

HONG KONG / JUDGMENT

M,B v. S,S**[2022] HKFC 72**

COURT

Family Court

DECIDED

30 March 2022

CASE / FILE NUMBER

FCMP30/2021

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bjbj FCMP 30 / 2021

**[2022] HKFC 72 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION FAMILY COURT MISCELLANEOUS PROCEEDINGS NO. 30 of 2021**-----
IN THE MATTER OF Section 10 of the Guardianship of Minors Ordinance (Cap. 13) and IN THE
MATTER OF S, Z and S, A, infants-----
BETWEEN M, B Applicant and S, S Respondent-----
Coram: Deputy District Judge Peter Barnes in Chambers (Not open to public) Dates of Hearing: 2
and 3 March 2022 Date of Judgment: 30 March 2022-----
J U D G M E N T (Custody, care and control, access)-----
The Application This Judgment follows a Trial of the Originating Summons dated 4 February 2021 by which the Applicant mother seeks orders for the sole custody and sole care and control of the two children of her marriage with the Respondent father: SZ, a girl born in July 2015 who is now 6 years of age, and SA, a girl born in November 2016 who is 5 (the Children). She opposes all access, alternatively that access be supervised and arranged according to recommendations of the social work officer. The Children live with their mother in a one-room studio apartment in Tuen Mun. They attend a local school. Both are fluent in Cantonese. On 7 May 2021 the Court granted interim sole custody care and control of the Children to the mother. On the same day the Court made a restraining/non-molestation order against the father under the Domestic and

Cohabitation Relationships Violence Ordinance (Cap 189) and excluding him from the FMH, with an authorization of arrest. On 15 July 2021 a further similar order was made and the authorization of arrest extended to 27 August 2021. On 27 August 2021 the Court gave directions for the filing of further affirmations, and fixed the trial dates. This order also suspended all access pending the trial.

Background

The mother, whose parents are from Pakistan, was born in Hong Kong. She is 36 years of age. She has two sisters who also live in Hong Kong. The father is from Gujarat in Pakistan and he is now 43. The parties met in mid 2013 and were married in Lahore in November 2013. Following the marriage the mother applied for a dependent visa for the father and he joined her in Hong Kong in 2014. Shortly thereafter he was able to obtain work as a security guard, working two jobs at a time. The mother had also worked as a security guard but quit work when she was 6 months pregnant with her first daughter. Since then she has been a full time mother. Problems began in the relationship at an early stage: the mother says the father provided little emotional support to her even when she was pregnant and giving birth in the hospital, and little financial support either, despite earning HK\$18,000 per month. Since 2017 she has been on CSSA. She says that the father only returned home on weekends and even then only to sleep, preferring to spend most of his time during the day with friends. When he did stay in the flat he would ignore the mother and the Children and spend most of his time drinking and smoking. The elder daughter has asthma. The mother's case is that it is she who has organised the kindergarten/school enrolments, attended parent/teacher meetings, and arranged additional classes, without any help from the father, who has been involved very little in the Children's lives. The mother additionally says that whenever she asked the father for money, the father would shout at her and assault her. She says that the children would start crying and the father would shout at them and sometimes even hit them. The mother has received counselling through the Integrated Family Services Units and the Family and Child Protective Services Unit have also become involved. In April 2018 the mother obtained legal aid to issue divorce proceedings, but upon the father persuading her not to file a Petition she relented and cancelled her legal aid, and re-sponsored his dependent visa which was successfully renewed. However, the relationship did not improve and, according to the mother, in November 2020 the father assaulted her with fists, and threatened her with a knife. She reported the matter to police and the father was charged with AOABH with a trial fixed for February 2021. The father was granted bail pending the trial. In December 2020 the father telephoned the mother and demanded that she withdraw her complaint, and when she refused, he threatened to kill her and take the daughters back with him to Pakistan. The mother reported this threat to the police and the father was arrested and charged with criminal intimidation. His bail was revoked. On 8 February 2021 the father was convicted of criminal intimidation and sentenced to 8 months imprisonment. He served his sentence in Pik Uk. On 20 May 2021 a deportation order (Deportation Order) was made against him, and on 27 May 2021, having completed his sentence, he was transferred to Castle Peak Bay Immigration Detention Centre () and detained pending deportation. On 2 December 2021 he was released on recognizance. He is currently staying with a

friend in Cheung Sha Wan. He remains on reporting conditions and is not permitted to work. The mother filed three affirmations together with her Form J. The mother affirmed that during his term of imprisonment and his detention in CIC the father had repeatedly called her. She produced a list of the calls. She says (3rd affirmation, para 4): Whenever he called he had nothing to talk about the well beings of me or children, however he used his calling time to make unreasonable demands and or threaten me. Whenever he called me, initially he asked me to engage a lawyer for him to get him released from CIC. Every time he would demand me to go to Immigration and speak to the officer and give them my consent for his release by them and also require me to withdraw my case filed in this Court, however, I always refused his such demands. He also demanded many times that I and children should agree to go back to Pakistan with him and stay in Pakistan. When I refused all his demands, he started threatening me that sitting at prison, he can do everything and now since he has seen the prison, he is not scared of prison. It makes no difference to him if he is again convicted or sentence to prison. He also said in any circumstances he will get his deportation order cancelled and get back his Hong Kong visa and ID card and take away children from me. He also threatened me many times if I don't listen to him and don't agree to his demands, he will arrange to kill me or frame me up for a false case and get me imprisoned and my daughters would be taken away by him or the government. I say that in the aforesaid manners whenever he got chance to make a call he called me and used to misuse it to threaten me and children with dire consequences. Whilst in Pik Uk Prison, on the pretext of seeing daughters, he also asked me to visit him with daughters, however, even during visit, he used his time to talk to me about withdrawal of my case and if I do not agree, he threatened me. In the witness box, the mother gave evidence that the father had twice visited her apartment/apartment building since his release, in December 2021, with the police having to be called (see below). It is in these circumstances that the mother opposes all access, but if the Court was to grant access, this should be day-time access only, be supervised and held at a specialist co-parenting coordination centre. The father, who did not file either his Form J nor any affirmation, said that he wanted to stay with the mother, and bring up his daughters and for the Deportation Order to be suspended. He was concerned that the mother was alone in Hong Kong and worried about the daughters if the mother ever became sick. He denied assaulting or threatening the mother or using foul language to her. The issues What orders should the Court make in respect of custody, care and control and access? In particular, should the Court order joint or sole custody, and should access be supervised? What orders should be made to take into account the possibility of the father no longer being able to remain in Hong Kong? Finally, should the Court continue or discharge the non-molestation order and if it is the former should the Court extend the authorization of arrest and if so for what period? The Law Section 19 of the Matrimonial Proceedings or Property Ordinance [HYPERLINK "https://www.hklii.hk/eng/hk/legis/ord/192"](https://www.hklii.hk/eng/hk/legis/ord/192) \t "_blank" Cap 192 MPPO) provides that the court may, in any proceedings for divorce, nullity or judicial separation, make such orders as it thinks fit for the custody and education of any child. [HYPERLINK "https://www.hklii.hk/eng/hk/legis/ord/13/s3.html"](https://www.hklii.hk/eng/hk/legis/ord/13/s3.html) \t "_blank" Section 3 of the [HYPERLINK "https://www.hklii.hk/eng/hk/legis/ord/13"](https://www.hklii.hk/eng/hk/legis/ord/13) \t "_blank" Guardianship of Minors Ordinance [HYPERLINK "https://www.hklii.hk/eng/hk/legis/ord/13"](https://www.hklii.hk/eng/hk/legis/ord/13) \t "_blank" Cap 13) requires the Court to have regard to the best interests of the child as the paramount consideration. The

paramountcy principle equally applies to any consideration of potential orders the court may make under the [HYPERLINK "https://www.hklii.hk/eng/hk/legis/ord/179"](https://www.hklii.hk/eng/hk/legis/ord/179) \t "_blank" Matrimonial Causes Ordinance [HYPERLINK "https://www.hklii.hk/eng/hk/legis/ord/179"](https://www.hklii.hk/eng/hk/legis/ord/179) \t "_blank" Cap 179) (MCO) or the MPPO: see [HYPERLINK "https://www.hklii.hk/eng/hk/legis/ord/179/s48C.html"](https://www.hklii.hk/eng/hk/legis/ord/179/s48C.html) \t "_blank" s 48C , MCO. General speaking, it is accepted that the long-term best interests of a child are best protected if both of the parents contribute to the important decisions determining the upbringing of the child: PD v KWW (Child: Joint Custody)

[2010] HKCA 172; [HYPERLINK "http://www.austlii.edu.au/cgi-bin/LawCite?cit=%5b2010%5d%204%20HKLRD%20191"](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%5b2010%5d%204%20HKLRD%20191) \t "_top" \o "View LawCiteRecord"

[2010] 4 HKLRD 191 . The Court may seek additional guidance from the welfare checklist . This now forms part of Hong Kong Children s Proceedings (Parental Responsibility) Bill. It is not necessary for the Court to set out each factor mechanically in order to demonstrate that each of them have been considered and the checklist is an aide-memoire designed to ensure that none of the factors potentially relevant for a court considering a child s welfare generally in the circumstances of each particular case is left out of account : H v N

[2012] HKCFR 1533; [HYPERLINK "http://www.austlii.edu.au/cgi-bin/LawCite?cit=%5b2012%5d%205%20HKLRD%20498"](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%5b2012%5d%205%20HKLRD%20498) \t "_top" \o "View LawCiteRecord"

[2012] 5 HKLRD 498 , at [27] (Poon J, as he then was). As set out in the proposed Bill, the checklist gives the following matters as those the Court should consider in determining the appropriate order(s) to make: the ascertainable wishes and feelings of the child concerned considered in the light of his age and understanding; the child s physical, emotional and educational needs; the nature of the relationship of the child with each of the child s parents and with other persons; the likely effect on the child of any change in the child s circumstances; the child s age, maturity, sex, social and cultural background and any other characteristics of the child that the court considers relevant; any harm that the child has suffered or is at risk of suffering; any family violence involving the child or a member of the child s family; how capable each of the child s parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; the practical difficulty and expense of a child having contact with a parent, and whether that difficulty or expense will substantially affect the child s right to maintain personal relations and direct contact with both parents on a regular basis; the range of powers available to the court under this Ordinance in the proceedings in question. any other fact or circumstance that the court thinks is relevant. It is important to say a few remarks as to the legal meaning of the term custody . The fact that one party is granted sole custody does not mean that this is awarding the children to that parent and excluding the other parent from the children s lives and any important decisions which have to be made about them: PD v KWW at 36-37. Specifically (at 38, per Hon Hartmann JA, as he then was):

38. A non-custodial parent therefore has the right to be consulted in respect of all matters of consequence that relate to the child's upbringing. While the right to be consulted does not include a power of veto, it is nevertheless a substantial right. It is not merely a right to be informed, it is a right to be able to confer on the matter in issue, to give advice and have that advice considered. The determination of whether an order for sole or joint custody is to be made is by reference to the level of cooperation to be expected having regard to the relationship of the parties (PD v KWW, at 55):
55. Accordingly, the issue for the judge is whether, with the court proceedings concluded, it is reasonably anticipated that the parents will be able to agree on the questions of importance that will determine the upbringing of the child, both recognising that, as difficult as it may be for them, this process of co-operation is in the best interests of the child. The Evidence The Social Work Officer The Social Work Officer, Ms. C, compiled a report for the Court dated 7 August 2021 and she attended the Trial and gave evidence. Her report is both balanced and well-prepared as was her evidence in Court. The report recommends that the mother have sole custody, care and control of the children and that there be supervised access, based on the following conclusion:
31. As the children were in the school age, the nurturing of the daily routine and the persistent response to the school issues were very important to them. The information gathered reflected that [the mother] had adequate knowledge and understanding of the children's personal interests and characters. She was attentive to their needs, school affairs, and daily routines. A strong bonding was developed between her and the children. [The] two children felt secured and trustful with her. The sibling relationship was also close [The father], though was caring about the two children, spared little time involving in the children's major and daily routine arrangements. His aggressive attitude presented in the past also scared the children. At present, both [the mother] and [the father] unanimously agreed that [the mother] was the appropriate parent to get the sole custody and sole care and control over Z and A for the best interests of the latter.
32. Concerning the access arrangement, it was the right of the non-residing parent to have regular contacts and meetings with the children. It was also the right of the children, especially at their tender age, to maintain bonding with the non-residing parent so as to fulfil their respective needs in different developmental stages in the days ahead. For the benefit of the children, both [the mother] and [the father] agreed that [the father] would get the reasonable day access to the two children in the presence of [the mother]. Staying access was not recommended at present as [the father] could not arrange staying access for to the children for the time being. The report noted that the mother had taken the children to see their father while he was detained. The mother's evidence was that this only happened twice to Pik Uk. In July 2021 Ms. C accompanied the mother and the children to CIC and escorted the children (without the mother) inside to see the father in the visit room. Before the visit, SZ told her she was nervous and did not want to see her father, but with Ms. C's encouragement, SZ agreed. During the visit the father and the children were separated by a

glass panel, and they communicated using handsets. Ms. C notes in her report that The father talked to the children gently with soft voice and smile on his face. He asked them about their daily life trivial matters such as what meals they had. He also showed concern to their school life asking what activities they had joined, what they had learnt from class etc. The children responded by nodding or simple words most of the time. As observed, the children maintained calm mood and listened to the father on the phones. Their interaction was peaceful and the children had not shown any emotional disturbance. In her evidence at the Trial, Ms. C acknowledged that the mother had more recently expressed concerns that if access was to take place it should be at a co-parenting centre and under the supervision of a member of the staff of the centre. It was put to her that this might not even be appropriate, for example if the father made any inappropriate comment or threats to the children the supervisor would not understand as he only speaks Urdu. Ms. C noted that the children both speak Cantonese and the supervising officer at the centre would be able to communicate with them and would additionally be alert to their facial reaction and moods if anything amiss occurred. She disagreed with the suggestion that it was not in the interests of the children to see their father. She concluded by saying that if direct access was not possible if for example the father could not remain in Hong Kong then this could be by video, such as Zoom or FaceTime. The Mother The mother gave evidence of her contact with the father since his release. She said that he had twice been to the apartment or area near to it, both in December 2021. The first time he came up to the apartment and was screaming at the mother to let him in. The police were called and the mother showed them the Court s Orders. After collecting his diabetic machine, the father left. Despite this, the father returned again, this time to the garden/play area near the apartment building. He told the mother she should stop all this, stop the deportation case, I want to stay with you and it will not be good for you if I go back to Pakistan. After about 15 minutes the mother then collected the children and was taking them back to the apartment. The father blocked her and pushed her against a wall. She was able to get free and took the younger daughter, SA, to the flat leaving the elder daughter SZ with the father. The mother then called the police. Three policemen arrived, and retrieved the elder daughter and brought her up to the flat. The father was warned by the police not to come again. The mother said that although the father has not returned to the flat, he has subsequently phoned her repeatedly, to try to persuade her to drop the case and to reconcile with him, and that these requests have been made with threats, including that he will kill her. The father did not cross-examine the mother. The Father The father said that he had not taken any legal challenge to the Deportation Order, at least not yet. (He was informed by the Court of the applicable time limits in taking judicial review proceedings.) He told the Court that he had been advised by Immigration that if the case was settled the Deportation Order could be suspended. As noted, the father did not file any affirmation or Form J, and in his evidence he repeated that this was because he had been in CIC. He said he had applied for legal aid but that no LAD staff had visited him in CIC. The Court file contains a Memorandum of Notification of an Application for Legal Aid dated 11 October 2021 indicating that an application was made by the father during his immigration detention. On 26 January 2022 a further Notice was filed

by the DLA stating that the application had been refused. During his evidence the father denied being hands off and said he had been involved in the Children's school including driving them to school in the morning, and in other activities, but that due to the Court cases and his imprisonment/immigration detention, this had made the extent of his involvement difficult. He disputed the mother's case that he had failed to provide financial support, saying that he paid the rent and utilities, bought groceries etc and gave the mother \$3,000 each month for MTR and to buy meat. The father denied ever having threatened the mother, and said that these were simple arguments. He specifically denied ever having threatened to kill her and take the Children to Pakistan. The father's primary focus is on remaining in Hong Kong. It seems that as far as he is concerned the only real hope of challenging his deportation is to reconcile with the mother in which case the Deportation Order may be suspended. When he was released on recognizance, the father gave Immigration the address of the FMH as his residential address. The Applicant's solicitor was critical of this during her questioning of the father, but I accept that the father may not have had an alternative address to give to Immigration at the time of his release. Conclusion and Order I am satisfied that the mother gave truthful evidence and that despite his denials, the father has repeatedly contacted the mother during and after his imprisonment/detention and twice approached her since his release with the main purpose of placing pressure on the mother to reconcile with him so that he can ask the Director of Immigration to suspend the Deportation Order. I accept that before and since his release he has repeatedly telephoned the mother with this purpose, and that these calls have included threatening language. I am also satisfied that there is minimal prospect of the parties communicating peacefully on matters relating to the Children. Consequently, there will be an order that the mother have sole custody, and sole care and control of the Children. Despite the mother's objection to all access, I am satisfied that it is in the Children's interests for some access to resume and that this include direct access. The father is to have access to the Children for initially at least an hour initially once per week at the Circle of Love Specialist Co-parenting Support Centre in Tin Shui Wai and such additional access at the Centre as may be agreed between the parties, subject to the Centre's availability. Additionally, the mother do facilitate FaceTime or other video access on a twice weekly basis, such times to be agreed. The father must be aware that if there is any repetition of the misbehaviour towards the mother then he risks all access being suspended once again. I am satisfied that it is necessary for the DVO Order to remain in place. Even if there was some misunderstanding on his part as to the nature of the Order, he is no longer under that misunderstanding, and he knows that he is not to approach the mother's apartment or molest/harass the mother. He has given evidence to the Court that he both understands the nature of the order and that he will not violate it. So that it is absolutely clear: the father must stop harassing the mother in person, or by telephone or other means (such as FaceTime calls) and putting pressure on her to reconcile or make any threats of harm against her or the Children. This includes threatening to take the Children away from the mother. If this misbehaviour is repeated then he will be liable to be arrested and as I have said, access is likely to be suspended. There will be an authorization of arrest, to remain in place for the next six months. I am mindful that in order for an authorization of

arrest to be attached to an Order, the Court must be satisfied that the respondent to an application has caused actually bodily harm to the person protected by the Order or the Court reasonably believes that will likely cause actual bodily harm to the person protected: Cap 189, s. 5(1)(a), (b). The same test is applicable to the extension of the authorization under s. 7. In this case there has been violence against the mother, and continual threats made by the father to repeat that abuse or worse. Threats of violence can form a basis for the reasonable belief: YLS v TL

[2008] HKFC 29; FCMC 8396/2007 (30 May 2008). I therefore make the following order:

- (1) The Applicant do have the sole custody, and sole care and control of the two children of the family;
- (2) The Respondent do have defined access to the children as follows:
 - (a) Once per week for at least one hour at the Circle of Love Specialist Co-parenting Support Centre, such access to be supervised by a staff member of the Centre. The parties are to liaise with the Centre on such access. All other additional access is to be by agreement between the parties.
 - (b) Twice per week on days and times to be agreed, by FaceTime or other video calls, the Applicant to facilitate such access. Additional access e.g. by telephone to be by agreement between the parties. Such access to continue in the event the Respondent is deported from Hong Kong.
- (3) There be a further restraining order and non-molestation order to be set out in the same terms as paragraphs 3(a) and (b) of the Order dated 15 July 2021. For the avoidance of doubt, the exercise by the father of the access granted by the Order now made will not constitute a breach of the non-molestation order.
- (4) An Authorization of Arrest be attached to this Order and shall be effective until 30 September 2022 whereby any police officer may arrest without a warrant a person whom he or she reasonably suspects of being in breach of this Order. The Applicant's solicitors are to serve a copy of the Order on the Commissioner of Police.
- (5) There be an Order nisi that there be no order as to costs, to be made absolute within 14 days.
- (6) The Applicant's own costs be taxed in accordance with Legal Aid Regulations. (Peter HC Barnes) Deputy District Court Judge Ms. B. Manek of Messrs. B. Manek & Co, Solicitors for the Applicant, on the assignment of the Director of Legal Aid The Respondent appeared in person PAGE PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V {ka{Wk{ gd"* gd"* gd"* gd"* gd"* gd"* gd"* sks`skU hN6Q hN6Q gd"\* gd"\* gdCRf gd\$7 gd\$7 hFR? hFR? hFR? hN6Q h@@/ gdCRf &`#\$ md[md[:p"* [Content_Types].xml _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml \$O}) Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@ j!Q_ jyV` |PZ+ T ""p < 4V O&x\$ A8>v ;EUC n 8r *~P(5 .}x

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