

**Ontario Superior Court of Justice
393 University Avenue, Toronto, Ontario, Canada**

BETWEEN:

Raza Mahmood Jaffery
Applicant

Counsel: James S. Marks

AND

Komal Hyder Jaffery
Respondent

Counsel: Esther L. Lenkinski

HEARD:

September 15, 2011

KITELEY J.

REASONS FOR DECISION

1. This is an application by Raza Jaffery for an order pursuant to the Hague Convention on Civil Aspects of International Child Abduction that Zain Ali Jaffery born 3 April, 2010 be returned to the care of his father who will return with Zain to his habitual residence of Hall Green, Birmingham, West Midlands, United Kingdom.

Background

2. The mother was born in Pakistan and immigrated to Canada with her parents in approximately 1999. She is a Canadian citizen. After obtaining a Bachelor of Science degree at McMaster University in Ontario, Canada, she attended Kings College in London and obtained an M.A. in Mathematics.
3. The father was born in Kenya and immigrated to England approximately 20 years ago. The father is a dentist and has a practice in Birmingham.
4. The mother and father were married in England on May 10, 2008 in a religious ceremony and on August 2, 2008 in a civil ceremony. They lived in Birmingham in a home with the parents of the father.

5. Based on the affidavits of the mother and the father, there were some issues between them prior to the events on July 22, 2011 when the mother took the child and travelled by train to Essex, England where her aunt resided. The father arrived a few hours later. According to the detailed affidavit of the mother, she was fearful of her safety and decided it would be best for her if she and the child went to Canada. She took a flight on July 25th. On arrival she left messages for the father that she and the child were in Canada.
6. The mother launched proceedings in this court on July 28, 2011. She brought a motion returnable July 29, 2011 in which she asked for an order for temporary custody of Zain. In support of that motion she filed a 20 paragraph affidavit.
7. On July 29, 2011, Wilson J. denied the motion for an ex parte interim order for custody. Her endorsement indicated as follows: "I do not see any valid grounds of urgency or safety. In my view the court with jurisdiction to hear this matter is in England, where the parties were married, where they have resided since their marriage in 2008, and where the child was born and were living until the wife came to Canada July 22 [???], 2011. The respondent shall be served with this material, and is free to raise the issue of jurisdiction without attorning to the jurisdiction of this court." No steps were taken to serve the father.
8. In an application dated July 28, 2011, the father applied in England to the Central Authority for International Child Abduction pursuant to Article 12 of the Convention. In an email dated September 6, 2011, the representative of the Ontario Central Authority indicated that a border watch had been issued for the mother and the child that included Canada and the United States.
9. The father began proceedings in the High Court of Justice Family Division in London. On September 9th, 2011, an order was made that the child remained a ward of that court until further order; that the mother should cause the child to be returned to the jurisdiction of England and Wales; that following the return of the child, the mother was forbidden from causing or permitting him to be removed from the jurisdiction; that the mother was at liberty to apply to vary or discharge any provision of the order on 2 working days notice, and that the application was adjourned to be heard within 3 working days of the child re-entering the jurisdiction and in any event for further directions on October 21, 2011.
10. On September 9th, 2011, the father began proceedings in this court and brought a motion returnable September 15, 2011 in which he sought various heads of relief, including an order that the child be immediately returned to the care of his father who will return with Zain to his habitual residence in Birmingham.
11. Counsel for the mother has filed responding material that includes her original application (and supporting affidavit) brought in the Superior Court of Ontario in which

she sought custody of the child and related relief. She also provided a 91 paragraph affidavit in response to the application returnable September 15, 2011. She proposed that I adjourn the father's motion and make an order as follows: joining the mother's Ontario application with the father's Ontario application and giving the mother carriage of the proceedings; allowing the mother to amend her application; allowing the mother 30 days to file further material in response to the father's application; allowing the mother to remain here with the child; requiring the mother to surrender her British and Canadian travel documents.

12. Counsel for the mother indicates that she intends to rely on Article 13(b) of the Convention which provides that the judicial authority of the requested State is not bound to order the return of the child if the person who opposed the return establishes that there is a grave risk that his return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
13. Counsel for the father resists the request for an adjournment and asks that his application be decided immediately.

Analysis

14. On this record: (a) the child was habitually resident in England in July 2011; (b) the father had rights of custody in July, 2011 when the mother removed the child from England; (c) the removal was wrongful.
15. The mother has provided detailed affidavits both in connection with her original application and in response to the father's motion which describe considerable conflict between her and her parents-in-law and between her and the father. They also describe how she has been abused by her husband. An adjournment might serve to reinforce the evidence of the mother. But the essence of her position is well-stated at this point. The considerable conflict described is essentially amongst the adults. There is no evidence that there is a grave risk that the child would be exposed to physical or psychological harm or otherwise be placed in an intolerable situation if he is returned to the jurisdiction. I am not satisfied that an adjournment would enable the mother to provide evidence to enhance the Article 13(b) argument.
16. Article 1 describes the objects of the Convention as follows: to secure the prompt return of children wrongfully removed and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting State.
17. To meet those objects, in the circumstances of this case, I decline to grant an adjournment which would serve only to reinforce a position that is already effectively articulated.

18. Having said that, I am not prepared to grant an order that the child "be returned to the care of his father". On this record, the mother is the primary caregiver. Furthermore, her affidavit indicates that, at 17 months, the child "continues to be breastfed in accordance with Sharia Law, which requires mothers to breastfeed sons until the age of 2 years". On this record, it is in the best interests of the child that he remain in the care of the mother. I am not making an order that the mother have care and control or have custody because this court does not have the jurisdiction to do so. Furthermore, I am assuming that the mother will comply with my order and a custody order will not be required to effect the return of the child. I also decline to make an order that the child be placed in the care or custody of the father. As indicated in paragraph 4 of the order made on September 9th, the mother may apply to vary or discharge any provision of the order. I am assuming that all of the issues raised by the mother in these proceedings will be raised in the High Court and that, once she participates in those proceedings, that Court will be in a position to weigh all of the evidence and make the necessary orders in the best interests of the child.
19. In the mother's notice of motion returnable September 15th, she asked for an order that the child remain in Canada. However, if the court declined to make such an order, she asked that the father pay all travel costs for Zain and the mother to travel to England; that the father arrange to have the names of the mother and the child removed from the border watch list; that the child reside primarily with the mother; that the father visit with the child at the home of the mother's aunt in Essex; that visits be supervised by the mother; that the father deliver up for safekeeping to the mother's solicitor all passports in his name and in the name of the child and undertake not to obtain any additional passports or travel documents for the child; that the father be prohibited from removing the child from the vicinity of the mother's aunt's home in Essex; that the father provide accommodation for the mother and the child and that the father pay monthly child and spousal support.
20. The order dated September 9th provides that the child is not permitted to travel using any existing travel documentation and that no further travel documents will be issued without the express authority of the High Court of Justice. As indicated above, the Ontario Central Authority has placed the names of the mother and the child on a watch list.
21. I do not have jurisdiction to deal with most of the issues raised by the mother in her alternative request. With the exception of the travel arrangements, they can be addressed by the High Court of Justice in England. But the travel arrangements must be addressed to ensure that the mother is in a position to return with the child.

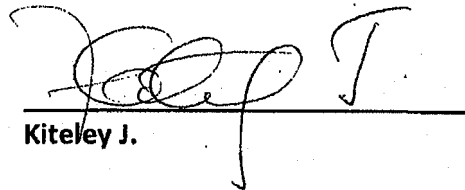
22. ORDER TO GO AS FOLLOWS:

- (a) Counsel for the father shall provide to counsel for the mother confirmation in writing from the Central Authority that the names of the mother and the child have been removed from the border watch list;
- (b) Counsel for the father shall take whatever steps are required to provide to counsel for the mother travel documents for the child;
- (c) Within 5 days of compliance with (a) and (b), the mother shall comply with paragraph 2 of the order of the High Court of Justice Family Division, namely that she will cause the child to be returned to the jurisdiction of England and Wales.

Costs

23. Counsel for the father asks for full indemnity costs in the amount of \$11468.97. Counsel for the mother resists any costs.
24. I agree with counsel for the father that the mother's conduct in wrongfully removing the child precipitated considerable legal expenses over a short period of time. However, I agree with counsel for the mother that although wrongful, she did have an explanation. The fact that a well-educated and obviously intelligent woman would take the steps she did underlines the depth of her concerns. Her conduct in wrongfully removing her son from the jurisdiction was not justified. But it also does not attract cost consequences. The request for costs is dismissed.

Sept. 16, 2011
Date


Kiteley J.