in the mother's favour. There is usually a restriction in a standard custody order that neither parent can remove the subject child from jurisdiction of Hong Kong, unless with the leave of the court or with consent of the other parent and with an undertaking that that parent will return the child to Hong Kong when called upon to do so. There is no sufficient evidence at this stage that the father has waived such a restriction. His application for joint custody is still pending. The father continues to have a right to veto on any removal application and not merely a right to be consulted and the mother cannot unilaterally remove HD from Hong Kong.

Conclusion

Having considered the present evidence placed before the Court, I am of the view that the mother's unilateral removal of HD to UK was in breach of the father's rights of custody, and that at the time of removal, those rights were actually exercised by father jointly with mother or would have been so exercised by the father but for the unilateral removal or retention.

In light of the above, I granted the Article 15 Declaration as sought by the father.

I direct a copy of these Reasons be sent to the Central Authority of Hong Kong.

(Bebe Pui Ying Chu)

Judge of the Court of First Instance

High Court

Mr Chan Yip Hei, instructed by Francis Kong & Co., for the Applicant

The Respondent, acting in person and absent

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