

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE <https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/>

**IN THE FAMILY COURT
AT WAITAKERE**

**I TE KŌTI WHĀNAU
KI WAITĀKERE**

**FAM-2020-090-000223
[2023] NZFC 6888**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[FAREEHA AHMAD] Applicant
AND	[IMRAN HASSAN] Respondent

Hearing: 22 June 2023

Appearances: M Saini for the Applicant
J Moore for the Respondent
F Shah as Lawyer for the Child (via teleconference)

Judgment: 22 June 2023

ORAL JUDGMENT OF JUDGE R VON KEISENBERG

[1] This is an application under s 77 of the Care of Children Act 2004. That provision gives the power to the court to make an order preventing the removal of children from the New Zealand jurisdiction. An order preventing removal of the children [Rafiq Hassan] born on [date deleted] 2012 and [Aziz Hassan] born on [date deleted] 2014 was made on 10 February 2021 upon application by the father Mr [Imran Hassan].

[2] Mr [Hassan] is represented today by Ms Moore, the respondent mother [Fareeha Ahmad] is represented today by Ms Saini. Ms Shai is lawyer for the child and has joined us by way of teleconference.

[3] The history of the matter is set out in some detail in the submissions filed by Ms Saini for this application to suspend the OPR to enable Ms [Ahmad], to take the two children of the marriage [Rafiq] and [Aziz] with her to visit her sister in the United States.

[4] The background to this application is that on 2 June 2023 the applicant filed a without-notice application seeking the suspension of the OPR to allow her to travel following her sister's bypass surgery. The intended travel was from 27 June to 30 July. That application was placed on notice. The Judge in her minute noted that the issues in dispute were urgent and that the matter should be dealt with on the without-notice track. The Court directed that the time for service was 72 hours.

[5] The respondent was served on 6 June, but he did not file his respond until 13 June. The grounds for Mr [Hassan]'s opposition is that he claims that Ms [Ahmad]'s reasons for travel are contradictory. Secondly and most significantly he claims that she, Ms [Ahmad], has strong reasons to relocate to the United States. The basis for this claim is that he says the applicant's entire family apart from her brother now reside in the US. I have heard and I will address each of those claims shortly. He says that at the time they separated she had considered moving to the US.

[6] In response to his claims at paragraph 6 of his affidavit, Ms [Ahmad] says that his refusal to allow her to travel with the children is an example of the power and control that he continues to exert over her despite being separated. The example she gave was that the respondent has refused to grant her a talaaq, which is an Islamic divorce to end the marriage. I have heard submissions from counsel at length on this issue and from the parties themselves.

[7] I must acknowledge this issue is not a matter before me but it dominated the hearing today. I am pleased to record what the parties have agreed on this issue. The evidence is that because Mr [Hassan] refused to grant her a talaaq, Ms [Ahmad]

approached the religious leaders in their mosque to mediate. Ms [Ahmad] is a devout Muslim and his refusal to release her from the Islamic marriage has caused her considerable anxiety. It is not in dispute is that the parties do not enjoy an amicable relationship which was only too clear from the hearing today. The respondent, Mr [Hassan], applied and was granted an order dissolving the parties' marriage under NZ law, however he still feels aggrieved about how the marriage ended (it was Ms [Ahmad]'s decision to end the marriage) and is one of the reasons he refuses to grant Ms [Ahmad] a talaaq.

[8] I am not an expert in Sharian law, but I have had the benefit of hearing from lawyer for child Ms Fazilat Shah, who has a thorough understanding of the issues involved in this matter. The reason I am addressing the issue in detail is that Mr [Hassan] does not believe the responses or explanations given by Ms [Ahmad] about her travel plans are genuine. He does not trust her. Mr [Hassan] denies that by refusing to agree to an order suspending the OPR, that this is evidence of power and control issues in the relationship and relies on the fact that he applied and was granted the dissolution of marriage upon two years of separation. He has now remarried.

[9] My understanding based on what the parties and Ms Shah have explained today is that unless there is a religious determination to end the marriage either by way of a *talaaq*, which the husband has to agree to before that can occur, or by way of a *khulanama* the applicant Ms [Ahmad] is not free to move on. In the absence of a *khulanama* or the *talaaq*, Ms [Ahmad] is unable to re-marry if that was her desire. For a *talaaq* the wife can seek a formal end to the marriage through the Iman or religious leaders. There is a different process for the *khulanama*, and can require the wife to attempted to do a *khulanama* through the Iman without success and was according to Ms [Ahmad] like shifting sand. By that I understand that despite providing everything which was asked of her by Mr [Hassan], he still refused and the *khulanama* did not occur.

[10] However, I am pleased to record that there has been some progress on this issue today and Mr [Hassan] agrees that he is now willing to sign the *khulanama* and bring the matter to an end. He acknowledges that he is not seeking anything else from her.

[11] I return to the issue requiring determination today and that is whether I should grant an order suspending the OPR to allow Ms [Ahmad] to travel with the children to her sister in Detroit. Mr [Hassan] has questioned the detail or lack of detail on the medical certificate which was attached to the affidavit concerning the sister's health, it simply records that she has had a CABG, coronary artery bypass graft. It is not being suggested by him that what her sister has suffered is not genuine. Mr [Hassan] questions why she needs to travel with the children because she only saw her parents at the start of the year. He has made it clear today that he does not trust Ms [Ahmad] and believes that this is evidence she intends to relocate. I enquired of his counsel what additional evidence he has over and above the 2020 affidavit he attached to his opposition, she confirmed there was no other evidence of Ms [Ahmad] trying to relocate. Mr [Hassan] simply believes very strongly that she will not return.

[12] In her evidence the Applicant says she has been in the same rental accommodation for four years, she now has a job training with [occupation deleted]. Importantly Mr [Hassan] arrived in New Zealand in 2006. Ms [Ahmad] has been in New Zealand since 2011. Both parties are New Zealand citizens. Ms [Ahmad] because she is a New Zealand citizen no longer has an Indian passport. The children were born in New Zealand in 2012 and 2014.

[13] When I questioned Mr [Hassan]'s fear about the mother relocating to the United States with the children, I asked him she was going to get past the ESTA requirements and the extremely tight US immigration system. An ESTA is the visa required to travel to USA – the parties must produce return tickets and show where they will be living and how much money they have to support themselves while in the US.

[14] It is also an important aspect of this decision which I am going to make is that the USA is a Hague Convention signatory. In addition, a bond has been offered. Ms Moore on behalf of Mr [Hassan], seeks a \$20,000 bond so that he can bring proceedings under the Hague Convention. What I have heard from all counsel today is that if there was a breach of the Hague the central authority funds the legal proceedings to bring the children back to NZ.

[15] The mother is seeking to travel with the children during the school holidays give or take. I have heard from Ms Saini today that if I make an order allowing the children to travel in that period that the father will be offered the following holidays in their entirety.

[16] I turn briefly to the lawyer for child's report. Ms Shah met with the children, and they have been asked about or the proposed plans to travel.

[17] [Rafiq] told his lawyer that he was aware of the plans, he was really excited about going but had not talked to his dad about it as he was going to see him the next day. He told his lawyer that he had spent time with his mother's family in January when they went to Christchurch on a plane, and it was exciting for him.

[18] [Rafiq]'s views about the trip is that he really wants to go, he is excited to see his aunt, grandparents and cousins. [Rafiq] says he wants to become a doctor. [Aziz], year 4, loves his school, he has like his brother obtained numerous awards at school. [Aziz] reported that everything was good in both homes but sometimes his dad screams at them, and that sometimes he is scared of him. He said he wants to travel to the USA and spend time with his maternal family. He said he would feel sad if he could not go and was not worried about missing a few days of school. He also wants to be a doctor.

[19] Lawyer for child summarised her attendance: that the children present as confident and articulate and are doing very well academically. Lawyer for child supports the application to suspend the OPR. She said the USA is a signatory to the Hague Convention and she supports the travel because it is supported by s 5 principles about maintaining and growing family ties.

Discussion

[20] In considering an order suspending an OPR under s 77 it is essentially a risk analysis which must be undertaken. What are the benefits to the children in travelling versus the risks that they do not return to New Zealand? I am satisfied that if the appropriate provisions are put in place that these children should travel and I intend to

make that order suspending the order preventing removal. I impose a \$2,000 bond to be paid by the mother to the registrar on the basis that the money will be forfeited if the children are not returned as planned.

[21] The traveling parent Ms [Ahmad] is to provide final copies of the child's passports and in that regard I understand there is an urgent application for a passport for the younger child that needs to occur. This suspension will allow her to apply for that passport. That application for the passport must be shown to the father. The father's consent is not required because I am making an order for the passport to be obtained for the child by the mother. The mother is also to provide the final tickets and travel documents and an itinerary including contact phone numbers and addresses where the children will be staying to lawyer for child and to counsel for Mr [Hassan].

[22] The contact for Mr [Hassan] while the children are in the United States will be on WhatsApp twice a week, that is video contact of up to half an hour. Counsel Ms Saini for Ms [Ahmad] has provided me with a draft order for suspending the order preventing removal. There are a couple of amendments which I am going to make to it.

[23] The bond I have already specified is recorded at a bond of \$2,000 to be paid by the applicant mother to the Waitakere Court registry. I have already stated that the mother will provide up to date tickets, travel documents, passports and itinerary of the planned visit including contact phone numbers and addresses to the respondent where the children will be staying. The contact has been specified here which is that while the children are in the USA the respondent father will have contact with them twice a week for up to 30 minutes via WhatsApp, Ms [Ahmad] is to facilitate the WhatsApp contact.

[24] There are also additional terms which Ms Saini has mentioned but I am going to add to the order. This is that the children's habitual place of residence is New Zealand. I am also going to record both parents have rights of custody of the children and the jurisdictional requirements of the Hague Convention are established. Thirdly it will also record that both parents are able to provide day to day care for the

children and any assertion that the children are at risk physically or psychologically in the presence of a non-travelling parent is without justification.

[25] I will explain what this means Mr [Hassan] and why I am doing this. I am also putting in the order that the court of originating jurisdiction is the Waitakere Family Court and neither party is to make applications in relation to the child to any other court in New Zealand or overseas. Clause 7(b) will state that New Zealand has exclusive jurisdiction to hear and to determine any parenting, guardianship, custody disputes and all matters relating to the care of the children.

[26] The suspension of the order is to enable the children to travel to the USA from 27 June to 20 July. The court authorises Ms [Ahmad] to obtain ESTA visas to enable the children's travel to the USA for the above-mentioned period.

[27] Upon the children's return the passports are to come back to the Family Court at Waitakere at the registry by 24 July. Notice that the passports have been returned will be provided to Ms Moore or Mr [Hassan].

[28] I would appreciate if you Ms Saini can tidy up the rest of the orders and I can have a look at the final draft while I am still here.

[29] The reason Mr [Hassan] I have put in these additional clauses about habitual residence and that both of you have rights to custody, is that these are usually the grounds that people use if they are trying to stay in another country. In short it is a further protection to ensure that the children will return to New Zealand.

[30] In conclusion, I have made orders and I am inviting Ms Saini in conjunction with Ms Moore and Ms Shah to finalise those orders and tidy these up for sealing.

Judge R von Keisenberg
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 02/07/2023