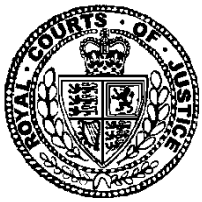

Neutral Citation Number: [2020] EWHC 877 (Fam)

Case No: FD20P00032

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/04/2020

Before :

MR JUSTICE MOSTYN

- -

Between :

VB	**Applicant**
- and -	
TR	**Respondent**

- -
- -

Mehvish Chaudhry (instructed by Dawson Cornwell) for the applicant
Katy Chokowry (instructed by Freemans Solicitors) for the respondent

Hearing dates: 4 April 2020
The hearing was conducted remotely via Zoom

- -

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.

.....

MR JUSTICE MOSTYN

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.

Mr Justice Mostyn:

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

2. RR was born on 3 September 2014 in the British Overseas Territory of Bermuda. Until 6 December 2019 he had lived his entire life in Bermuda. Each of his parents were born, and have lived their entire lives, in Bermuda. British Overseas Territory citizens have freedom to enter and live in the United Kingdom and to access its welfare services, including the National Health Service.

3. On 6 December 2019 the mother removed RR from Bermuda to the United Kingdom. As I will explain, she did so clandestinely and without the father's agreement. The child has not seen his father since. In doing so the mother has placed herself in breach of an order of the court in Bermuda which stipulates that the father should have access to his son on each alternate weekend from Friday 5:30 PM to Sunday 5:30 PM.

4. The father wishes this court summarily to order that RR be returned to Bermuda, so that the status quo ante can be restored. One would have thought, surely, that he could invoke the provisions of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, given, as I shall explain, that both United Kingdom and Bermuda are parties to the Convention. This is not in fact possible for arid technical reasons which I will explain.

5. The United Kingdom is a subscriber to the 1980 Hague Convention on the Civil Aspects of International Child Abduction. It was incorporated into our domestic law by the Child Abduction and Custody Act 1985 which came into force on 1 August 1986. Section 28(1)(c) allows Her Majesty by Order in Council to direct that the provisions of this Act may be extended to any colony. In fact, no such Order has ever been made in relation to Bermuda, in contrast, for example, to the Cayman Islands. This is because in 1998 the Bermuda legislature enacted the International Child Abduction Act 1998, which is in virtually identical terms to the United Kingdom 1985 Act. Accordingly, the United Kingdom notified the Hague Convention depository, in accordance with article 39 the Convention, that the Convention had been extended to Bermuda on 21 December 1998 and that it took effect there on 1 August 1999.

6. Section 2(1) of the United Kingdom 1995 Act states that for the purposes of the Act the contracting states, other than the United Kingdom, shall be those for the time being specified by an Order in Council. The current list is contained within the Child Abduction and Custody (Parties to Conventions) (Amendment) Order 2020 (SI 2020 No. 277). As is well-known the European Union claims sole competence to decide which accessions to the convention should be accepted and recognised. This will endure for the few remaining months that this country is subject to EU law.

7. The current list does not include Bermuda. Why is this? The answer is rooted in a colonial anachronism. For the purposes of the Convention British Overseas Territories are treated as being part of the United Kingdom. Just as the Convention does not operate between, England and Wales, on the one hand, and Scotland on the other so it does not operate between the United Kingdom, on the one hand, and British Overseas Territories on the other.

8. If a child is removed from Scotland to England it is very unlikely that there would be a welfare-based enquiry in England as to whether that child should be returned to Scotland. This is because, inevitably, an order would be made in Scotland requiring the return of the child (or some other suitable child arrangements made), and such order would be automatically recognised in England pursuant to the terms of section 25 of the Family Law Act 1986. But the mutual recognition of orders under section 25 only applies to orders made in England and Wales, Scotland and Northern Ireland. There is no automatic statutory recognition of orders between the United Kingdom and its Overseas Territories. Nor does the mutual recognition of orders regime under the 1996 Hague Convention apply to orders made in British Overseas Territories. It would seem that the only way in which a return order made in a British Overseas Territory could be recognised would be pursuant to the common law. The common law on the recognition of foreign orders about children was recently analysed by the Privy Council in *C v C (Jersey)* [2019] UKPC 40. As I understand it such a foreign order can and should be recognised unless it would be contrary to public policy to do so. The Privy Council's analysis demonstrates that in determining the question of public policy the court does not embark on a full welfare-based enquiry.

9. In this case there exist in Bermuda orders granting the parents joint custody of RR; the mother care and control; and the father access on alternate weekends. It is obviously implicit in such orders that the child should reside in Bermuda. Recognition in this country of that order would inevitably lead to a consequential order in this country for the return of the child to Bermuda. However, that is not a path that the father has adopted in this case. He has applied in Form C66 to the High Court for an order pursuant to its inherent jurisdiction for the summary return of RR to Bermuda. The decisions of the House of Lords in *Re J (A Child) (Custody Rights: Jurisdiction)* [2005] UKHL 40, [2006] 1 AC 80 and of the Supreme Court in *Re NY (a child)* 2019] UKSC 49, [2019] 3 WLR 962 confirm that this is a permissible path. However such a cause of action requires the paramountcy principle in section 1(1) of the Children Act 1989 to be applied; for the first six specific matters in section 1(3) to be specifically addressed; and for the eight matters mentioned in paras 56 – 63 of Lord Wilson's judgment in *Re NY(a child)* to be worked through.

10. This is a far cry from the exercise on an application under the 1980 Hague Convention. In such proceedings the welfare of the child, while a primary consideration, is not the paramount consideration. The court starts from the position that a return should be ordered unless a defence can be demonstrated.

11. In my judgment it is bizarre that the 1980 Hague Convention should not apply between United Kingdom and its Overseas Territories. It leads to counterintuitive statements being made in judgments such as that by Theis J in *S v S* [2014] EWHC 575 (Fam). That was another case involving a removal of a child from Bermuda. In summarising the law Theis J stated at para 21(2) "there is no basis for the principles of the Hague Convention being extended to countries which are not parties to that convention" and proceeded to go on to decide the case on the false basis that Bermuda was not a country which was a party to the Convention, when in fact it was.

12. In my judgment the law needs to be changed as between the United Kingdom and its overseas territories to provide that the 1980 Hague Convention operates between them. It is an embarrassment that if a child were taken from Bermuda to United States of America the Convention would apply, but if the child is brought here it does not.

13. Alternatively, the law needs to be changed so that the automatic recognition of orders within the United Kingdom under the Family Law Act 1986 is extended to orders made in the Overseas Territories and the Crown Dependencies.

14. I now turn to the facts of this case.

15. In the light of the national coronavirus medical emergency I directed that this case would be heard remotely by Zoom. It worked reasonably well until the conclusion of the evidence when for reasons which were not clear the mother's connection, which had hitherto been functioning clearly, was completely lost. Therefore, final submissions were made in writing.

16. The father is aged 36. He works as an electrical engineer assistant for the Ministry of Public Works. The mother is aged 37. She is a personal trainer. The parties met in 2013 and began a casual relationship which resulted in the birth of RR. He is now 5½ years of age. The father is named as such on RR's birth certificate.

17. There have been two rounds of proceedings in the Magistrates Court in Bermuda concerning RR. In July 2016 the first round was concluded on the basis of no order, an agreement as to the father's access having been negotiated in mediation.

18. The second round of proceedings began in 2018. On 21 June 2018, by consent, the court made an order for joint custody; care and control to the mother; and access in favour of the father each weekend. The court later directed the parties to attend mediation. That resulted in an agreement made on 9 July 2019 which was embodied in an order made by the court the following day on 10 July 2019. That agreement granted the father access for two nights every alternate weekend. As stated above, although the agreement and order does not explicitly state that RR must live in Bermuda, that is obviously an implied term of the order.

19. At the time that the agreement was reached the mother had formed the intention of leaving Bermuda with RR. This intention was formed in May 2019 but was never mentioned during the negotiations, or in the agreement, or in the order. What was mentioned in the agreement was that the father had agreed to the mother travelling with RR to Boston Massachusetts to receive medical treatment there between 1 May and 21 May 2019.

20. The mother has suffered from Crohn's disease since the age of 18. She says, and it is not disputed by the father, that following the birth of RR the disease has extended to the vulva. This is a rare condition, with debilitating effects. The father acknowledges this. She claims that Bermuda does not have the medical experience or facilities to deal with her condition; and that in any event she could not afford any such treatment that was on offer. Indeed, she says that the hospital that she attended in May 2019 in Boston, Massachusetts was similarly ill-equipped to deal with her condition. In contrast, she claims that the National Health Service in Birmingham is equipped to deal with her condition, and it is for this primary reason that it would not be in RR's interests for an order to be made requiring his return to Bermuda. Essentially, she claims that the only place where she can properly be treated for her condition is Birmingham, and as primary carer of RR he will, perforce, have to stay here with her. Thus, her primary argument is that it would be contrary to RR's best interests for him

to be returned to a place where his primary caregiver cannot access the necessary medical treatment for her rare and serious condition.

21. Her secondary argument is that the father in fact consented to her relocation with RR to the United Kingdom.

22. The problem with the medical argument is twofold. First, it is based virtually entirely on assertion rather than evidence. Second, if it is a good argument, and it may very well be, then it should be advanced by the mother to the court in Bermuda in a relocation application rather than to this court after having engaged in self-help.

23. At the commencement of the case the mother's counsel sought an adjournment on the basis that she had not been afforded the opportunity sufficiently to address the medical question. This I rejected. On 14 February 2019 this court had held a directions hearing which the mother attended. The mother was ordered to file her evidence by 28 February 2019. She secured public funding on 1 March 2019 and instructed her current solicitors who are specialists in this field. The statement was prepared and filed on 13 March 2019. She had ample time to say everything she wanted to say about her medical condition. Indeed, she went into it in some depth. She stated at paragraphs 21- 22:

> "I also knew from my enquiries that the hospitals in the UK were best placed to treat my particular diagnosis. Upon my return to Bermuda in May 2019, I began to seriously consider moving to the UK on a permanent basis with RR. There has never been any suggestion that I would have left RR in Bermuda or that I would have relocated without him. The whole purpose of the move was to access health care on a longstanding basis so any consideration of plans were for a permanent move; there was never a suggestion of a short term move simply for surgery or a one off medical appointment. This proposal was not discussed during mediation because it concluded on 10 July 2019 before I had properly formulated any plan."

And at paragraph 40:

> "I do not accept that it would be in RR's best interest for him to be summarily returned to Bermuda. The decision I made to move to the UK was one with RR's interests firmly at its centre. I need to be able to access medical treatment to enable me to be the best parent that I can be for RR and which also includes being able to work and provide for him financially. I cannot do this if I am in poor health. If the Court makes an Order that RR must be returned to Bermuda, then I do not know what we would do because we would be returning back to an intolerable situation. It is my understanding that without regular and updated medical treatment, my illness will only get worse. I have already spent in the region of $30,000 on medical treatment and I am in debt. It is impossible for me to be able to secure a level of health insurance with a pre-existing condition

> that would enable me to cover the costs of further and extensive invasive surgery and medication which will need to take place abroad. It is extremely distressing for me to be in this position at such a young age to know that I have a future of financial difficulties as a result of an illness which I have no control over and has no cure. I will need constant medical attention throughout the rest of my life for my current health to be maintained."

24. Following the rejection of the adjournment application the mother's counsel then applied for oral evidence to be heard. Although this court at the directions hearing had provisionally concluded that oral evidence would not be necessary, I allowed the application. Just before the mother was due to give evidence counsel for the father sent an internet link to the medical insurance that would be provided by the government to those who could not afford to make private arrangements. That link is https://www.gov.bm/sites/default/files/MKT-CA10%20-%20HIP%20and%20FutureCare%20Plan%20Guide%20v05.00_0.pdf

25. That link shows that, as a safety net, and as one would expect, the Bermuda government will provide insurance cover for its less well-off citizens. It is true that in relation to overseas treatment the cover would only extend to 60% of the cost.

26. I do not accept that the production of this material at that late stage exposed the mother to procedural unfairness. The mother chose not to back up her assertions about the Bermudan health system with documentary material exhibited to her statement.

27. The mother stated in her oral evidence that the treatment she is receiving on the NHS is intravenous Remicade every three months. This was not mentioned in any written material beforehand. There is no evidence that such treatment would not be available in Bermuda. It is used for the treatment of mainstream Crohn's disease as well as other conditions. I cannot accept, in the absence of specific evidence, that it would not be made available to the mother in Bermuda. If it were in fact not available, then that would be a good reason for the Bermuda court to consider favourably an application by the mother for relocation.

28. The mother's secondary argument, namely that the father either consented to or acquiesced in her removal of RR is completely untenable.

29. The mother first raised with the father the question of relocating to England in October 2019. It is clear that he did not agree then, or at any time subsequently, although he has from time to time expressed resignation that she would probably in the end get her way. I accept that the relevant events are as set out in paragraph 8 of the final written submissions of the father's counsel namely:

    i) On 1 December 2019 the father was asking the mother when RR's Christmas play was and whether she would spend the father's birthday with him (which is on 24 December).

    ii) On 2 December the father informs the mother that he is devastated and feels that there is nothing that he can do. The following day the mother tells the father that he is saying something different.

iii) The mother stated in her oral evidence that she booked single flights for herself and RR on 3 December 2019 and did not tell the father. There was continued communication after the flights were booked and the mother did not tell the father of her plans.

iv) On 4 December the mother offers the father sex for his consent to travel. This consent is not forthcoming.

v) On 5 December, the day before the removal, the mother asks "just say will you let me take RR" the father states "And I haven't told you that I let you take him." and asks her to share her plan. The mother does not tell the father at any point that she has flights booked for herself and the child the next day.

vi) The text messages sent by the father to the mother on 6 and 7 December demonstrate his shock at the mother's actions.

vii) The text messages from the father to the child's godfather on 6 December also demonstrate his distress: "she took my son away. Im flippin devastated. Baby mama got him on a plane somehow… I'm flippin broken right now." "My brother she flippin kidnapped him".

viii) The father immediately reported the matter to the police in Bermuda and restored the matter to the Bermudan courts. The court found on 13 December 2019 that the mother had removed the child in breach of court orders. The father's actions following the removal demonstrate that he did clearly not consent to the removal.

30. The mother's oral evidence was that the father's agreement was never given in writing but was verbal. I reject this. I find as a fact that the father never explicitly consented to, or tacitly acquiesced, in the removal of his son from Bermuda.

31. Having made these primary findings, I now turn to the exercise mandated by section 1 of the Children Act 1989. In making my decision RR's welfare shall be my paramount consideration.

32. I do not have any direct evidence of the wishes and feelings of this five-year-old boy. I doubt that at his age, given his level of maturity, direct expressions of his wishes and feelings would have any relevance. I am certain that he is suffering from the separation from his father – one of the two most vital figures in his life.

33. As to his physical and emotional and educational needs I have little doubt that his mother is dealing satisfactorily with his physical needs. As stated above, his emotional needs will be impacted severely by his separation from his father. It is noteworthy that notwithstanding that four months have passed since his arrival in the United Kingdom the mother has not secured school enrolment for him. This is a serious disadvantage. Plainly, his emotional needs require that his primary caregiver does not suffer from needless health problems. However, I cannot accept, for the reasons I have given above, that the mother's health problems cannot properly be treated in Bermuda. If I am wrong about this then that will be, as I stated above, a strong reason for the Bermuda court to consider positively an application by the mother to relocate.

34. The likely effect on RR of a return to Bermuda is, in my assessment, positive. His relationship with his father will be restored and the emotional harm that is being inflicted on him by the rupture of that relationship will be brought to an end.

35. I have already dealt above with RR's age, sex and background. I have also dealt with the harm that he is likely to suffer if he is not returned to his homeland and his relationship with his father restored.

36. Both of his parents are capable of meeting his needs although I have my concerns at the selfish and high-handed conduct which the mother has engaged in. I agree with counsel for the father's submission that she has acted deceitfully and arrogantly; these are not good standards of parenting.

37. I now turn to Lord Wilson's eight linked questions.

    i) I am satisfied that the evidence before me is sufficiently up-to-date to enable me to make the order which is sought.

    ii) I am satisfied that I can make, and indeed have made, findings sufficient to justify an order for summary return.

    iii) I have carefully considered all the six matters in section 1(3) of the 1989 Act.

    iv) There are no allegations of domestic abuse to be investigated.

    v) I am satisfied that were the mother to return to Bermuda with RR that she could accommodate herself and RR satisfactorily, as before.

    vi) I allowed oral evidence to be given.

    vii) It was not suggested that the matter should be adjourned for a Cafcass report. Had it been I would have rejected the application as I do not regard that at aged five the child's wishes and feelings would be relevant to the decision I have to make.

    viii) I am completely satisfied that the court in Bermuda is fully equipped to deal with any further child arrangement issues which may come before it, including any application by the mother to relocate to the United Kingdom.

38. Pulling the threads together I am abundantly satisfied that it would be in RR's best interests for him to be returned to Bermuda. This is a case where the mother clandestinely and deceitfully engaged in self-help. The law has always set its face against self-help. One of the oldest statutes in force in this country, the Statute of Marlborough 1267, explicitly outlaws self-help. It is important, unless it is shown to be contrary to the best interests of the child, that the self-help engaged in by the mother in this case is reversed, and the status quo ante restored.

39. I accept the father's undertakings proffered in support of a soft landing. This includes the purchase of flight tickets for the return of both mother and child. The mother has additionally asked that the father undertake to support her and the child at the rate of $2000 a month. That would be completely inappropriate. The question of general maintenance for the mother and the child must be for the Bermuda court alone.

40. There has been a suggestion within the context of the current coronavirus medical emergency that a rescue flight from this country to Bermuda will depart early this week. In order to be registered to go on that flight a commitment had to be made by 3 April 2020. That date has come and gone. The mother is plainly in a vulnerable medical condition. I do not think that it is reasonable to expect her to travel back with the child until the UK government has stated that it is safe for people in vulnerable conditions to travel. However, I will receive further submissions in writing as to when RR should be returned to Bermuda.

41. Finally I would make the obvious point that even at this late stage it is open to the mother to apply now, and necessarily remotely, to the court in Bermuda for an interim order permitting her to remain in this country pending the hearing of a substantive application by her for relocation. Were such an order to be made, then, of course, my order for return will be set aside. The order giving effect to my decision will provide for this.

42. I give leave to both parties to disclose the papers in these proceedings, as well as this judgment, to the court in Bermuda.

43. That concludes this judgment.