

HONG KONG / JUDGMENT

T v. A

[2023] HKCFI 2827

COURT

Court of First Instance

DECIDED

3 November 2023

CASE / FILE NUMBER

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HCMP 1948/2019

[2023] HKCFI 2827

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO 1948 OF 2019

IN THE MATTER of AAR, a girl, born [in] October 2007 (the “Minor”) and IN THE MATTER OF SECTION 26 OF GUARDIANSHIP OF MINORS ORDINANCE (CAP 13) and IN THE MATTER OF ORDER 90 OF THE RULES OF THE HIGH COURT and IN THE MATTER OF SECTION 3 OF THE GUARDIANSHIP OF MINORS ORDINANCE (CAP 13) and IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ORDINANCE (CAP 512)

BETWEEN

T

Plaintiff

and

A

Defendant

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

Date of Defendant's submissions: 31 August 2023

Date of Plaintiff's reply submissions: 7 September 2023

Date of Decision: 3 November 2023

DECISION

(On Costs)

Introduction

These wardship proceedings were issued by the plaintiff father ("P") concerning his daughter AAR who was unilaterally taken to Russia by her mother, the defendant herein ("D"). The events leading to the issue of these proceedings have been set out in this Court's earlier judgement handed down on 29 August 2022, on a preliminary issue which arose out of P's application for leave to issue a writ of sequestration ("Preliminary Issue Judgment"). In this decision, I shall adopt the nomenclature and abbreviations in the Preliminary Issue Judgment, unless otherwise indicated.

Briefly, AAR was taken by D to Crimea for her annual summer holiday in July 2018 and thereafter, D had refused to return her to Hong Kong. P had filed return proceedings under the Convention on 3 July 2018, which was eventually heard by the Russian Court which made an order on 25 April 2019 for AAR to be returned to Hong Kong. In August 2019, an order for enforcement was issued by the Russian Court and the bailiff went to retrieve AAR. This failed as D issued court proceedings against the bailiff.

The present wardship proceedings were issued by P on 28 October 2019, and the Return Order was made by this Court on 28 October 2019.

On 14 November 2019, D's proceedings against the bailiff were dismissed by the Russian Court. Thereafter, D moved with AAR from Crimea to Sochi.

All attempts at mediation in May and June 2021 failed and later, P received notice that D intended to sell the Property in Hong Kong, which was registered in her name and bought by P under their separation/divorce settlement for D and AAR to reside in.

Upon receiving notice, P issued the Leave Summons, for leave to issue writ of sequestration. The Preliminary Issue which arose at the hearing of the Leave Summons, which was attended by D by VCF, was whether the Return Order imposes a mandatory obligation on her to return AAR. This led to the Preliminary Issue Judgment in relation to the interpretation of the Return Order. Upon

this Court deciding that it does in the judgment, a substantive hearing was fixed for the Court to deal with the remaining issues as to whether D had complied with the Return Order and whether any failure to comply was accompanied by a state of mind necessary to establish punishable contempt.

The Substantive Hearing of The Leave Summons

The substantive hearing for the Leave Summons was fixed on 9 May 2023, and D attended the hearing through VCF.

At the hearing, upon this Court explaining to D about the nature of the Leave Summons and the writ of sequestration, D sought an adjournment as she believed that she could bring AAR back to Hong Kong but she would need time to apply for renewal of AAR's UK passport which had expired on 20 January 2023, and also AAR would only finish her school examinations by end of June 2023.

This Court acceded to D's request for adjournment and directed the Leave Summons be adjourned to 14 July 2023 to give D time to arrange for the return of AAR, and also to direct the Official Solicitor to represent AAR on her arrival in Hong Kong.

P indicated that he was willing to pay the cost of AAR's return and to consent to her being issued with a UK emergency travel document. Subsequent thereto, P agreed to pay the cost of D's visits to Moscow as well as her temporary accommodation in Hong Kong until mid August 2023. All in all, on 7 June 2023, P had transferred HKD 62,503 to the bank account specified by D.

Eventually, D and AAR returned to Hong Kong on 11 July 2023.

With AAR having returned, the Leave Summons became academic, and at the resumed hearing which eventually took place on 2 August 2023 ("Hearing"), P accepted that it was no longer necessary to go ahead with the contempt trial, and that the only matter remained to be dealt with in respect of the Leave Summons was the issue of costs. This Court then dismissed the Leave Summons and directed that, amongst other things, the matter of costs of the Leave Summons be dealt with on paper.

There have been a total of 3 Updating Notes lodged on behalf of P for the Leave Summons, the 1st one dated 5 July 2023 and the 2nd one dated 13 July 2023 by P's Counsel Mr Shaphan Wahwah and the 3rd one dated 28 July 2023 by P's then Counsel Mr Azan Marwah. The submissions on costs were made in both the 2nd and the 3rd Updating Notes.

D's Submissions were lodged on 31 August 2023 in which she has set out her grounds for opposing to pay costs of the Leave Summons.

P's Reply Submissions were lodged on 7 September 2023.

P's Grounds for Seeking Costs Against D

P's grounds for seeking costs against D were essentially D failed to comply with the Return Order and was in contempt of an order of this Court, and that he had incurred substantial legal costs in securing the return of AAR.

D's Grounds for Opposing

In D's Submissions, her grounds for opposing to pay costs can be summarized as follows:

The legal costs were incurred and wasted by P's own conduct;

She was never planning to abduct or retain AAR in Russia and not return to Hong Kong and that their stay in Russia was only temporary until P had complied with the Consent Order;

AAR's objection to return to Hong Kong

Brief Family Background

P is British. He was born in the United Kingdom and is now about 54 years old. He moved to Hong Kong in 1993 and had worked mainly in the field of digital consulting and marketing in Hong Kong. D is Russian. She was born in Komsomolsk-on-Amur in Russia and later relocated to Sudak, Crimea. She came to Hong Kong in 2004 to work as a performer. The parties met in 2004 and later married on 2 July 2005. They first lived on Hong Kong Island but later moved to Clearwater Bay. AAR was born in October 2007, and is 16 years old.

As disclosed by P in his 1st affidavit filed herein, in 2008, AAR was diagnosed with acute myeloid leukemia and she spent the first year of her life in and out of hospital. She later made a full recovery. Then in 2009, P was diagnosed with neurosarcoidosis. P had to spend time between Hong Kong and UK for treatment between 2009 to 2011 during which he was unable to work.

The parties' marital relationship started to decline from about 2011 onwards, and eventually P moved out of the parties' then matrimonial home in Clearwater Bay in 2016. Later in February 2017, his employer decided not to renew his employment contract and he became unemployed.

Understandably, those were difficult times for the parties. After a year's separation, P issued the divorce petition on 18 May 2017 and with D's consent, the Consent Order was made on 12 October 2017 and the Decree Absolute was granted on 14 December 2017.

Their divorce was amicable and under the Consent Order they had agreed to joint custody of AAR with D having her care and control and reasonable access including staying access. Save for an incident in November 2017, generally the access arrangements seemed to be working out fine, and during the academic year 2017 to 2018, which was prior to D and AAR going to Crimea, AAR was in fact staying with P during the school term, as P was living closer to the school AAR was attending.

The Consent Order contains a usual restriction that AAR is not to be removed from Hong Kong unless with written consent of the other parent, by either parent having given a general undertaking to return AAR to Hong Kong when called upon to do so (“General Undertaking”).

According to P, D and AAR had previously gone to Crimea for their summer holiday from July to August 2017, which had been a regular occurrence for many years and which he had paid in full. Thus, on 1 July 2018, with P’s consent D and AAR left for Crimea for their summer holiday and were due to return on 14 August 2018 but this time, they failed to return.

Pursuant to the Consent Order, the sale proceeds of the matrimonial home of about HKD 8m were used to buy the Property, which is in Discovery Bay. The Property is registered in D’s sole name and free of mortgage and was purchased for D and AAR to reside in. According to P, it was D who had expressed a strong desire on a property to be purchased in Discovery Bay as she would like to be close to her own friends despite the long commute for AAR to and from her then school in Clear Water Bay. That was why for 2017-2018, AAR was staying with him during school term. According to P, AAR was later awarded a place at a well regarded school in Kowloon in late 2017 and that P, D and AAR were all very excited and happy with this outcome, and that at no time D had ever raised any objection or concern that it would not be AAR’s best interest to attend the school in Kowloon in the new academic year in 2018.

Under the Consent Order, P was to pay a lump sum of USD 125,000 to D in full and final settlement of her financial claims, plus maintenance for AAR at HKD 12,000 per month whilst she was residing with D, in addition to school and bus fees. Further, even though the Consent Order did not record this, P said he had previously bought an apartment in Crimea for D as a gift in 2014, which both of them had agreed to be D’s.

According to P, he paid D part of the lump sum of USD 50,000 in July 2017 upon the sale of the matrimonial home which was prior to the Decree Absolute, and a further USD 50,000 in January 2018 after the Decree Absolute. As he was still unemployed in January 2018, he requested D that the balance of USD 25,000 be paid once he found employment. As AAR was staying with P, he did not pay any child maintenance to D, which according to P, this arrangement was agreed by D in August 2017. However, as set out later, D had relied on P’s non compliance with the financial terms in the Consent Order to justify her and AAR remaining in Russia.

Discussion

D’s taking AAR to Crimea on 1 July 2018 for their annual summer holiday was with P’s consent and subject to the General Undertaking. As said, they were due to return to Hong Kong on 14 August 2018, the day before AAR was to commence attending her new school in Kowloon, but on 2 July 2018 only one day after her arrival in Crimea, D informed P that she had no intention of returning with AAR to Hong Kong. Subsequent thereto, she did not return AAR to Hong Kong on 14 August 2018. In my view, she was clearly in breach of the General Undertaking to the Court.

As mentioned, the Russian Court made an order on 25 April 2019 for AAR to be returned to Hong Kong under the Convention. This would mean that the Russian Court was satisfied under the provisions of the Convention that AAR had been wrongfully removed and/or retained in Russia. D had failed in her subsequent appeal against that decision.

As also mentioned earlier, the Russian bailiff had attempted to retrieve AAR from D's apartment in Crimea in August 2019 but was unsuccessful. P in fact went to Crimea at the time with the hope of bringing AAR back to Hong Kong. He had attended D's apartment along with his Russian lawyer to observe the bailiff's unsuccessful attempt to retrieve AAR. D was clearly in defiant of the return order made by the Russian Court.

After P issued the present wardship proceedings in Hong Kong and obtained the Return Order, he had instructed his Russian lawyer to serve the proceedings and the Return Order out of jurisdiction on D. On 24 September 2020, P's Russian lawyer received notice from the bailiff that D moved from Crimea to Sochi with AAR.

On the evidence, D had ignored both orders made by the Russian Court and this Court.

Even though D had confirmed receipt of the Return Order by Whatsapp on 25 November 2019, she never appealed or applied to vary it, and ignored the Return Order until after P issued the Leave Summons. She had claimed that she could not afford legal fees and was "emotionally drained". However, as pointed out by Mr Marwah in P's Reply Submission, she did engage lawyers in her own appeal in the Russian proceedings in June 2019, and had obtained a temporary order against the bailiff and even issued proceedings against the bailiff. Any emotional drain was in my view brought by D upon herself.

Not being able to afford the legal fees was no excuse for D to ignore the Return Order and the present proceedings until after the issue of the Leave Summons. Further, as seen in the Preliminary Issue Judgment, D was able to and did make submissions on the Preliminary Issue herself through VCF.

Having considered all the evidence including all the letters written by D directly to the Court, I find that D has shown herself to be fully capable of litigating on her own, and it was only after the issue of the Leave Summons that D decided to participate in these proceedings.

It was alleged by D that P had created the entire situation himself in the first place and that he had other simpler ways to resolve this situation. D alleged that when she and AAR left Hong Kong on 1 July 2018 on their annual holiday, she had no plans to move there, and that she had paid for the return tickets herself as P had refused to do so. D denies that she had ever planned to abduct or retain AAR in Russia permanently. D had produced a letter dated 2 July 2022 from her friend DP to show that she had no plans to leave Hong Kong permanently on 1 July 2018.

The letter was signed by DP 4 years after D had removed AAR from Hong Kong and had refused to return with AAR. What was stated in the letter was that, amongst other things, when D and AAR left for their summer holiday on 1 July 2018 and did not return, all their mutual friends and children were shocked, but D had explained to DP that she did not have a choice because P would not follow the Consent Order to pay her alimony for her to be able to afford to continue to live in Discovery Bay and that P would not agree to AAR attending a school nearby.

On the day upon their arrival in Crimea on 2 July 2018, D had immediately sent the following email to P, which indicated she did not intend to return with AAR:

“I’m informing you that [AAR] and I will remain in Russia and not be coming back to HK. You have created impossible situation for us to live there. You do not pay child support or any other expenses regarding [AAR]. You put her to [school] against my will ... I hope you understand it was not easy decision to make and nothing can change it. There is no way back...”

In D’s Submissions, she had produced an email she said she sent to P on 2 August 2018:

“[T], we are coming back to hk on 14th. Can you pls transfer the rest of the divorce settlement money you owe me. Also pls can you pay back the money for [AAR’s] tickets to Crimea and child support for August”.

However, P had produced an email on 13 August 2018 from D saying:

“[T], after long consideration and taking every circumstance into account [AAR] and I are decided to stay in Russia for now. She ... actually took it very well and got really [excited] that she will have better opportunity to learn more about Russian culture and speak more fluent Russian language. Just until things will get better and we both can agree on making decisions about [AAR]. And you can follow our divorce agreement ...”

This was followed by another email on the same day:

“[T], I’m telling you one more time. I have not kidnapped [AAR] and holding her against her will here. She is well aware of what is going on. We just staying back temporarily, until you find a job and can pay child support...”

Notwithstanding what D indicated in her emails, the fact was she did not return with AAR on 14 August 2018 as agreed with P. On 23 August 2018, P had sent D an email setting out his then position and informing her that he had contacted the Hong Kong Central Authority and the Russian Central Authority to start the application for AAR’s return under the Convention and he gave D a further deadline of 30 August 2018 for her to return with AAR, and stated therein that if D were to return with AAR, he would start paying the full amount of child support every month upon D’s return to Hong Kong, and would apply for a loan to pay D the final balance of the lump sum of USD 25,000 if he were not to have found work within the next two months, and he would also try to get AAR a place in Discovery College depending on the availability.

Despite P's above efforts, D simply replied that unfortunately she and AAR could not return to Hong Kong as P still did not have a job and stable income.

As submitted by Mr Shaphan Marwah in P's Reply Submissions, "child abduction is an entirely unacceptable means of resolving family disputes".

Even if P was not complying with the Consent Order in full and had not paid D the balance of the lump sum, he had paid her a substantial part of it and he also had bought the Property in her name. There was no sufficient evidence that he was not paying AAR's school fees. He did not pay AAR's maintenance as she was staying with him mostly during her school term for the academic year 2017-2018. P had also explained that this was because he was out of a job. D was clearly aware of all this, and in any event, it would have been open for her to issue enforcement proceedings of the Consent Order in Hong Kong. Similarly, if D did not wish AAR to go to the school in Kowloon, it was open to her to apply to the Family Court in Hong Kong and sought direction from the Family Court. There was nothing to stop her from seeking legal advice. After all, by 2018, she had been living in Hong Kong for some 14 years and she had friends here. There was no sufficient evidence that D had no financial means to support herself and AAR in Hong Kong, at least until P found employment, since she had the Property and an apartment in Crimea, and there was also no sufficient evidence that D had no earning capacity at all.

Notwithstanding D maintaining that she was never planning to abduct or retain AAR in Russia and not to return, her email of 2 July 2018, which was sent immediately on her very first day of her arrival in Crimea was in fact telling and indicated the contrary. What she now claimed to be her only intention at that time was to make P pay child support and to transfer AAR to a school in Discovery Bay could not have been right, as seen in the last sentence of her said email. She had clearly referred to it being not easy a decision and that nothing could change it, and there was no way back. I am of the view that D must have planned it all when she and AAR left Hong Kong. What was clear was that even when P sent her his email of 23 August 2018 entreating her to bring back AAR, and making proposals to meet her demands, she failed to return AAR to Hong Kong.

In the circumstances, P had no alternative but to pursue his application for AAR to return, and I do not accept D's submission that the legal costs were wasted by P's own conduct. On the contrary, the costs were incurred by reason of D's unilateral decision to keep AAR out of Hong Kong for some 5 years, and it was only after P issued the Leave Summons, and no doubt for fear of losing the Property, D then decided to return with AAR.

D claimed that that the only motive she had for the past 16 years was to protect AAR's best interests. From all accounts, AAR was close to her mother. However, AAR had also been under the care of her father for almost a year during her last term time in Hong Kong. There was no evidence that prior to her being taken to and retained in Crimea, AAR had been informed that she would not return to Hong Kong for a long period of time. As the emails showed, AAR missed her "school stuff", such as "her rucksack, water bottle, pencil cases, lunch box and school shoes" which she wanted when she was told by D that she was to start school in Crimea and that D had asked P to send them to her. AAR was 10 years old then.

There was no evidence that AAR's wishes had been ascertained prior to her being taken away. There was no evidence that AAR had been given a chance to say good bye to her friends/classmates. Even though she and maybe her friends/classmates would be going to different schools after 2017-2018, it did not mean that they would not be able to continue to meet up in Hong Kong. AAR's then good friend was in Hong Kong. Seeing her father every week and being able to spend time together, physically with her father is different from seeing her father on screen/facetime and/or only during long school holidays. AAR was unilaterally uplifted from the family and social environment in which her life had developed for some 10 years, and in my view, this could not have been in her best interests. What is sad is that, as the social investigation report and the Official Solicitor's report have now shown, the protracted litigation had had an adverse impact on AAR's relationship with her father, which has been impaired. D's unilateral actions could not have been said to be "protecting" AAR's interests and/or in AAR's best interests.

It was also D's case that AAR had refused to return, or that there was a "travel ban" in Russia preventing AAR to return.

After receiving the Leave Summons, D had sent to this Court a letter around 28 December 2021 purported to be written by AAR with AAR promising the Court that she would return to Hong Kong and requesting this Court not to take away the Property from her mother as then they would have no money for food and for her education because her father did not help them at all, and that her father had already told her that he would not pay for her university fees if she chose to live with her mother, and AAR said she was only afraid that if she were to return to Hong Kong, her father would not return her to her mother. D had also produced copies of messages between AAR and P in which P indicated that he would not pay for AAR's university.

Then there was a 2nd long letter purportedly written by AAR with a typed version produced by D stating that although in her 1st letter she promised the Court to return, she decided that she did not wish to return to Hong Kong and she then set out her explanations, including that her relationship with her father was not good, and that she felt like he did not love or care about her and had stopped being her dad long time ago.

However, as seen in a psychologist report on AAR submitted to the Russian Court in the Russian Convention proceedings in 2019 which showed AAR's closeness to both parents during the process of the "(Harry Potter's) magic wand" game. Further, AAR was heard by the Russian Court and it was recorded in the judgment of the Russian Court that AAR was willing to return if it was with her mother and that AAR indicated that she was more comfortable communicating in English and that she missed her friend who lived in Hong Kong. The conclusions in the report was that the level of psychological development of AAR did not allow her to form her own opinions with respect to the country of her permanent residence.

There was simply no sufficient evidence that AAR had refused to return when she was first retained by D in August 2018 and/or at the time of the Russian proceedings in 2019. There was also no evidence that the "travel ban" referred to by D was intended to stop AAR from returning to Hong Kong, the place of her then habitual residence.

It is most unfortunate that AAR has been caught between her parent's litigation. Even though D kept saying it was AAR who did not wish to return, D clearly managed to bring her back on 11 July 2023. There was no sufficient evidence that AAR had objected to return, and in any event, if the Russian Court had thought this was a valid ground for objection to return, the Russian Court would not have made a return order and/or the Russian Appellate Court would not have upheld the return order.

By now, AAR has been under D's sole care for some 5 years without having any meaningful contact with P. It would take time to rebuild a father and daughter relationship, and I understand that there is a therapist helping them. P is hoping that AAR will be willing to engage in therapy, and D has previously indicated her agreement.

Conclusion

After her return with AAR, there had been further mediation between the parties. On 23 August 2023, D had sent a letter to the Court which was addressed to "Phoenix". She indicated she was willing to pay P HKD 1.7m which he claimed he had spent and that such be paid out of the sale proceeds of the Property. D obviously has sufficient means to pay the costs.

Having considered all the circumstances of this case, I find that D has not made out her grounds for opposing an order for costs against her. I therefore order her to pay P's costs of the Leave Summons including all reserved costs, to be summarily assessed.

P has submitted a Statement of Costs for HKD 874,880. As Counsel's Brief Fees for the attendance of the first directions hearing had included settling affirmation in support and in reply, and most of the professional work has been done by Counsel, I would allow HKD 160,000 for Counsel's fees in Section E of the Statement of Costs. I find the amount charged for communications and professional work for the solicitors to be on the high side, and there was also no need for 3 fee earners to be involved. In my view, a reasonable amount for Sections B, C and D would be HKD 500,000. The total amount of costs and disbursements summarily assessed is HKD 660,000.

I understand the Property will be sold and I order such costs to be paid out of the net sale proceeds of the Property.

So far as the Originating Summons is concerned, directions have been given for a date to be fixed. The present proceedings have not yet been finalized, and I will not deal with the costs of the Originating Summons at this stage.

(Bebe Pui Ying Chu)

Judge of the Court of First Instance

High Court

Mr Shaphan Marwah, instructed by Oldham, Li & Nie, for the Plaintiff

The Defendant, unrepresented, acting in person

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