[2015] JMCA App 27

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 96/2015

BETWEEN	**SHERIKA DARE**	**APPLICANT**
AND	**ISRAEL CARMET-CACHADINA**	**RESPONDENT**

Roderick Gordon and Kereene Smith instructed by Gordon McGrath for the applicant

Mrs Judith Cooper-Batchelor instructed by Chambers Bunny and Steer for the respondent

2, 3, 10 June and 17 July 2015

IN CHAMBERS

PHILLIPS JA

[1] On 10 June 2015, I gave my decision that the amended notice of application filed on 27 May 2015, to stay the execution of the order of Her Honour Mrs D Gallimore-Rose dated 2 March 2015, which was varied on 11 May 2015 pending the determination of the appeal filed on 18 May 2015, was granted. I promised that my reasons would be made available shortly. This is a fulfillment of that promise.

[2] The details of the order(s) of the learned judge of the Family Court which the applicant sought to be stayed are set out below.

Order dated 2 March 2015:

> "**IT IS HEREBY ORDER INTERIM EX-PARTE:**
>
> Custody to father.
>
> Liberal access to mother within the jurisdiction of Jamaica upon her immediate return of the child [IC] to the said jurisdiction.
>
> Substituted service is hereby ordered on mother by e-mail at S.A. DARE@G-Mail.Com and on Marjorie Dove maternal grandmother of 18 Trinidad Road, Kingston 11, St. Andrew.
>
> Dated the 2nd day of March, 2015."

Varied order dated 11 May 2015:

> "Upon hearing the parties and taking evidence in this matter the order made on the 2nd of [*sic*] day of March, 2015 is varied as follows:- Interim Custody to father. Access to mother within the jurisdiction of Jamaica every other weekends [*sic*] and half holidays until further ordered. Father is permitted to travel with the child to Jamaica.
> Application to set aside the order of March 2, 2015, is refused.
>
> Dated the 11th day of May, 2015."

Background

[3] The above orders were made in respect of the applicant and the respondent with regard to IC who was born in Jamaica on 25 June 2010. The applicant is the mother of IC and a Jamaican national while the respondent is the father of IC and a Spanish national, habitually resident in Jamaica.

[4] The respondent had initiated custody proceedings in the Family Court for the parishes of Saint James, Hanover and Westmoreland ("the Family Court") after he had

started to experience difficulties in obtaining access to his daughter. The proceedings were presided over by Her Honour Mrs D Gallimore-Rose and out of those proceedings the applicant and the respondent arrived at a settlement agreement dated 13 November 2013. The settlement agreement was endorsed by the learned judge of the Family Court and concluded the custody proceedings before the court.

[5] The relevant terms of the settlement agreement for the purposes of this application provided that:

> "**1. CUSTODY.**
>
> a. Both parties agree to joint custody of [IC]; and
> b. Her Mother will continue to have care and control of [IC] and [IC] lives with her Mother; [sic]
>
> **2. VISITATION.**
>
> a. [IC] will spend every other weekend in Montego Bay with her Father commencing the week following the date of this agreement;
> b. [IC] will spend every other Christmas day with her Father commencing the year after this agreement;
> c. [IC] will spend mid-term holidays with either parent based on the weekend on which the respective holiday falls; and
> d. Time spent during the longer school holidays (Christmas, Easter & Summer) is to be divided equally between SHERIKA and Israel.
>
> **3. OVERSEAS TRAVEL.**
>
> a. Both Passports are to be kept by her Mother;
> b. Israel to be given passports as requested upon reasonable notification to SHERIKA of intended travel; and
> c. Each party must inform the other of overseas travel plans involving [IC], providing the other party with adequate details of such plans including contact information."

[6] On 10 February 2015 (about one year and three months after the settlement agreement had been signed by both parties), the respondent filed in the Family Court a petition under the Children (Guardianship and Custody) Act, with affidavit in support, for him to be granted custody of IC on the ground that the applicant had breached the settlement agreement, taken IC to Australia and that he would be better able to give his daughter a happy home in the country in which she was born. The application was heard *ex parte* by Her Honour Mrs D Gallimore-Rose, who had presided over the previous custody application.

[7] The respondent in a further affidavit, sworn to on 2 March 2015, in support of the *ex parte* custody application, before the learned judge of the Family Court stated that:

> " …
>
> 4. I went to China on a business trip in October. The [applicant] had previously told me that she wanted to take [IC] to Orlando to Disney World in October 2014 for the heroes weekend. I agreed.
>
> 5. On October 17, 2014 I sent [the applicant] a message via whatapp [sic] asking her if she was still going to Orlando. Her response was that she and [IC] were going to Australia.
>
> 6. I was shocked. She told me that this was a last minute decision as her fiancée was worried about Chickungunya. She told me that it was a four (4) week trip and that they would be back in time for me to spend Christmas holiday with [IC].
>
> 7. I did not agree to [IC] going but decided to wait the four weeks for [IC] to be returned.…"

[8] The respondent then stated through paragraphs 8 to 10 of the affidavit that the applicant had failed to return to Jamaica as anticipated in November 2014. However at his insistence that IC be returned to Jamaica, the applicant promised to have her back home in January and sent him the flight itinerary which had a scheduled return date of 27 January 2015. On 20 January 2015, the applicant had informed him that her paperwork with regard to her residency in Australia was taking longer than anticipated and as a result she could not say when she would return to Jamaica. Additionally, the respondent discovered that the applicant had married her fiancée, six weeks after she had left Jamaica.

[9] In paragraph 11 of the affidavit, the respondent stated that although he was able to communicate with IC via Skype, he was of the view that the applicant had no intention of returning to Jamaica to live and therefore he was being deprived of his court ordered access to his daughter. He also stated at paragraphs 13 and 14 of the affidavit that he was unaware of IC's address or school information and had expressed concern that the applicant was trying to "cut" him out of his daughter's life.

[10] Upon perusing the relevant affidavits of the respondent and having heard the submissions of counsel for the respondent, Mrs Judith Cooper-Batchelor, an interim *ex parte* order dated 2 March 2015, was made by Her Honour Mrs D Gallimore-Rose as set out at paragraph [2] herein.

[11] An application was thereafter filed in the Family Court by counsel for the applicant, to set aside the *ex parte* order of the learned judge of the Family Court,

made on 2 March 2015. The matter was heard on 11 May 2015. The applicant was absent from the hearing but an affidavit, sworn to on 4 May 2015, in support of the notice of application to set aside the *ex parte* order, had been filed and exhibited thereto a letter dated 22 April 2015 from Dr Liz Davidson MBBS, FRACGP. The letter stated that the applicant had been advised not to undertake any extended travel, including air travel, due to having been experiencing severe morning sickness as a result of being 10 weeks pregnant and consequently was unable to attend the hearing.

[12] It was stated in the applicant's affidavit that since the signing of the settlement agreement dated 13 November 2013, her circumstances had changed. She stated as follows in the respective paragraphs:

> "4. …I became engaged to an Australian. By virtue of my engagement, it was envisaged that I would spend the majority of my time in Australia and therefore it was necessary for [IC] to acquire residency in Australia. In my capacity as the parent with whom she resides, it was only natural that [IC] would reside in Australia as well. In light of this development, I consulted with the [respondent], informed him of my new relationship, my intention to be married in December 2014 and the necessity for [IC] to acquire permanent residency in Australia. The [respondent] agreed to support my application on [IC's] behalf for a permanent visa and, he even signed an application indicating his consent to said application. I exhibit hereto a copy of said application marked "**SD 3**" for identity.
>
> 5. …
>
> 6. …
>
> 7. The [respondent] has claimed that I have breached the Settlement Agreement however, I have not breached any of the terms thereof. The Settlement

> Agreement provides that I inform the [respondent] of overseas travel plans and I did so and gained the [respondent's] consent. The [respondent] is free to visit [IC] in Australia and I am willing to permit [IC] to visit with the respondent and spend alternate holidays with him as previously agreed. Therefore, I have fully complied with the terms of the said Settlement Agreement.…
>
> 8. …
>
> 9. …
>
> 10. …I did not believe that it would be necessary to go through the Court in order to arrive at an agreement that [IC] and I move to Australia. In fact, the [respondent] consented to [IC] moving to Australia since in a Statutory Declaration signed by him in support of the application for a permanent visa, the [respondent] himself wrote '*I agree on [sic] my daughter, [IC] to apply for a permanent visa for Australia*'...I exhibit hereto a copy of said Statutory Declaration marked "**SD 4**" for identity."

[13] The learned judge of the Family Court on 11 May 2015, after having heard Mr Roderick Gordon, attorney-at-law for the applicant and, Mrs Judith Cooper Batchelor, attorney-at-law for the respondent, varied the order dated 2 March 2015 and refused the application to set aside the *ex parte* order, as stated at paragraph [2] herein.

[14] The respondent thereafter communicated to the applicant that he would be travelling to Australia on 15 June 2015, to return IC to Jamaica.

[15] On 18 May 2015, the applicant filed a notice of appeal in the Family Court against the order of the learned judge of the Family Court, dated 2 March 2015, which had been varied on 11 May 2015, and also initiated custody proceedings in Australia.

The details of the order as stated in the appeal are not entirely accurate when compared with the signed order of the learned judge of the Family Court Mrs D Gallimore-Rose. The details of the order stated as being the order appealed from in the notice of appeal, were stated as follows:

> "(a) The ex-parte Order of 2nd March, 2015 is varied as follows:-
>
> (i) Interim Sole Custody of [IC] is granted to the Applicant, Israel Carmet-Cachadina; and
>
> (ii) The Applicant is permitted to travel to Australia in order to retrieve [IC] from her mother, the Respondent and return her to this jurisdiction [sic]"

[16] The applicant in her notice of appeal had filed several grounds of appeal. They were stated as follows:

> "(a) The learned Resident Magistrate erred in law in not setting aside her ex-parte order as it was an order that could not have been made having regard to the best interest of the child, given the fact that the child has lived with her mother since birth, and solely with her mother since January 2013.
>
> (b) The learned Resident Magistrate erred in law in not setting aside her ex-parte order for *audi alteram partem* and the denial of the Appellant's constitutional right to a fair hearing.
>
> (c) The learned Resident Magistrate erred as to law when she made the Order she did, since to make such an Order, she would need current and relevant information of the living conditions, schooling, health and welfare of the child, which was not available to her.

(d) The learned Resident Magistrate erred in law and in the exercise of her discretion when she awarded sole custody to the Respondent, since she did not have sufficient evidence before her to consider what would be in the best interest of the relevant child.

(e) The learned Resident Magistrate erred when she failed to give due regard or sufficient/ and or proper regard for the documentary evidence before her that showed that the Respondent had consented to [IC] residing in Australia.

(f) The learned Resident Magistrate erred when she failed [sic] give due consideration to the fact that denying the Appellant custody of [IC] is not in [IC's] best interest. The learned Resident Magistrate thereby offended the overriding principle in child custody cases, that the welfare of the child is paramount.

(g) The learned Resident Magistrate erred and misdirected herself as to the law and when she gave insufficient regard to the authorities declaring the law and the relevant principles on the issue that have [*sic*] handed down by Courts of superior jurisdiction, on whose decision she is bound.

(h) The learned Resident Magistrate erred in exercising her discretion on whether to set aside the previous order made ex-parte, in light of new evidence showing the Respondent's consent to [IC] moving to Australia; and the material non-disclosure by the Respondent to her on 2nd March, 2015

(i) The learned Resident Magistrate erred in law and in the exercise of her discretion when she failed to consider that her [sic] Court may not be the proper/ or appropriate forum for the application made by the Respondent, since the relevant child is not in this jurisdiction."

[17] On 27 May 2015, an amended notice of application was filed, to stay the execution of the order of Her Honour Mrs D Gallimore-Rose dated 2 March 2015, which was varied on 11 May 2015, pending the determination of the appeal. Seven grounds have been advanced in respect of that application. Those grounds are as follows:

> "(a) Rule 2.11 (1) (b) of the Court of Appeal Rules, 2002 provides for an application of this nature to be made to a single Judge in Chambers.
>
> (b) The stay is necessary to preserve the status quo, ensure the welfare of the relevant child and the Applicant's interest therein, pending the determination of the Appeal.
>
> (c) If the stay is not granted then the relevant child will face disruption in her life that is not in her best interest.
>
> (d) Whilst the Respondent will suffer no significant harm should the stay be granted, a refusal to grant the stay will be prejudicial to the welfare of the relevant child and may cause her undue distress and irreparable psychological harm.
>
> (e) The interest and administration of justice will not be compromised by the stay of the Order, pending the determination of the Appeal. Indeed, there is a real risk of injustice, particularly to the relevant child, who would be uprooted from her life in Australia and the care of her mother, if the stay is refused.
>
> (f) The Applicant has a real prospect of success on Appeal, and it is in the interests of justice with regard to the welfare of the relevant child, that the Applicant be allowed to have the Order of the Resident Magistrate stayed until this Honourable Court determines the Appeal.
>
> (g) The costs attendant to relocating [IC], and her return to Australia are significant, and ought to be taken into account."

Submissions of the applicant

[18] Counsel for the applicant, in his written submissions, contended that the relevant principles to be applied by the court upon consideration of the application for the grant of a stay of execution were whether the appeal had a reasonable prospect of success and whether greater injustice would be caused by a grant or refusal of the stay of execution, re **Jamalco (Clarendon Alumina Works) v Lunette Dennie** [2010] JMCA App 25 and **Caribbean Cement Company Ltd v Freight Management Limited** [2013] JMCA App 29.

[19] Counsel submitted that the applicant's appeal had a real prospect of success based on the errors which the learned Resident Magistrate had made when she had considered the evidence before her and the precedent set by the authorities cited on behalf of the applicant, at the interim hearing.

[20] Counsel relied on **National Commercial Bank Jamaica Limited v Olint Corp Limited** Privy Council Appeal No 61 of 2008, delivered on 28 April 2009, to submit that the applicant ought not to have been denied her right to be heard, as the circumstances which had existed in the respondent's case did not warrant an *ex parte* hearing. Thus the learned Resident Magistrate had erred in not applying the principle *audi alteram partem* to the case. With respect to this averment counsel referred to paragraph [13] of the **National Commercial Bank v Olint** case where Lord Hoffmann stated as follows:

> "…Although the matter is in the end one for the discretion of the judge, *audi alterem* [sic] *partem* is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no

> notice has been given unless *either* giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a *Mareva* or *Anton Piller* order) *or* there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act…Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none."

[21] Counsel contended that the settlement agreement was effectively a consent order. He relied on **Marsden v Marsden** [1972] 3 WLR 136 to submit that the learned Resident Magistrate having been privy to and having endorsed the settlement agreement, ought to have exercised extreme caution in interfering with its terms. Further, counsel relied on **LM v CS** [2013] JMCA Civ 12, to submit that there had been no evidence presented to the court, by the respondent, which demonstrated that there was a change of circumstances to the degree that the settlement agreement was no longer in IC's best interest; thus the learned Resident Magistrate having varied the settlement agreement had nonetheless erred in the exercise of her discretion.

[22] Counsel relied on the Supreme Court decision of **Richards v Richards** (2008) Claim No 2007 M 00756, delivered on 2 September 2008, to submit that the return order had been wrongly made by the learned Resident Magistrate and that in granting sole custody to the respondent, the learned Resident Magistrate had really sought to punish the applicant and was not acting in the best interest of IC.

[23] Additionally, counsel submitted that the learned Resident Magistrate had erred in the exercise of her discretion as she had made no inquires in respect of IC's state of affairs as to whether she was settled in Australia, healthy, or whether her religious and emotional needs were being met. Furthermore, no evidence had been elicited from the respondent to determine whether he was in a position to care for IC or assume full time responsibility for her care before he was awarded sole custody.

[24] Counsel also submitted that although the learned Resident Magistrate had not been a stranger to the matter, she had not taken advantage of that, as the cross-examination of the respondent at the *inter partes* hearing on 11 May 2015 had been limited by the learned Resident Magistrate. The cross-examination of the respondent had been limited to the itinerary, which the respondent had obtained from the applicant, to show the date that the applicant had scheduled for her and IC to return to the jurisdiction, and that it was on that basis which the respondent had signed the application for the permanent Australian visa. Counsel submitted that this limited cross-examination of the respondent did not allow the learned Resident Magistrate to be as familiar with the matter as she should have been.

[25] Counsel argued that the learned Resident Magistrate had erred in law and in the exercise of her discretion when she had failed to set aside the grant of sole custody of IC to the respondent, at the *inter partes* hearing, in light of counsel's submission that the respondent had failed to make full and frank disclosure. Counsel submitted that the non-disclosure pertained to the respondent's failure to alert the court at the *ex parte*

hearing that he had agreed to the applicant obtaining a permanent visa on IC's behalf and had signed a statutory declaration evincing that consent. The case of **Brink's Mat Ltd v Elcombe and Others** [1988] 1 WLR 1350 was cited in support of that submission.

[26] Counsel submitted further that in applying the test approved by McDonald-Bishop JA (Ag) in **Sagicor Bank Jamaica Limited v YP Seaton and others** [2015] JMCA App 18, to the issues raised in the appeal, the appeal could not be deemed "unmeritorious" or "completely unarguable". Accordingly, counsel contended that a stay should be granted to preserve the status quo and ensure that IC did not experience any unnecessary disruption in her life until the appeal was determined, which would be in IC's best interest. Counsel also submitted that it would be costly for the applicant to finance IC's relocation and trip back to Australia should the respondent be permitted to bring IC to the jurisdiction and the appeal is determined in the applicant's favour. However counsel noted that on the contrary there would be no prejudice to the respondent should a stay be granted as he was free to communicate with IC via phone and video calls and he was also free to visit her.

[27] With regard to the risk of injustice, counsel submitted that the court should be guided by section 18 of the Children (Guardianship and Custody) Act which stipulates that the court should regard the welfare of the child as the paramount concern when deciding issues of custody. Counsel also submitted that the foregoing principle was

equally applicable to all proceedings in the court, in which the custody of a child was in issue, see **Clarke v Carey** (1971) 18 WIR 70.

Submissions of the respondent

[28] Counsel for the respondent submitted that the order of the learned Resident Magistrate ought not to be stayed, as the Resident Magistrate had granted the *ex parte* order in circumstances in which she knew the parties and had a sure knowledge that she understood the history of the matter. The respondent had been examined and cross-examined and various applications had been made before the learned Resident Magistrate. Additionally, there were clear, flagrant breaches of the settlement agreement by the applicant which would have caused the learned Resident Magistrate to make the order that she did. Counsel distinguished **Richards v Richards** on the basis that in that case, there had been no consent order in place between the parties when the appeal had been brought, as against the instant case, where there was in existence the settlement agreement, including custody orders endorsed by the court.

[29] Counsel submitted that the applicant who was a Jamaican citizen had presented no indication of her legal status in respect of Australia, in the documents submitted to the court. Thus, both the applicant's and the child's immigration status were unknown and could create instability in IC's life. Moreover, on the evidence before the learned Resident Magistrate it had been revealed that the situation was deteriorating, as the respondent had agreed and expected to have access to IC every other weekend and

from October 2014, he had been having no access at all to IC and although he was able to speak to his daughter, it was infrequently and only after "begging" the applicant.

[30] It was also submitted that the consent order clearly envisioned that access to IC was to be in Jamaica, thus IC having been taken outside the jurisdiction constituted a withdrawal of access and breach of the order. The respondent would no longer be able to have access to IC regularly, and as he had been a father playing an active role in IC's life, the settlement agreement had facilitated his involvement. Counsel also submitted that there had been no suggestion or undertaking that IC would spend two months with the respondent and then be returned, additionally, no arrangements had been made for the respondent to get access to IC (although counsel conceded that the respondent had likewise not suggested such an arrangement to the applicant).

[31] Counsel further submitted that if the *inter partes* order was to be set aside then what would remain would be the consent order, embodied in the settlement agreement dated 13 November 2013; and since there was no indication that it would be obeyed, as IC was already outside the jurisdiction, the respondent would in effect be left without a remedy. Counsel further submitted that if the court was mindful to grant a stay of execution of the order of the learned Resident Magistrate, the stay should be granted in relation to the second part of the order only, so as to allow the respondent to retain sole custody of IC. When I inquired of counsel what would be the useful purpose of not staying all of the order, counsel indicated that the order had been granted against the background of the applicant being in Jamaica and that since she had breached that

aspect of it, while the award of custody was not to punish an individual, to stay the entire order would in effect, condone the illegal actions of the applicant.

Analysis

[32] Rule 2.14 of the Court of Appeal Rules ("the CAR") provides that except so far as the court below or this court or a single judge of this court may otherwise direct, the filing of an appeal does not operate as a stay of execution. However rule 2.11(1)(b) of the CAR permits a single judge of this court to order "a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal". The power of the court or a single judge to grant or refuse a stay of execution of a judgment is discretionary and unfettered (see **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Services Limited and Paul Lowe** [2011] JMCA App 1.) Additionally all the facts of the case must be considered and the discretion of the court or a single judge exercised judicially in the interests of justice.

[33] It has been established that a stay of execution will not be granted unless it is disclosed that the appeal has some prospect of success. McIntosh JA (Ag) (as she then was), laid down the relevant principles for consideration at paragraph [45] of **Jamalco (Clarendon Alumina Works) v Lunette Dennie**. In that case McIntosh JA (Ag) granted an application for a stay of execution on the basis that the appeal had some prospect of success and that there was a greater risk to the applicant than the respondent if the stay was refused. She stated that:

> "…The interests of justice require another consideration namely, whether the applicant has some prospect of

> succeeding in the appeal. That consideration is directly linked to the interests of justice because,…if the appeal had no prospect of success, it would not be in the interests of justice to deprive the respondent of the fruits of the judgment."

[34] Additionally, Lawrence-Beswick JA (Ag) (as she then was), at paragraph [16] of **Caribbean Cement Company Ltd v Freight Management Limited**, confirmed the above principle when she stated that:

> "…in determining whether to grant or refuse an application for the stay of execution pending appeal, the court should consider (i) where the interests of justice lie and that (ii) the respondent should not be unduly deprived of the fruits of his successful litigation. Further, in determining where the interests of justice lie, consideration must be given to:
>
> (a) The applicant's prospect of success in the pending appeal.
>
> (b) The real risk of injustice to one or both parties in recovering or enforcing the judgment at the determination of the appeal.
>
> (c) The financial hardship to be suffered by the applicant if the judgment is enforced."

[35] Section 18 of the Children (Guardianship and Custody) Act applies to proceedings concerned with the custody of a child; it stipulates that:

> "Where in any proceeding before any Court the custody or upbringing of a child…is in question, the Court in deciding that question, shall regard to the welfare of the child as the first and paramount consideration…"

[36] I am mindful that in considering this application, I ought not to give my views on the merits of the case at this stage of the proceedings as the matter is on appeal where

the issues will be fully ventilated and decided. My role is to examine whether the applicant has a real prospect of success on appeal, bearing in mind the risk of injustice to the parties which may be caused by the grant or refusal of the stay, with paramount consideration being what is in the best interest of IC.

The applicant's prospect of success on appeal

[37] Having examined the submissions, in my view these are the issues which have been raised on this application: (i) whether the decision of the learned judge of the Family Court was in the best interest of the child; (ii) whether the principles with regard to *audi alteram partem* were properly observed by the learned judge of the Family Court; (iii) whether there were sufficient, relevant considerations before the learned judge of the Family Court to vary the consent order; (iv) whether the learned judge of the Family Court wrongfully exercised her discretion in awarding sole custody of IC to the respondent and permitting the respondent to travel with IC to Jamaica; and (v) whether the Family Court had been the proper forum to hear the matter, IC having been outside of the jurisdiction.

[38] The learned judge of the Family Court had initially varied the settlement agreement to grant the respondent sole custody of IC, with liberal access to the applicant, upon her immediate return of the child to the jurisdiction. Then subsequently, that order was varied and the application to set aside the first order dismissed. The varied order granted interim custody of IC to the respondent with access to the applicant within the jurisdiction every other weekend and half major

holidays, and the respondent was permitted to travel with the child from Australia to Jamaica. This resulted in the respondent communicating his intention to the applicant to travel to Australia and remove IC from there and take her to Jamaica.

[39] The evidence before the learned judge of the Family Court at the *ex parte* hearing on behalf of the respondent was that the applicant had taken IC to Australia and had not returned to Jamaica and that he was being deprived of his court ordered access. On the other hand, at the *inter partes* hearing to set aside the order, the evidence on behalf of the applicant was that the respondent had consented to an application on IC's behalf for a permanent visa for IC to acquire permanent residency in Australia, (this was strongly disputed by the respondent) and that IC had settled into life in Australia with the applicant and her husband.

[40] With regard to the issues of whether, the learned judge of the Family Court had rightly exercised her discretion to have ordered that the respondent was permitted to travel to Australia to return IC to the jurisdiction, and the order of the learned judge of the Family Court was in the best interest of IC, **Richards v Richards** is of significant relevance. In that case, the applicant (father) had petitioned for a divorce. The respondent (mother), unknown to the applicant and without his consent removed the two minor children of the marriage from the matrimonial home to live in the United States of America ("the USA"). Subsequently when the applicant visited the children in USA, the older child A, was turned over to him and he returned with her to Jamaica. The applicant thereafter applied for custody, care and control of both children, pending

the determination of the petition. The application was made without notice to the respondent and she was unrepresented at the hearing.

[41] The court had to decide whether it had jurisdiction to grant an order for custody of the younger child B, while she was outside the jurisdiction and whether it was appropriate to order the respondent who was also outside the jurisdiction, to return B to the jurisdiction of the court. Brooks J (as he then was) recognised that section 23(1) of the Matrimonial Causes Act empowered the court to make order(s) fit for the custody, maintenance and education of any relevant child in any proceedings for the dissolution of marriage, and that the court could likewise direct proceedings for placing the child under the protection of the court. However, he found that while this provision was clearly applicable to the child in Jamaica, further conditions applied in relation to B as she was outside the jurisdiction.

[42] Brooks J cited **Harold Morrison v Noelia Seow** SCCA No 107/2001, which was delivered on 13 March 2003, in which the Court of Appeal had ruled that the Supreme Court had jurisdiction to hear applications for maintenance and custody, despite the fact that the child was living outside of the jurisdiction at the time. He also considered **Harben v Harben** [1957] 1 All ER 379, in which the children had been kidnapped by their father and taken out of that court's jurisdiction. Sachs J in that case cited **Hope v Hope** (2) (1854) 4 De G M & G 328, 43 ER 534, where Cranworth LC had confirmed that the court's jurisdiction applied equally to subjects born abroad and those born within the country. Cranworth LC had stated that:

> "But a more difficult point has been raised, namely, putting aside the question as to the place of birth, how can the jurisdiction be exercised in the case of an infant who at the time the jurisdiction is asked is not within the jurisdiction of the Court? This is a more plausible objection than the one based on the mere place of birth, but it is not of a material nature, as bearing upon the existence of the jurisdiction. **It may be that the child is placed under such circumstances that the jurisdiction of the Court cannot be exercised over it because no order I might issue could be enforced; but in that case there is not want of jurisdiction, but a want of the power of enforcing it…Therefore, it is putting the matter on a wrong footing to say, because the child is out of the jurisdiction, that the Court has no jurisdiction**."

[43] With regard to A, Brooks J, granted custody to the applicant. On the other hand he found that it was clear that B, being the offspring of Jamaican parents (according to the divorce petition), was a citizen of Jamaica by virtue of section 3C(b) of the Constitution of Jamaica and therefore subject to the inherent jurisdiction of the Supreme Court, despite the fact that she was born in the USA and was currently residing there. However, he refused to exercise jurisdiction to grant orders for her custody and return to the jurisdiction, as he had found that the circumstances of the case did not justify the granting of such orders. Additionally, Brooks J considered that the court could not be seen to act in vain, the respondent and B having been absent from the jurisdiction. He stated at page 9 of the judgment that:

> "…Although the court has the jurisdiction to make an order for the custody of a child who is at the time of the application, outside of the jurisdiction, such an order is only made in exceptional circumstances, and is warranted by what is in the best interest of the child."

Brooks J, held that the evidence provided did not indicate that B had been in any harmful situation, B was not yet four years old and there having existed a situation where the child had spent almost six months exclusively with the respondent and a bond having been created, it was not in the best interest of the child to break that bond, albeit that situation had arisen from the wrongful taking of the child from the jurisdiction. Brooks J, cited Goldstein J, in **In the Marriage of Kress** (1976) 2 Fam LR 11,330 at page 11,339 where he had been quoted by the learned authors of Family Law in Australia, 6th Ed at paragraph 6.133, to reinforce the principle that:

> "…whatever the wrongs of the taking of a child from a parent by stealth and the keeping of such child's whereabouts secret, it is not the court's function to punish the taking parent when deciding the issue of the custody of the child. **The welfare of the child is the paramount consideration of the court**."

Brooks J at page 6 of the judgment also relied on **Thompson v Thompson** (1993) 30 JLR 414, where this court held that in cases where the issue of a conflict of laws arises, with the principle of the *forum non conveniens* being a live issue, the "welfare of the children is the first and paramount consideration." Thus irrespective of the issues which had arisen for consideration, the most weighted consideration was what was in the best interest of the child concerned.

[44] The above principles relied on by Brooks J, will be relevant in disposing of the matter on appeal and/or in the proceedings in Australia. The court on hearing the appeal would have to assess, the age of IC, the period of time she has spent in the care of the applicant, the bond created between the applicant and IC and whether IC was in

any harm and how well she has settled into life in Australia, to determine what would be in her best interest. Thus, albeit that the order(s) made by the learned judge of the Family Court have given rise to issues which are somewhat similar to those highlighted in **Richards v Richards**, the paramount consideration of the court will focus on what is in the best interest of IC.

[45] With regard to whether the applicant has a real prospect of success on appeal, the Family Court could have found that it did have jurisdiction to hear the matter, but could have also refused to exercise that jurisdiction. Thus the issue of whether the discretion of the learned judge of the Family Court was rightly exercised will have to be determined by the Court of Appeal. In my view, it cannot be said that the applicant is without an arguable or meritorious case.

[46] In relation to the issue of whether there had been a sufficient change of circumstances since the settlement order had been signed by both parties, which justified the variation made by the learned judge of the Family Court, **LM v CS** is important. In that case the appellant (mother) had initiated custody proceedings in the Family Court in order to gain access to the child who was then residing with the respondent (father). On 28 January 2009, an interim order was made by the Family Court which granted joint custody to the parties, care and control to the appellant with residential access of the child to the respondent.

[47] Subsequently, on 13 May 2009, the interim order was varied to the extent that care and control was granted to the respondent. On 21 October 2009, the order was

again varied to grant care and control to the appellant. The appellant's application for custody was set for hearing on 23 February 2010 but on that date the parties consented to an order being made by the Family Court where joint custody was awarded to the parties, care and control to the appellant with residential access to the respondent.

[48] On 26 March 2010 (one month and three days after the order had been agreed), the respondent applied to the Family Court for a variation of the order for him to be granted care and control of the child on the ground that the appellant was to be deported and that the appellant had been denying him access to the child. On 7 April 2010, the application came before the Family Court for hearing and the parties consented as they did on 23 February 2010, for joint custody to the parties, care and control to appellant with residential access to the respondent.

[49] On 23 June 2010, the hearing of the custody application commenced and concluded on 16 June 2011, throughout that period, the interim order of 7 April 2010 was extended. At the determination of the hearing, judgment was delivered which awarded joint custody to the parties, care and control to the respondent with the appellant having residential access. It was also ordered that the child was not to be removed from the jurisdiction without the prior written consent of the parents.

[50] On appeal to the Court of Appeal, the appellant submitted that the learned judge of the Family Court did not take all the relevant matters into consideration in making her decision and that the respondent had failed to show that any new factors had

occurred since the 7 April 2010 which demonstrated a change of circumstances which rendered the prior consent order to not be in the best interest of the child. The respondent had alleged that the appellant was to be deported and that she had denied him access to their child. However the court did not find such claims to have been substantiated. Further McIntosh JA (as she then was) noted that where the court sought to vary a consent order regard must be given to section 7(1) of the Children (Guardianship and Custody) Act. McIntosh JA also stated at paragraph [33] of the judgment that:

> "When the court sanctioned the consent order it must be taken to have had regard to the welfare of the child and to the wishes of both parents, accepting that their agreement was in the best interest of their child. Therefore, it seems to me that Mr Steer's [counsel for the appellant] submission is sound that for such an order to be varied the party seeking the variation must show that there has been a change of circumstances which make their agreement no longer in the best interests of the child...."

Accordingly, the appeal was allowed and the decision of the learned judge of the Family Court was reversed and the consent order of 23 February 2010 reinstated.

[51] In this regard, the applicable principle derived from **LM v CS,** is that where there is a consent order, there should be a change of circumstances sufficient to justify the variation of the order, which had existed, particularly if it had the sanction of the court. In my view, there were changes of circumstances evident on the facts of this case, the applicant was at the time of the application residing with the child in Australia, the applicant had married an Australian, the residency status of the child and the applicant were unknown, but the child was settled in a new environment and was attending a

new school. As a consequence the liberal access granted to the respondent was no longer available. In fact, to the contrary he was being denied the access to which he and IC had become accustomed.

[52] However, the court will have to determine whether these or any other such changes were in IC's best interest and whether such changes were of such a nature to warrant the granting of the order by the learned judge of the Family Court, initially in the absence of the mother and child. In any event, while the grounds raised by the applicant may have some weight, the gravamen of the matter is what is in the best interest of the child, and so the applicant may be successful on appeal if it can be demonstrated that the situation which obtains is in the best interest of IC, that is, that she continue to reside with her mother in Australia.

[53] In the light of the above the applicant appears to have crossed the threshold of showing that she has a realistic prospect of success on appeal.

Risk of Injustice

[54] In **Hammond Suddard Solicitors v Agrichem International Holdings Limited** [2001] EWCA Civ 2065, Clarke LJ (at para. 22) expressed the overriding consideration when deciding whether to grant or refuse an application for a stay of execution as follows:

> "…Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one…or both parties if it grants or refuses a stay.…"

Thus, a balancing exercise must be conducted to determine the risk of injustice to the applicant and the respondent which may be occasioned by the grant or refusal of the stay of the execution of the order of the learned judge of the Family Court, always focusing however on what is in the best interest of the child.

[55] The respondent in his affidavit in response to the notice of application for the stay of execution, filed on 1 June 2015, demonstrated that he had shared a strong relationship with the child, she referred to him as "pappi" and he was teaching her, her Spanish heritage. By virtue of the settlement agreement the respondent had access to his daughter on alternate weekend and half major holidays. The respondent stated that his daughter had spent an entire summer with him in 2014, and that the last weekend he had spent with her was the 11 to 12 of October 2014. He also stated that prior to that date he had spent every other weekend with his daughter and on occasions more than one half her major school holidays. The respondent contended that the action of the applicant to take IC outside the jurisdiction has restricted his access to the child.

[56] On the other hand, IC is five years old and had resided with both parents prior to their separation, then solely with the applicant since January 2013; she has since resided in Australia with the applicant and her husband since October 2014. The applicant at paragraph 19 of her affidavit in support of the application for stay, filed 22 May 2015, stated that IC had been adjusting well to life in Australia, attending a good school and excelling academically. IC's welfare at school was also supported by a letter

dated 28 April 2015, from the school which she now attends, which reiterated her adjustment to her new environment.

[57] The respondent has not alleged any harm to IC in the care and control of her mother and it seems his major contention is that IC should reside in Jamaica. The respondent had claimed that he would be going to Australia to collect IC, by virtue of the order of the learned judge of the Family Court. However, I am of the view that if this act had taken place, it would have been pre-mature, since the appeal in Jamaica is scheduled for 27 July 2015, and the custody proceedings initiated in Australia have not yet been concluded. IC may therefore have to undergo the upset of two relocations if the applicant was successful on appeal.

[58] I have given due consideration to the welfare of IC and find that it is not in her best interest that she suffer this disruption in her life, at this time. Thus a stay of execution will preserve the status quo in the matter until the issues are ultimately decided, firstly, which country is the *forum conveniens* with the most substantial connection to the parties in the dispute where the custody proceedings should take place, and secondly with whom and where IC should reside. It is in my view that any harm that the respondent should suffer, should the stay be granted, would be outweighed by the prejudice to the child if the stay were refused.

[59] In the light of all the above, on 10 June 2015, I granted the stay of execution as set out in paragraph [1] herein and ordered costs of the application to be costs in the appeal.