Neutral Citation Number: [2021] EWFC 8

Case No: FD20P00572

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/02/2021

Before :

MR JUSTICE MOSTYN

- -

Between :

TK **Applicant**

- and –

ML **Respondent**

- -
- -

The Applicant appeared in person
Nasstassia Hylton (instructed by **Barker Gotelee & Co**) for the **Respondent**

Hearing date: 28 January 2021

Approved Judgment

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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 child and members of her 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.

Mr Justice Mostyn:

1. In this judgment I shall refer to the applicant as "the mother" and to the respondent as "the father".

2. On 11 September 2020 the mother issued an application in Form C100 at the Royal Courts of Justice seeking an order "as to whom a child should live with" pursuant to section 8 of the Children Act 1989. The application concerned her adopted daughter O whose date of birth is not known exactly but which has always been taken to be 15 October 2005. Thus, O is 15½ years old.

3. There is a preliminary issue as to whether the Family Court has jurisdiction to hear the mother's application. This is my judgment on that issue.

4. The reason a jurisdictional issue arises is because O has never lived in England/Wales and has not set foot here since 9 January 2019. However, in the past there has been extensive litigation here concerning her. As I will explain, she was a ward of court between 2012 and 2016, and also for a few days in January 2019. Her Nepalese adoption was recognised under the common law by McDonald J on 10 October 2016. On that day he made orders providing for O to live with her father in Dubai and for her to have contact with her mother. The wardship for three days in January 2019 arose when the mother retained O after a period of contact.

5. I shall endeavour to state the background facts shortly.

6. The mother and father are both British citizens although each has an Irish background. The father has an Irish passport also. They were married in 2001.

7. O was born in 2005 in Nepal. She was abandoned by her natural parents and placed in an orphanage.

8. In July 2008 the mother and father adopted O under the laws of Nepal. Following the adoption the mother and father took O to live in Dubai. O gained British citizenship in September 2008. She grew up in Dubai.

9. The marriage broke down. In November 2011 the mother was deported from Dubai. The following year she issued divorce proceedings in Guildford. Decree nisi was pronounced on 4 July 2013, and was made absolute on 10 February 2014.

10. Custody proceedings concerning O were initiated in Dubai. On 10 May 2012 the first instance court in Dubai granted the custody of O to the mother. The father appealed.

11. On 21 June 2012, in reliance on the Dubai judgment of the previous month, the mother applied ex parte to the High Court in London to make O a ward of court. That application was granted and an order was made placing O in the care and control of the mother to be exercised in England and Wales. The jurisdictional basis for the order is unclear, as, at the relevant time, O was habitually resident in Dubai and was not present in England and Wales. Therefore, under section 2(3) of the Family Law Act 1986 the court was prohibited from making an order in wardship proceedings giving the care of a child to anyone.

12. The father lost his appeal to the Dubai Court of Appeal on 26 January 2014. However his further appeal to the Court of Cassation (the final Court of Appeal in Dubai) was successful and he was awarded custody of O.

13. In 2015 the father applied in the 2012 proceedings to discharge the wardship. Understandably, there was doubt as to the jurisdiction to entertain the application. However, an agreement was reached between the parties that the court did have jurisdiction not only under s.2(1)(b)(i) of the Family Law Act 1986 in circumstances where there were recently concluded divorce proceedings here, but also under article 12(3) of Council Regulation No. 2201/200 ("Brussels 2"). The latter basis of jurisdiction was established by virtue of the mother being habitually resident here; O being a British citizen; the parties expressly accepting the jurisdiction of the court; and it being in O's best interests for the court here to exercise jurisdiction over her.

14. Plainly, the agreement made by the father which established jurisdiction under article 12(3) was only for the purposes of the matter before the court at that time. Plainly, he was not giving a jurisdictional blank cheque for any further proceedings that the mother might commence in the future.

15. On 15 October 2015 Macdonald J gave a judgment recording the parties' agreement as to jurisdiction and the court's acceptance of the same: see *QS v RS* [2015] EWHC 4050 (Fam).

16. In 2016 the proceedings changed course. The parents jointly applied for recognition under the common law of the Nepalese adoption of O. At some point in 2016 the wardship was discharged; the date is unclear to me. On 10 October 2016 Macdonald J gave an extensive judgment in which he navigated formidable legal obstacles on the way to his conclusion that the adoption could be validly recognised at common law. He further made a declaration under section 57 of the Family Law Act 1986 that O was the adopted child of the mother and father. He made a child arrangements order that she live with her father in the UAE and spend time with her mother both in the UAE and England: see *QS v RS & Anor* [2016] EWHC 2470 (Fam).

17. That order remains in force, although its status is somewhat uncertain. As I will explain, there is no jurisdiction in this case for this court to entertain any child arrangements dispute of any nature, and that want of jurisdiction extends, for sure, to any application to discharge or vary the residence or contact terms in the order of 10 October 2016. Further, on 4 December 2020 this court issued a certificate under article 41(1) and (2) recording the contact terms in the order of 10 October 2016, notwithstanding that the father was not heard on that occasion, and O was not given an opportunity to be heard. According to article 41, once the certificate has been issued, the rights of access shall be recognised and enforceable in another member state, in this case Ireland, without any possibility of the father opposing recognition. A mysterious aspect of this procedure is that there is no reference within it to the ability of the court in the other member state to vary the contact terms if the welfare of the child requires this. In this case, therefore, a literal interpretation of the regulation leads to the conclusion that the contact terms seem to be written in stone and are incapable of being varied either in England or in Ireland no matter how clamant a need for change might be.

18. The mother did not return O following a period of contact at Christmas 2018. The father applied to the court urgently. On 5 January 2019 Gwynneth Knowles J made O a ward

of court (again) and issued a collection order. I assume that the basis of jurisdiction was the presence of O in England and Wales (see ss.2(1)(b)(ii) and 3(1)(b) of the Family Law Act 1986).

19. The collection order was duly executed and on the return date on 8 January 2019 HHJ Richards discharged the wardship and recorded that the father and O would return to Dubai the following day. O has not been in England since.

20. On 5 August 2020 the father and O (and their three dogs and cat) relocated from Dubai to County Clare in Ireland. This was a permanent relocation in circumstances where the father's business in Dubai had been greatly impaired by the global coronavirus pandemic. On 28 August 2020 O began school in County Clare.

21. As recorded above, on 11 September 2020 the mother issued her application. The reason that there have been so many case management hearings is because of difficulties in serving the father. He says that he did not receive any of the documents sent to him by email and the first that he knew about the proceedings was when he received some documents in the post on 9 December 2020. The mother says that this is entirely untrue; he was well aware of the proceedings but chose to ignore them. It is not necessary for me to decide this dispute.

22. The mother's application was issued in the context of communications by text and calls between her and O in which the mother alleged that O expressed a wish to move to live with her mother in England. The mother hatched a plan to travel to O's school on Thursday, 26 November 2020 and to spirit her to England. The school became aware of this plan and foiled it. Since then the mother has had no communications with O.

23. I turn to examine the question of jurisdiction. The mother's application was made before 31 December 2020; this means that Brussels 2 lives on for the purposes of this case.

24. Under s.2(1)(a) Family Law Act 1986 the first port of call is whether jurisdiction can be established under Brussels 2 or the 1996 Hague Convention. Article 8 of Brussels 2 states:

> "The courts of a member state shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that member state at the time the court seised."

Article 5 of the 1996 Hague Convention states:

> "The judicial or administrative authorities of the contracting state of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property."

25. O is manifestly not habitually resident in England, and so there is no possibility whatsoever of jurisdiction being established under article 8 of Brussels 2. Nor is there any possibility of jurisdiction being established under article 12(3). The previous agreement of the father to vest jurisdiction in the court in 2016 under article 12(3) was,

as I have stated above, plainly limited to those proceedings which concluded with the judgment and order of Macdonald J on 10 October 2016.

26. There is no other ground within Brussels 2 for establishing jurisdiction to determine the mother's application of 11 September 2020. Nor is there any possibility of the mother establishing jurisdiction under the 1996 Hague Convention.

27. I now turn to the so-called residual jurisdiction under ss.2(1)(b)(1) and 2A(1)(a)(i) of the Family Law Act 1986. Conflating these provisions, they say that where neither Brussels 2 nor the 1996 Hague Convention applies, the court here has jurisdiction where the question of making the child arrangements order "arises in or in connection with" divorce proceedings which are "continuing". However, s.42(2) gives an extended meaning to "continuing". It provides:

> "For the purposes of this Part proceedings in England and Wales or in Northern Ireland for divorce, nullity or judicial separation in respect of the marriage of the parents of a child shall, unless they have been dismissed, be treated as continuing until the child concerned attains the age of eighteen (whether or not a decree has been granted and whether or not, in the case of a decree of divorce or nullity of marriage, that decree has been made absolute)."

This provision has been much overlooked when ss.2(1)(b)(1) and 2A(1)(a)(i) have fallen for judicial consideration. For example in *Re I (a child)* (2009) UKSC 10, where there had been a divorce, Baroness Hale said at [14]: "section 2A need not concern us as there are no continuing matrimonial proceedings between the parties, nor were any orders made in connection with them."

28. Section 2A(4) allows the court, where the residual jurisdiction is established, to make an order that no child arrangements order shall be made by any court under that jurisdiction if it considers that it would be more appropriate for that matter to be determined outside England and Wales.

29. This residual jurisdiction is similar to, but not by any means identical with, articles 12(1) and (2) of Brussels 2. Those in turn are similar to, but not identical with, article 10 of the 1996 Hague Convention. I shall refer to these as the "divorce prorogation provisions".

30. Articles 12(1) and (2) of Brussels 2 permit spouses going through divorce proceedings in country A to agree that a dispute about their child habitually resident in country B can be dealt with in country A. At least one of the spouses must have parental responsibility for the child. The jurisdiction expires on the date when the divorce is made final, but it remains alive to allow any child arrangements application pending on that date to continue to final judgment. Article 10 of the 1996 Hague Convention has an additional requirement that one of the spouses must be resident in country A.

31. The main differences between the residual jurisdiction and the divorce prorogation provisions is that the former does not depend on the agreement of the parties. Nor does the former expire on the date when the divorce is made final (or when proceedings pending on that date are made final).

32. Article 12(3) of Brussels 2 provides an additional ground of prorogation in a child arrangements case which does not depend on divorce proceedings continuing between the child's parents, or even on them having been married. If one of the parents is habitually resident in country A, or the child is a national of country A, but the child is habitually resident in country B, then the parents can agree that country A has jurisdiction to resolve a child arrangements dispute. Unlike the divorce prorogation provisions this jurisdiction does not expire but continues during the child's minority. I have explained above that this additional ground was used by the parties in this case to vest this court with jurisdiction in 2015. I note that this additional ground does not appear in article 10 of the 1996 Hague Convention, and so for cases commenced after 31 December 2020 this useful measure will disappear from our law.

33. There can be no doubt that the father and O have established habitual residence in Ireland. There have been many decisions of the Supreme Court and the Court of Justice about the meaning of the very simple concept of "habitual residence". They all come back to the decisions of the Court of Justice in *Proceedings Brought By A* [2010] Fam 42 and *Mercredi v Chaffe* [2012] Fam 22. In the former case the Court stated at [37] – [39]:

> "37. The 'habitual residence' of a child, within the meaning of Article 8(1) of the Regulation, must be established on the basis of all the circumstances specific to each individual case.
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> 38. In addition to the physical presence of the child in a Member State other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment.
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> 39. In particular, the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration."

34. There is no requirement of a minimum period of residence or of an intention of permanent residence, as Lord Reed explained in *AR v RN (Scotland)* [2016] AC 76 at [16] where he wrote:

> "It is therefore the stability of the residence that is important, not whether it is of a permanent character. There is no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely."

35. Applying this test of "some degree of integration in a social and family environment" it is clear beyond doubt that O is now habitually resident in Ireland. Therefore, any jurisdictional dispute between England and Wales, and the Republic of Ireland was, before 31 December 2020 governed by Brussels 2, and after that date by the 1996 Hague

Convention. In circumstances where these instruments apply the residual jurisdiction is thus not available.

36. In my judgment the residual jurisdiction would be equally unavailable even if O remained habitually resident in Dubai, where neither Brussels 2 nor the 1996 Convention applies. In *Lachaux v Lachaux* [2017] EWHC 385 (Fam) at [147] – [148] I expressed the view that section 2(1)(b)(i) of the Family Law Act 1986 had become obsolete with the repeal of ss 41 and 42 of the Matrimonial Causes Act 1973 by, respectively, the Children and Families Act 2014 and the Children Act 1989, followed by the later complete administrative delinking of the divorce suit and child arrangements applications. I said:

> "It seems to me that while sections 41 and 42 of the 1973 Act were in force then the idea of a child related application "in" (section 42) or "in connection with" (section 41) the divorce is very apt. But with the repeal of those sections the platforms fall away."

37. Those observations by me were all *obiter dicta* because in that case I recognised a divorce in Dubai with the consequence that divorce proceedings in England commenced by that wife were set aside. My recognition of the Dubai divorce was upheld by the Court of Appeal in *Lachaux v Lachaux* [2019] EWCA Civ 738. However, Moylan LJ did go on to disagree with my view of the availability of section 2(1)(b)(i) at [186] – [187]. His view, which was also *obiter dicta*, was that he could envisage circumstances where it would be appropriate for jurisdiction to be provided in or in connection with divorce proceedings. His single example was that provided by article 12(1) and (2) of Brussels 2. He stated at [186]:

> "I can envisage circumstances in which it would be appropriate for jurisdiction to be provided in or in connection with matrimonial or civil partnership proceedings. A simple example is that provided by Article 12 of BIIa, namely where the parents agree to the courts of England and Wales exercising parental responsibility jurisdiction when this is "connected" with the divorce proceedings. I certainly have experience of cases in which parents wanted proceedings concerning their child or children to be determined in England rather than the country in which they lived. There might be a number of reasons for this and, in my view, it would be regrettable if there was not scope to accommodate at least this type of case. This would, of course, be subject to the provisions of BIIa or the 1996 Hague Child Protection Convention ("the 1996 Convention"), but the fact that habitual residence is, for good reason, the core basis of jurisdiction does not, in my view, mean there is not a legitimate place for the jurisdiction provided by s. 2(1)(b)(i)."

38. If divorce proceedings are pending then primary jurisdiction will be established under article 12(1) and (2) of Brussels 2 and so there is no need to have recourse to the residual jurisdiction. Therefore I assume that the example given by Moylan LJ relates to a situation where the parents want to vest this court with jurisdiction some time after the

divorce has been finalised. In that case the divorce prorogation provisions do not apply (but article 12.3 would, but only in a case started before 31 December 2020).

39. In such a situation it is clear that the residual jurisdiction can be invoked only if the application is "in connection with" the now finalised divorce proceedings. Obviously, in this country, the application could not be "in" such proceedings.

40. At [187] of *Lachaux v Lachaux* Moylan LJ stated:

> "The courts should take a broad view as to whether the question arises in or in connection with the other proceedings. In broad terms all that is required is that the parties to those proceedings are "the parents of the child concerned", that the proceedings are taking place or did place in England and Wales, and that one or other or both of the parents seek a s. 1(1)(a) order because their marriage or civil partnership is being or has been dissolved. The reason the court can take a broad view is because this provision only applies if neither BIIa nor the 1996 Convention apply and because s. 2A(4) balances the broad scope of s. 2(1)(b)(i) by giving the court the power not to exercise this jurisdiction."

41. On this analysis the residual jurisdiction can, at any rate in theory, be invoked years after the divorce provided that the applicant parent can earnestly claim that the child arrangements application is being made "because" the marriage has been dissolved.

42. I agree that there must be a clear causal link demonstrated between the child arrangements application and the divorce. A causal link requires the facts giving rise to the present application to be fairly traceable to the now concluded divorce. This must be so because any other interpretation would make a mockery of the statutory requirement that the question of making the child arrangements order arises "in connection with" divorce proceedings. I would suggest that taking "a broad view" of the words of the statute does nonetheless require fidelity to their plain intention.

43. In this regard I completely agree with Parker J in *AP v TD* [2010] EWHC 2040 (Fam) at [122] where she stated:

> "Therefore I conclude that section 2(1)(b)(i) does qualify section 42(2) and does require a connection, probably a temporal connection, to be established between "the question of making the order" and the matrimonial proceedings, but how that connection is to be defined is more difficult. In the light of the Explanatory Note to the Rules introducing the amendments consequent on Brussels II Revised, a purposive construction of Section 2(1)(b)(i) would support an interpretation of the provisions bringing it into line with the provisions of Brussels II Revised, and away from the UK based "continuing proceedings" jurisdiction. The time frame of the revoked FPR 2.40 is similar to the time frame for continuing jurisdiction based on divorce in Brussels II and Article 12 of Brussels II Revised. In my judgment to fall within the residual jurisdiction there must be proximity between the divorce proceedings and the court being asked to

> determine a question of making an order in relation to children. In any case it may be that essentially the same application or issue has been before the court, unresolved, for some time, but once an order has been made, then in my view the connection with the matrimonial proceedings would terminate."

I see the criterion of temporal proximity as being the prime (but not only) metric for establishing whether there is a causal link between the child arrangements application and the earlier, now concluded, divorce.

44. The criterion of temporal proximity leads in this case to the unambiguous conclusion that the application made by the mother on 11 September 2020 was neither "in" nor "in connection with" her divorce proceedings against the father which concluded with decree absolute on 10 February 2014, 6½ years earlier. The mother cannot honestly assert that she made the application in relation to O because 6½ years earlier she was divorced from the father. The marriage and its dissolution have absolutely nothing to do with the present dispute.

45. Therefore, whether O is habitually resident in Ireland or the UAE, the residual jurisdiction is not available.

46. Accordingly, my clear conclusion is that the mother's application of 11 September 2020 has no jurisdictional foundation whether under Brussels 2, the 1996 Hague Convention, or the residual jurisdiction. It will therefore be dismissed.

47. Finally, and as a footnote, I raise a matter of procedure.

48. The mother's application of 11 September 2020 was correctly headed as being issued in the Family Court, as this is what FPR r.5.4 requires. However, there were five case management orders made after the application was issued and each of these orders stated on its face that it was made in the High Court. None of the first four orders provided for a transfer of the application to the High Court. Three of them were made by deputies who did not have the power to transfer a case to the High Court (see r.29.17 (3) and (4)). Each of these orders therefore contained an error as to which court the case was proceeding in. Each of those orders should have been headed "In the Family Court" and should have recorded that the application was proceeding in the Family Court at High Court judge level.

49. The last case management order was made on 4 December 2020. It recorded in recital 10 that the mother's application "proceeds in the Family Division rather than the Family Court because of the jurisdictional issue". Recital 11 records that "if the jurisdictional issue is resolved in the mother's favour, it may be appropriate to transfer the application to the Family Court in the appropriate local area". Order 15 provides that "if the court concludes that it has jurisdiction to make the order is sought, it shall go on to consider case management including transfer to the Family Court". Yet the order does not provide for a transfer of the application from the Family Court to the High Court pursuant to r.29.17.

50. I mention these matters somewhat wearily, and I hope not too pedantically, because it is remarkable that nearly 7 years after the creation of the Family Court there is still a seemingly ineradicable belief that if a case deserves to be heard by a High Court judge

then it has to be transferred to, or commenced in, the High Court itself. In his Guidance of 28 February 2018 (Jurisdiction of the Family Court) the then President painstakingly explained how High Court judges routinely sit in the Family Court to hear complex cases. He explained and directed that only the matters specified in Schedule A or B to the Guidance have to be heard in the High Court. This case is not one of them.

51. It is important that I again emphasise strongly that the Family Court should be regarded as the sole, specialist court to deal with virtually all family litigation. I can do no better than to set out para 30 of the President's Guidance:

> "30. It is very important for the Family Court, which has now been in existence for nearly four years, to gain the respect it deserves as the sole, specialist, court to deal with virtually all family litigation. Except as specified in the Schedule to this Guidance, cases should only need to be heard in the High Court in very limited and exceptional circumstances.
>
> (a) There is no justification for transferring a case from the Family Court to the High Court merely because it requires to be heard by a judge of the Family Division. The proper course is to re-allocate the case for hearing in the Family Court by a "judge of High Court level" or, if appropriate, a judge of the Family Division.
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> …
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> (c) There is no justification for transferring a case from the Family Court to the High Court merely because of some perceived complexity or difficulty. The proper course is to re-allocate the case for hearing in the Family Court by a "judge of High Court level" or, if appropriate, a judge of the Family Division."

52. I confirm, for the avoidance of any doubt, that I have heard this case in the Family Court. I treat the order of 4 December 2020 as saying that the preliminary jurisdictional issue shall be allocated to be heard within the Family Court at High Court judge level.

53. That is my judgment.
