



Neutral Citation Number: [2019] EWHC 846 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3/04/2019

Before:

THE HONOURABLE MRS JUSTICE KNOWLES

London Borough of Waltham Forest v X, Y, Z and others (Inherent Jurisdiction)

Miss Anne Spratling for the local authority
None of the Respondents were given notice of the hearing

Hearing dates: 27 March 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MRS JUSTICE KNOWLES DBE

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 children and members of their 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.

Mrs Justice Knowles:

1. This was a without notice application by the local authority which sought permission to invoke the inherent jurisdiction of the High Court and thereafter orders in wardship in respect of two girls, M born in April 2003 and now aged almost 16, and K, born in October 2008 and now aged 10. The local authority sought an order for their summary return to this jurisdiction together with Forced Marriage Protection Orders and Female Genital Mutilation Protection Orders. M is a British citizen having held a British passport which has now expired. K has never held a British passport but her mother is a British citizen and so she has a claim to British nationality. The Foreign and Commonwealth Office has agreed to issue K with a passport/emergency travel document so that she might enter this jurisdiction.
2. Both M and K are presently in Somaliland. The self-styled Republic of Somaliland is a state which is currently not recognised by any other United Nations Member state. It is, however, internationally recognised as an autonomous region of Somalia. Somalia itself is not a signatory to any international instrument governing the movement of children or their welfare.
3. The mother of M and K is ID who is a British citizen. For reasons which will become apparent, she has not been given notice of this application. She is in Somaliland living with M and K. M's father is Bashir Hamza whose present whereabouts are unknown. He is said to have sexually abused an older half-sister and the brother of M. K's father is Adam Ahmed who is dead.
4. The local authority contended that the court should exercise its powers to protect both M and K on the basis of both girls' actual or presumed nationality.
5. I decided to grant the orders sought by the local authority at a hearing on 27 March 2019 and now set out my reasons for so doing.

Background

6. This local authority had no involvement with M and K or their family for reasons which will become clear. ID has older children: I, a girl born in 1994 and now aged 24 years; K, a boy born in 1999 and now aged almost 20 years; and B, a boy born in 2001 and aged almost 18 years. I is the daughter of Dean Wyse; K, B and M are the children of Bashir Hamza and K is the daughter of Adam Ahmed. About 11 years ago the mother took the four eldest children with her to live in Somaliland and K was born in Somaliland. The four eldest children travelled on British passports which have now expired. According to an account given by B to the local authority's social workers, the children did not attend school in Somaliland and were subjected to harsh treatment by their mother.
7. At the age of 13 years I was forced into marriage by her mother and there was an attempt or attempts to subject her to female genital mutilation which she successfully resisted. In 2012 I was able to alert officials in the Forced Marriage Unit of the Foreign and Commonwealth Office to her plight and she was assisted by them to return to this jurisdiction. Sadly, I's two children were subsequently removed from her care by another local authority and remain in foster care. She also had a third child who died. The death of that child and the removal of I's two other children was

because of her neglect of them. I is described in the local authority's statement as being vulnerable and is apparently, as I have already mentioned, a victim of sexual abuse by Bashir Hamza.

8. In May 2018 I alerted the Forced Marriage Unit that her brothers K and B were at risk of forced marriage. Communication with both boys was established as they had the use of a mobile phone which they kept hidden from their mother. From time to time that communication was broken as the mother kept destroying any phone which she found in the boys' possession. Initially the plan was to help the boys and their younger sisters leave but K and B were reluctant to let the girls speak to officials as they feared the girls would tell their mother, thereby jeopardising any plans for them to leave Somaliland. In September 2018 an application was made in the Family Division for forced marriage protection orders with respect to both K and B. This was refused on the basis that both boys had been out of the jurisdiction for too long and it had been some time since they had confirmed their wishes to officials from the Forced Marriage Unit. Eventually, the boys were assisted by a cousin who took them to the capital of Somaliland, Hargeisa, where Forced Marriage Unit officials made contact with them and assisted them to return to this jurisdiction on 13 March 2019. They are now living with I who resides in shared accommodation in the London Borough of Waltham Forest.
9. B and K have confirmed that both were forcibly married by their mother despite them telling her they did not want this to happen. This happened in summer 2018 and B reported that his mother had taunted him that he was gay because he told her he did not want to be married. He was forced to share a bedroom with his wife even though he did not want to do so. B has told social workers that his mother physically and emotionally abused him. B was noticeably underweight and, on medical examination, was said to be the weight of a ten year old boy.
10. B has told social workers that his mother plans to marry M to a 45 year old man in the foreseeable future. I also reported that the mother is planning to move with M and K to either the Yemen, Syria or Qatar to avoid any attempt by the Forced Marriage Unit to bring the girls to this jurisdiction. She is reportedly making sure that M and K are supervised at all times, but there is a female cousin who may be willing to help and who could speak to the girls to ascertain their wishes.
11. If the girls are returned to this jurisdiction, the local authority will assess I as a possible carer for her sisters or consider placing the girls in foster care.

The Law

12. A useful summary of the jurisprudence is provided by a decision of MacDonald J in Surrey County Council v NR and RT (Wardship: Without Notice Return Order) [2017] EWHC 153 (Fam). Paragraphs 26-33 deal with the exercise of the inherent jurisdiction based on nationality. I summarise the salient points as follows:
 - a) The Supreme Court has affirmed that the inherent jurisdiction can be exercised with respect to a child who is a British national wherever s/he may be located (A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening) [2013] UKSC 60 at paragraph [60]);

- b) In Re B (A Child) [2016] UKSC 4 the Supreme Court made a number of observations as to the circumstances in which the inherent jurisdiction based on nationality could be exercised. The use of the jurisdiction did not require the circumstances in an individual case always to be “*dire and exceptional*” or “*at the very extreme end of the spectrum*” [paragraph 59];
 - c) Re B set out three main reasons for caution when deciding whether to exercise the jurisdiction: first, that to do so may conflict with the jurisdictional scheme applicable between the countries in question; second, that it may result in conflicting decisions in those two countries; and third, that it may result in unenforceable orders [paragraph 59];
 - d) The real question which the court needed to ask itself was whether the circumstances were such that the British child concerned required the protection afforded by the inherent jurisdiction [Re B, paragraph 60];
 - e) There is a strong reason to approach the exercise of a nationality based jurisdiction with great caution because this may run counter to international legal frameworks to which this country has subscribed [Re B, paragraph 61];
 - f) The test for exercising the jurisdiction does not appear to be conclusively settled [Surrey County Council v NR and RT, paragraph 33];
 - g) A court may, albeit with great caution and circumspection exercise its inherent jurisdiction in respect of a British child who is outside the jurisdiction based on the nationality of that child where the court is satisfied on the evidence before it that the child concerned requires the court’s protection [Surrey County Council v NR and RT, paragraph 33].
13. Sir James Munby, P (as he then was) declared in Re M (Wardship) [2015] EWHC 1433 (Fam) that the Crown’s duty in relation to children extended, in the case of a child who was a British subject, to protect the child wherever he may be, whether in this country or abroad [paragraph 30]. In that case he invoked the inherent jurisdiction to make orders with respect to children who had purportedly been taken by their parents to Syria in circumstances where it was feared their lives were at risk. He commented:
- “[32] ...I add that the use of the jurisdiction in cases where the risk to a child is of harm of the type that would engage Arts 2 or 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention) – risk to life or risk of degrading or other inhuman treatment – is surely unproblematic. So wardship is surely an appropriate remedy, even if the child has already left the jurisdiction, in cases where the fear is that a child has been taken abroad for the purposes of forced marriage (as in Re KR and Re B) or so that she can be subject to female genital mutilation or (as here) where the fear is that a child has been taken abroad to travel to a dangerous war zone....”

His observations clearly survive the decision of the Supreme Court in Re B (see above) which concerned itself with a child who was not at risk of the harms identified by Sir James Munby in Re M.

14. Where a person to be protected is outside the jurisdiction of England and Wales but is nevertheless a British national, concomitant circumspection as to the exercise of the jurisdiction to make forced marriage protection orders or female genital mutilation protection orders is not engaged. Both these types of orders are ones whose terms may relate to conduct which takes place outside England and Wales as well as within England and Wales [see paragraph 63(2)(a) of the Family Law Act 1996 with respect to forced marriage and paragraph 1(4)(a) of Schedule 2 of the Female Genital Mutilation Act 2003].
15. Finally, this application was made without notice to the mother. In Re A (A Child) [2016] EWHC Civ 572, the President (Munby P as he then was) set out a number of principles to be applied to all applications made without notice. A without notice will normally be appropriate only if the case is genuinely one of emergency or other great urgency or if there are compelling reasons to believe that the child's welfare will be compromised if the parents are alerted in advance to what is going on. There must be a proper evidential foundation both for the asserted risk emanating from a parent's knowledge of the proposed application and for the level of protection required to manage that risk. An explanation of why the application is being made without notice should be provided alongside a brief account of what the applicant thinks the respondent's case is or is likely to be.

Discussion

16. Pursuant to section 100(3) of the Children Act 1989, no application for any exercise of the court's inherent jurisdiction may be made by a local authority unless the local authority has obtained the permission of the court. In this case I was satisfied that the relief sought by the local authority did not contravene section 100(2) of the Children Act 1989 and that the criteria for granting permission to a local authority set out in section 100(5) were met. Accordingly, I granted permission to the local authority to make an application under the inherent jurisdiction in respect of M and K.

Proceeding Without Notice

17. In this case I am satisfied that it is appropriate to proceed without notice to the mother. There is clear evidence that to give the mother notice of the application would result in a significant risk that the mother would seek to frustrate the court's orders by removing the children to another jurisdiction where it may be more difficult for the Forced Marriage Unit both to operate and to effect the return of the girls to this jurisdiction. Whilst I have not heard the mother's side of the story, the evidence points to her having forced three of her older children into marriage and having attempted to arrange for her daughter, I, to be the subject of female genital mutilation. I consider it is likely that she has similar aspirations for M and K and, having "lost" three of her children to this jurisdiction, will be anxious to ensure the same does not happen to M and K. To give her notice in this context would, in my view, trigger a flight with the girls out of Somaliland which would make them either much harder to locate or much harder to protect or both.

Jurisdiction

18. M and K are in Somaliland with their mother. K has always lived there though M lived in this jurisdiction for the first five years of her life. Though K has never held a British passport, she has a claim to British nationality through her mother. The Passport Office has agreed to issue her with a passport or emergency travel document to enable her to return to this jurisdiction which, in my view, constitutes an express acceptance that she has a right to such documents. The Passport Office and the Foreign and Commonwealth Office have waived the usual evidential requirements such as DNA testing to establish K's identity and entitlement to a British passport. On that basis I am satisfied that both girls are British nationals.
19. If this court does not exercise the inherent jurisdiction to make M and K wards of court, this may prove to be an impediment to their protection from forced marriage and female genital mutilation. The Forced Marriage Protection Unit has stated that orders making each girl a ward of court would assist it in demonstrating to any relevant foreign authority that, notwithstanding any objection by the mother, the court had sanctioned the protection of the girls from their mother's actions and that such orders would facilitate the return of the girls to this jurisdiction. I note that it is beyond argument that, if M and K remain in Somaliland, there is a very high risk that each will be forced into marriage and that each may also become a victim of female genital mutilation. The latter harm is a harm which engages Art. 3 of the European Convention, namely the right to protection from torture or inhuman or degrading treatment. The very high risk of these harms in this case have persuaded me that I should exercise the nationality based inherent jurisdiction notwithstanding that it is eleven years since M lived in this jurisdiction and that K has never lived here.
20. I am thus satisfied that both M and K require the protection of the court and that the appropriate means of protecting them is to make them wards of court alongside making forced marriage and female genital mutilation protection orders. I consider it almost inevitable that their welfare will require their return to this jurisdiction where the local authority can put in place arrangements for their care and protection.
21. I am also satisfied that the exercise by the court of its inherent jurisdiction based on the girls' nationality does not risk creating a conflict of jurisdiction since Somaliland or Somalia itself are not signatories to any applicable treaty alongside/with the United Kingdom. Furthermore, it is unlikely that the courts in Somaliland or Somalia would entertain an application by a local authority for protective orders in respect of M and K which required their removal from both their mother's care and from that territory. Finally, it is possible that there are steps which an English court may be able to take which might persuade the mother to obey the court's orders. In that regard, I note that the mother still claims child benefit for both M and K. The Forced Marriage Unit has raised the possibility that, as leverage to persuade the mother to comply with this court's orders, the payment of this benefit might in due course be suspended.
22. Likewise, I am satisfied that there is persuasive evidence that supports the making of forced marriage protection orders and female genital mutilation protection orders. The experiences of M and K's older siblings underscore the very high risk that the girls will become victims of forced marriage and female genital mutilation.

23. Finally, I observe that my orders pursuant to the inherent jurisdiction and to the relevant statutes are purely protective in nature. They do not seek to prescribe matters concerning the care of the girls, contact with them or their education or medical treatment.

Conclusion

24. This court will always be cautious before it accedes to a without notice application in circumstances such as this. Given the length of time since M lived here and the fact that K had never lived here, I adopted a cautious approach in this case and, following a short delay, required the matter to be returned to my court to hear argument on whether it was proper for me to make the protective orders sought by the local authority. Nevertheless, each case turns on its own facts and, in this case, I consider it appropriate to exercise my jurisdiction to protect these two British subject children for the reasons which I have explained.
25. That is my decision.