

Summary return and competing jurisdictions

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Family analysis: Richard Harrison QC at 1 King's Bench Walk Chambers and Katherine Dunseath, a barrister at 3 Paper Buildings, advise that the judgment in *LM v DR* emphasises the duties of those who pursue without notice applications.

Original news

LM v DR [2016] EWHC 1943 (Fam)

The High Court (Family Division) considered an application by the mother for the summary return of a child, aged two, to the jurisdiction of Azerbaijan pursuant to the inherent jurisdiction of the High Court. The court noted that the issue of jurisdiction had not been fully addressed at an earlier without notice hearing, resulting in orders being made which would not have been made had the court been fully informed of the proceedings in Azerbaijan and been given a full background. Consideration was also had to the status of the legal system in Azerbaijan, including expert evidence. McDonald J concluded that it was in the child's best interests to order his return to the jurisdiction of Azerbaijan in order that issues concerning his welfare could be determined by the courts of his home country, and that it was proper on the evidence available to the court to characterise Azerbaijan as the child's home country. In addition, that the mother had undertaken the majority of the care for the child, and that the father had removed the child from his home country in a clandestine manner and without notice to, or gaining the consent of, the mother.

What key issues did this case raise?

This case concerned the mother's application for summary return of her two-year-old son to Azerbaijan under the inherent jurisdiction. The mother was an Azeri national and the father was a British national who had worked in Azerbaijan since approximately 2004. The child had British citizenship, having been born in England but had lived in Azerbaijan for the majority of his life with his parents. After an altercation between the parents in February 2016, where the mother found out that the father was cheating on her with her best friend, the father retained the child. The mother then initiated proceedings in Azerbaijan for custody and raised a concern that the father might abduct the child. An order was made on 7 March 2016 in the Azeri court prohibiting the father from leaving the jurisdiction, which he applied to set aside on 10 March 2016. On 14 March 2016, the court dismissed his application and referred the case to the appeal court. On 17 March 2016, prior to the decision of the appeal court, the father removed the child to England without the mother's knowledge or consent.

The case raised a number of interesting issues including the following:

Expert evidence

The expert evidence indicated that the removal had not been unlawful as the child was a British national and it was not possible as a matter of Azeri law to regulate the travel of a foreign national.

Non-primary carer

This was a removal by the non-primary carer for the child, in contrast to the majority of applications in this field.

Status of legal system in Azerbaijan

Part of the father's case for the child remaining in England pending a full welfare determination was that Azerbaijan is a corrupt country and that he would not receive a fair trial there.

Without notice vs on notice

The father had, at the commencement of the proceedings, made a without notice application for an order prohibiting the child being removed from the jurisdiction of England and Wales without disclosing the ongoing court proceedings in Azerbaijan or certain other material facts—the application should have been made on notice as there was no evidence of irretrievable prejudice or exceptional urgency.

What did the High Court decide?

The court decided that the child should be summarily returned to Azerbaijan. The court took into account a number of relevant factors including that:

- o the mother had undertaken the majority of the care for the child and spoke limited English
- o the mother's immigration status was uncertain and, if she were to remain in England, she would be heavily reliant upon the father
- o the relevant witnesses to an incident on 8 February 2016 relied upon by the father were in Azerbaijan—if the case were to proceed in England translators and a video-link would be required, which would cause further delay and extend the cost and timeframe for trial
- o the parties both had lawyers in Azerbaijan—in contrast, the mother's legal aid position under the Children Act 1989 (ChA 1989) proceedings in England was uncertain
- o the child, who was bilingual in English and Russian, had lived the majority of his life in Azerbaijan and the mother's extended family lived there also—the father had lived and worked primarily in Azerbaijan since 2004

The court considered arguments raised on behalf of the father, including that:

- o the mother posed a risk to the child as a result of an alternation between the parents on 8 February 2016—the court rejected this argument primarily on the basis that on 1 March 2016 the father had sought to obtain the mother's agreement via a written contract that she become the 'nanny' for the child, caring for the child full-time but without legal rights
- o Azerbaijan was a corrupt country and he would not receive a fair trial—this argument was also rejected as the evidence relied upon did not indicate that the family law system was corrupt nor that the mother had the ability to bribe officials

To what extent is the judgment helpful in clarifying the law in this area? Are there any unresolved issues remaining?

This was a fact-specific case in which the court applied the principles set out in leading authority concerning applications for summary return under the inherent jurisdiction (*J (a child) (return to foreign jurisdiction: convention rights)* [2005] UKHL 40, [2005] 3 All ER 291). The application was unusual as the person abducting the child was not the primary carer.

The judgment emphasises the duties of those who pursue without notice (*ex parte*) applications. In this case the issue of jurisdiction was not fully addressed at the without notice hearing resulting in orders being made which would not have been made had the court been fully informed of the proceedings in Azerbaijan and been given a full background.

One unresolved issue that this case highlighted was that for the purposes of the proceedings under the inherent jurisdiction the mother was entitled to legal aid. However, if the court had determined that the child remain in this jurisdiction pending a welfare hearing under ChA 1989 her legal aid position was uncertain. A lack of access to lawyers in a complex international case would have been prejudicial to the mother.

Any other points of interest?

This case yet again highlights the concerns previously raised in respect of the limited availability of legal aid in complex matters such as this. If the court had determined that the child should remain in England pending a welfare hearing under ChA 1989, the mother may have had to act in person in circumstances where she spoke limited English and was dealing with a complicated case with an international dimension—it is difficult to see how she could have had a fair trial in those circumstances. This issue remains highly concerning for members of the profession. An absence of legal aid in this jurisdiction may prove to be a decisive factor in future cases.

The case also highlights the concerns that continue to be raised by the higher courts in respect of without notice applications and ensuring that:

- o the full picture is presented to the court, and
- o a without notice order is justified on the basis of irretrievable prejudice or exceptional urgency

The transcript of the without notice hearing demonstrated that the court had not been fully informed of the background and as a result an order was made in circumstances where this never should have occurred.

MacDonald J referred to his previous guidance in relation to without notice applications at para [60] of *R v R (Jurisdiction and Acquiescence)* [2016] EWHC 1339 (Fam).

Richard Harrison QC is a specialist family lawyer with particular expertise in international children cases and financial remedy applications. Richard has been involved in some of the leading child abduction cases in recent years and he specialises in cases involving international forum disputes under Council Regulation (EC) 2201/2003 and the Family Law Act 1986. He has expertise in relation to a broad range of private law children issues including international relocation applications and residence and contact disputes.

Katherine Dunseath has a thriving practice encompassing all areas of family law. She has a particular interest in medical law, human rights arguments and jurisdictional cases. She regularly appears in the High Court and has appeared in the Court of Appeal on numerous occasions.

Interviewed by Kate Beaumont.

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