[2010] EWHC 3240 (Fam)

Case No: FD10C00128

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

9th December 2010

B e f o r e :

MRS. JUSTICE ELEANOR KING

Between:

THE LONDON BOROUGH OF ISLINGTON	**Applicant**
- and -	
E V	**1st Respondent**
and	
N K	**2nd Respondent**
and	
M K (by his children's Guardian Z K)	**3rd Respondent**
and	
S B	**4th Respondent**

Miss Paula Diaz (instructed by Islington Borough Legal Services) for the Applicant
Mr. Edward Devereux (instructed by Kaim Todner Solicitors Ltd) for the 1st Respondent
Miss Suna Kursun Solicitor (instructed by Fahri Jacob Solicitors) for the 2nd Respondent
Khela PARVINDER (instructed by Aitken Associates) for the 3rd Respondent

Hearing dates: 1st and 3rd November 2010

Mrs. Justice Eleanor King :

1. These are care proceedings concerning the future of a little boy M K who was born on [DOB] and is now 4 yrs and 10 months of age.
2. The background can be set out shortly for the limited purposes of this judgment. M is the child of E V (the mother) and N K (the father). The mother is currently on remand at Holloway prison and the father is living in Turkey. The parents were married under religious law and have since been divorced. The father has parental responsibility for M.
3. The mother suffers from a severe personality disorder. She has received treatment for her mental health for much of her life. In March 2010 she was detained under s136 Mental Health Act 2010 and she was again “sectioned” in June 2010.
4. The mother has had a number of relationships and marriages. M’s father is Turkish and the family appear to have lived between the UK and Turkey when M was a baby and toddler. For a period between January 2008 and July 2009 the father was M’s sole carer in Turkey whilst the mother was living in England.

5. The mother travelled to Turkey in the spring 2009 when she and the father spent some together. The father then agreed, to his lasting regret, to allow the mother to return to England alone with M. The father has been the subject of scrutiny and criticism about that decision but, in fairness to him, it should be recorded that the contemporaneous medical records in relation to the mother show that as of 24 August 2009 she had been symptom free for six months. She was regarded by her treating psychiatrist at that time as being in 'full remission' and her case was closed.

6. Unhappily that remission was not sustained and the local authority became involved with the family when the Mother was sectioned under Section 2 of the Mental Health Act 1983 on 11 September 2009. M went to live with his Grandmother, S B who lives in Islington together with his half brother K A, (who is aged 20). M has remained living with his grandmother and half brother ever since.

7. Following the mother's discharge from hospital, M continued to live with his Grandmother with the agreement of the mother. A court order only became necessary when the mother told the social services in March 2010 that she planned to take M to Turkey "in a couple of days time".

8. Accordingly, an Emergency Protection Order was made on 24 March 2010. Care proceedings followed with M thereafter being cared for by his grandmother under an interim care order.

9. Upon being notified of the proceedings, the father applied for a visa to come to England to take part in the proceedings. A visa was refused and it became clear that he was unlikely to obtain one within the timescales of the proceedings.

10. A decision was therefore made that an assessment of the father would be carried out on behalf of the local authority in Turkey for three days between 8th and 10th June 2010. The social workers who carried out the assessment were entirely satisfied that the father had separated from the mother and, importantly, that whilst he felt compassion for the mother; the father was and is able to prioritise M's needs. The conclusion of the assessment was:

> Mr K offers M stability, consistency, safety and love. M would have a good standard of life in Turkey and Mr K has a supportive network of family and friends.

11. Given the length of time M has now been living in what is agreed was intended to be a short term placement, (albeit with his Grandmother), it is small wonder that the local authority was and remains anxious that M should move to live with his father as soon as is practicable.

12. The grandmother has offered M much needed love and security and whilst living with her, he has also built up a strong bond with his half brother. The Grandmother accepts that she cannot offer M a home for the rest of his childhood and is firmly of the view that hard though it will be to part with M, he should go to Turkey to live with his father. She regards him as a good man and a loving father and speaks regularly to him on the telephone.

13. The placement is not without its problems: the relationship as between the grandmother and K is volatile and the local authority have been concerned at M being exposed to hostility between his two adult carers.

14. K has until recently supported the plan that M should move to live with his father. Not surprisingly given his young age, as time has gone on and plans for M have changed and dates for M to travel have been pushed back, K has found it increasingly difficult to face being parted from his little brother. At one stage he sought legal advice with a view to giving consideration to putting himself forward as a carer but he has wisely not pursued that course. This is however an indication of how the delay and uncertainty are beginning to have an impact upon the family and, most importantly, on M who no longer has the unconditional support for the move from the family with whom he lives.

15. In the meantime the mother has variously moved between Turkey and in England and is currently held on remand in Holloway awaiting trial for criminal matters.

16. On Tuesday (2 November 2010) the Mother appeared at the magistrate's court, where she was found guilty of being in breach of a restraining order. She was remanded in custody pending a further trial. It is understood that the Prosecution may be seeking a hospital order at the conclusion of the hearings.

17. The mother does not consent to the plan that M should live with his father in Turkey. She gave evidence before me on 4 October 2010 and told me that she would like M to go and live with the Prime Minister of Turkey and then, when she is free to do so, she would wish to go to Turkey and resume his care.

18. The circumstances in which the mother came to give evidence before me at a directions hearing on 4 October 2010 arose because she did not accept the independent psychiatric evidence of Dr A C that she lacks capacity to litigate. At the invitation of all the parties I heard oral evidence from the mother. Her love of M was clear for all to see but, sadly so too was the abnormal presentation described by Dr AC in his report and addendum report filed in these proceedings. Having seen and heard the mother give evidence, I had no hesitation in accepting the written evidence of Dr AC and making a declaration that the mother lacked capacity to litigate. therefore accepted the Official Solicitor's offer to act on her behalf. At the conclusion of the hearing the mother became extremely distressed and was only removed from court with considerable difficulty.

19. In his addendum report dated the 22nd `August 2010, Dr AC expressed his opinion that the mental health of the mother had deteriorated, even in the couple of weeks since he had examined her for his main report. Unfortunately there would appear to have been a further deterioration since then. On 4th October 2010 a legal visit arranged to take place at Holloway in order for the Official Solicitor's representative to see the mother, had to be cancelled as she was felt to be too unwell. Similarly it was decided that it was not appropriate to put the mother on the prison bus to attend court on Monday of this week.

The Proceedings

20. Care Proceedings having been commenced, by 20 July 2010 the local authority had filed their proposed final threshold document based on the mental health difficulties of the mother. This was followed by a final care plan providing for M to return to the care of his father under a residence order. By this stage, due to the well documented difficulties of Cafcass, no Guardian had yet been appointed to represent M in the proceedings.

21. On 29th July 2010 the matter was transferred to the High Court. By 5 August 2010 the local authority proposal was that the court should be invited to exercise its inherent jurisdiction to make M a ward of court and for an interim residence order to be made to the father. At the hearing on 5th August 2010 Cafcass were directed to allocate a Guardian as a matter of extreme urgency, the Official Solicitor was invited to act for the mother and the case was adjourned to 1st September 2010

22. On 1 September 2010 the court was faced with the situation whereby the care plan provided for M to fly to Turkey with his grandmother and the social worker just two days later on 3 September 2010. The plan was that the social workers would assess the placement of M with his father for several days before returning to the UK with the grandmother on 8 September 2010. This would be followed by a final hearing listed for November 2010.

23. To carry out this plan in the context of the court having invoked its inherent jurisdiction, the court would, during the currency of the live care proceedings, have had to discharge the interim care order and make a new order in wardship. Orders would thereafter be made in the wardship for the child to be permitted to leave the jurisdiction and giving the father an interim residence order.

24. The tightness of the timescales and late appointment of the Guardian inevitably meant that the plans for M to travel to Turkey on 3 September 2010 had to be put on hold.

25. As previously noted, the matter came before me on 4 October 2010. The local authority indicated that it had managed to change the plane tickets so that the party could now travel to Turkey on 19 November 2010. By that time a Guardian, Mr Y, had been appointed and I accordingly gave my outline approval to the plan that M should go to Turkey, be placed with his father for an updating assessment and remain with him to the final hearing. That indication was recorded on the face of the order as was the fact that the indication was given was at a time when the Official Solicitor and the Guardian had only just come into the case.

26. That the proposed date for M to travel had to be put back from 3 September 2010 to 19 November 2010 was inevitable. It was however unfortunate. M had been prepared for the

change in his life and was ready to go. His grandmother and brother were also prepared. The change in plan has been upsetting and unsettling for all three of them.

27. When the matter came before me again on 1 November 2010 there was a dispute as between the Official Solicitor (in his capacity as representative of the mother) on the one part and the Local Authority and the Children's Guardian on the other as to the proper structure of orders which should properly be made in order to allow M to return to his father.

28. It must seem to the family that the court is 'dancing on a pin head' as time and hearings are devoted to the jurisdictional basis upon which M will leave England to go and live with his unimpeachable father; a man who has parental responsibility, with whom M has previously lived and who lives in a country which is signatory to the Hague Convention 1980.

29. The fact remains that the issue has arisen and must be resolved urgently if M is to travel on 19 November 2010. I have indicated to all the parties in strong terms that the date for him to travel cannot and will not be altered.

30. In order not to lose that travelling date I listed a number of short hearings to resolve the matter. I am grateful to Counsel and Solicitors who have made themselves available at short notice to argue the jurisdictional issue.

The Law

31. The two alternative jurisdictional routes are:

> i) Inherent Jurisdiction
> ii) Interim care order and permission to place out of the jurisdiction under paragraph 19 of Schedule II Children Act 1989.

Inherent Jurisdiction

32. The use of the court's inherent jurisdiction in the form of wardship was significantly circumscribed by the coming into force of The Children Act 1989.

33. Section 100 of the Children Act 1989 provides the statutory scheme which in the first instance regulates the use of wardship in public law proceedings.

> "2) No court shall exercise the High Court's inherent jurisdiction with respect to children—
>
> (a) so as to require a child to be placed in the care, or put under the supervision, of a local authority;
>
> (b) so as to require a child to be accommodated by or on behalf of a local authority;
>
> (c) so as to make a child who is the subject of a care order a ward of court; or
>
> (d) for the purpose of conferring on any local authority power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.
>
> (3) No application for any exercise of the court's inherent jurisdiction with respect to children may be made by a local authority unless the authority have obtained the leave of the court.
>
> (4) The court may only grant leave if it is satisfied that—
>
> (a) the result which the authority wish to achieve could not be achieved through the making of any order of a kind to which subsection (5) applies; and
>
> (b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.
>
> "(5) This subsection applies to any order—
>
> (a) made otherwise than in the exercise of the court's inherent jurisdiction; and
>
> (b) which the local authority is entitled to apply for (assuming, in the case of any application which may only be made with leave, that leave is granted).

34. It follows therefore that in the event that the court is to give leave to invoke its inherent jurisdiction under s100 (3) of the Children Act 1989 the court has to be satisfied that "the result which the authority wish to achieve" could not be achieved through the making of any order of a kind to which subsection (5) applies.

Schedule 2, paragraph 19 Children Act

35. Placement of children outside the jurisdiction is provided for in paragraph 19 of Schedule 2 of the Children Act 1989:

> 19(1)A local authority may only arrange for, or assist in arranging for, any child in their care to live outside England and Wales with the approval of the court.
> (2) A local authority may, with the approval of every person who has parental responsibility for the child arrange for, or assist in arranging for, any other child looked after by them to live outside England and Wales.
> (3) The court shall not give its approval under sub-paragraph (1) unless it is satisfied that—
>
> > (a) living outside England and Wales would be in the child's best interests;
> > (b) suitable arrangements have been, or will be, made for his reception and welfare in the country in which he will live;
> > (c) the child has consented to living in that country; and
> > (d) every person who has parental responsibility for the child has consented to his living in that country.
>
> (4) Where the court is satisfied that the child does not have sufficient understanding to give or withhold his consent, it may disregard sub-paragraph (3)(c) and give its approval if the child is to live in the country concerned with a parent, guardian, special guardian, or other suitable person.
> (5) Where a person whose consent is required by sub-paragraph (3)(d) fails to give his consent, the court may disregard that provision and give its approval if it is satisfied that that person—
>
> > (a) cannot be found;
> > (b) is incapable of consenting; or
> > (c) is withholding his consent unreasonably.
>
> (6) Section 85 of the Adoption and Children Act 2002 (which imposes restrictions on taking children out of the United Kingdom) shall not apply in the case of any child who is to live outside England and Wales with the approval of the court given under this paragraph.
> (7) Where a court decides to give its approval under this paragraph it may order that its decision is not to have effect during the appeal period.
> (8) In sub-paragraph (7) "the appeal period" means—
>
> > (a) where an appeal is made against the decision, the period between the making of the decision and the determination of the appeal; and
> > (b) otherwise, the period during which an appeal may be made against the decision.
>
> (9) This paragraph does not apply to a local authority placing a child for adoption with prospective adopters.

What do the parties wish to achieve?

36. The Official Solicitor (on behalf of the mother) submits that the appropriate way to cover the period between now and the final hearing of the care proceedings, (now listed for three days in February 2011), is by way of an interim care order with the local authority being given permission to arrange for M to live outside England and Wales pursuant to para 19 of schedule 2 of the Children Act 1989.

37. The Local Authority for their part proposes that the inherent jurisdiction of the court should be invoked; M would then be made a ward of court with an interim residence order in favour of the father. The interim care order would at that stage be discharged.

The result which the authority wish to achieve

38. In considering whether it is appropriate to invoke the inherent jurisdiction it is necessary too identify "the result which the authority wish to achieve". In the present case all parties (save the mother) share a common goal, summarised as follows:

> i) that M will move to live with his father on 19 November 2010.
> ii) that M remains habitually resident in England at least until the final hearing.
> iii) that the English courts retain jurisdiction until the final hearing.

iv) that in the event of a breakdown in the placement of M that a social worker should travel out to Turkey and bring him back to England.
v) that in the event that M returns to England, he will be the subject of an interim care order and consideration will be given, in the first instance, to placing him in the interim with his grandmother.

39. All parties agree that insofar as there is any risk of the placement in Turkey breaking down it stems not from the father and his ability to care for M, but from the mother in the event that she should, travel to Turkey (as she has indicated is her intention should she be free to do so), and thereafter cause difficulties for M and his father.

40. Assistance and advice has been obtained from A D-S who is the Legal Adviser to the Turkish Consulate General in London as to the recognition of British Residence and / or Contact orders in Turkey. Her report is dated 26 July 2010. In preparation for this hearing, the Local Authority posed a number of additional questions. Mr Devereux on behalf of the Official Solicitor made clear to the court that those questions were not put in the form of an agreed letter of instruction and the information/advice provided by Ms D-S and must be considered in the light of that significant limitation. Ms D-S has not attended to give evidence. No party felt it necessary or appropriate to delay this hearing to enable her to be present: a view with which I agree.

41. For the purposes of this judgment the advice given amounts to this:

i) Decisions in relation to children are governed by what is in their best interests.
ii) Foreign final orders are recognised by the Turkish courts.
iii) It is possible that a care order which was prompted by the need for protection would be recognised and that the local authority would be able to exercise their rights under an interim care order if so recognised.
iv) Paragraph 19 of Schedule 2 of the Children Act 1989 is a possible option.
v) Wardship in relation to minors is only used where both parents are deceased or incapable of looking after the child. The English form of 'ward of court' is used by the English Courts in the best interest of the child, the procedure for recognition in Turkey is therefore the same as set out in (ii) above, namely the Turkish Courts will recognise a final order.
vi) If the father has a residence order in Turkey then the mother can apply for a contact order. The Local Authority can be a party to those proceedings by virtue of "being responsible for the minor" (by which one suppose it means its interim care order.)

Protection for M in the Interim period.

42. It is accepted that M will remain habitually resident in the UK during the period of assessment: that is to say from placement on 19 November 2010 until the final hearing.

43. The father, both in submissions through Counsel and by signed agreement also accepts that the English courts will retain jurisdiction in relation to all matters concerning M until the final hearing.

44. Turkey is a signatory of the Hague convention 1980. In the event that M was abducted in Turkey then either the English courts would have rights of custody through wardship or the local authority would by virtue of its interim care order.

45. The expert evidence available to the court is that interim orders are not generally recognised by the Turkish courts. The Turkish courts would not therefore it seems, recognise an interim residence order or a wardship order that is not final order. Conversely however, the somewhat imprecise evidence of Ms D-S does seem to suggest that an interim care order, because of its protective nature, may be recognised.

46. In my judgment for this relatively brief period of a little under three months, this court would be unwise to rely on any interim order being recognised by the Turkish courts. If M was abducted either by the mother or by the father (by his refusal to return him when called upon to do so), the proper procedure would be to make an application through the Central Authority under the Hague Convention with the rights of custody vesting either in the local authority under its interim care order or in the court in wardship. In the event that M was abducted to a non convention country the inherent jurisdiction of the court would be invoked in any event.

47. The rationale behind the respective positions of the parties can be summarised briefly:

> i) The Local Authority does not wish there to be an interim care order once M goes to Turkey. They feel strongly that it is a responsibility that they cannot fulfil from a distance. They would not be exercising their parental responsibility on a day to day basis either directly or by delegating the monitoring and/or supervision of M to the local social services. It is therefore, they submit, inappropriate for there to be an interim care order.
> ii) The Guardian who has experience of Turkish cases and in particular one where a child was abducted to Northern Cyprus, believes that wardship would receive a respect, and therefore carry more weight, in the Turkish courts than that which would be accorded to an interim care order.
> iii) The Official Solicitor says that an interim care order is the correct and appropriate route:
>
> > a) s100 of the Children Act 1989 requires the statutory route and
> > b) the care proceedings are on-going and the local authority, whilst not utilising their parental responsibility on a day to day basis once the social workers have left Cyprus, intend to continue to exercise it from afar. It is they who will decide if the placement has broken down and should it come to an end, they will send a social worker out to bring him back to England. If M returned to England they would immediately seek an interim care order so as to ensure that it is they who decide on placement on his return (whether with the maternal grandmother or a foster carer).

The appropriate statutory framework

48. Both the local authority and the guardian accept that they are faced with considerable difficulties in maintaining a submission that the proposed structure for M's assessment in Turkey cannot be achieved under para 19 of Schedule 2. In order to escape the restrictions of s100 the local authority would have to demonstrate that:

> i) they could not achieve that which they wish to achieve by way of an order under the Children Act 1989 (s100(4)(a)) *and*
> ii) that there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm (s100 (4) (b)).

49. The local authority in their skeleton argument submit that their proposal that the courts inherent jurisdiction should be invoked does not fall foul of s100 because, they argue, paragraph 19 does not apply to a placement with a parent. Paragraph 19 they submit is intended for members of the extended family and for non family members. That with respect is not correct: not only does the paragraph contain no such restriction but there are authorities where paragraph 19 has been used to place children with parents (see for example *Re P (Minors) (Interim Order)* [1993] 2 FLR 742).

50. Similarly there are cases where children have been placed out of the jurisdiction under paragraph 19 under an interim care order (see *Re H (residence Order: Placement out of the jurisdiction)* [2004] EWHC 3243 (Fam); [2006] 1 FLR 1140)

51. Counsel for the Guardian's final position was that is 'very difficult' to argue that the case was not caught by s100, but that the Guardian would prefer wardship.

52. In my judgment an order under paragraph 19 of Schedule 2 of the Children Act 1989 is the jurisdictionally correct order. I am entirely satisfied that that which is sought to be achieved can comfortably be achieved by that route. I do not therefore need to consider the likelihood of significant harm under s 100 (4)(b).

53. The only gap which arguably remains is that it is not wholly clear from the evidence before the court whether a Turkish court would recognise an interim care order if called upon so to do. Invoking the inherent jurisdiction would not however "plug" that gap as the Turkish Courts would not recognise the proposed interim residence order; indeed there is reason to think that the interim care order may be of more value as its protective quality may lead to recognition by the Turkish Courts.

54. In my judgment an interim care order is the most appropriate order in the best interests of M. These care proceedings have not been concluded. It would be a highly unusual course to discharge the interim care order and then, in a somewhat contrived manner, bring the care proceedings to a premature end in circumstances where the child is to be placed for assessment overseas and there is a final hearing listed in several months time.

55. Procedural irregularity apart, in my judgment it is important that the local authority retain parental responsibility of M pending the final hearing.

56. The local authority's main objection to having an interim care order during the interim period prior to final hearing is that they would have the 'liability', as they put it, of having an interim care order with no way of exercising their responsibilities or discharging their duties under such an order. That, they say is inappropriate, and they are "not prepared to countenance" being put in such a position. At one stage they suggested through Miss Diaz that, if the court adopted the statutory route, they may change their interim care plan and keep M in England until the final hearing in February 2011. Fortunately wiser counsel prevailed and I am told that regardless of the mechanism, the care plan will remain for M to travel on 19 November 2010.

57. There can be any number of reasons why and in what manner a local authority seeks to exercise parental responsibility. It need not be to monitor the day to day care of a child: often a child is placed with a parent whose day to day care is unimpeachable but the risk of harm is presented by, for example, a third party.

58. It is agreed that the greatest risk to M being able to remain living safely and securely with his father in Turkey for the rest of his childhood is his mother. There is a real fear held by the local authority, the father and M's Guardian, that the mother when free to do so, will travel to Turkey and disrupt M's life with his father to such an extent that it is no longer in his interests to remain living with the father.

59. Having heard and seen the mother in the witness box I understand their concerns. It seems likely that should she be free to do so, she will travel to Turkey with a view to regaining care of her son. Given her present state of health however it seems unlikely that she will be free to put her plan into action in the immediate future.

60. If the mother travelled to Turkey and disrupted M's life with the father it would be to the local authority that the father would turn for advice and it would be the local authority who would decide if the placement should come to an end and require the return of M to this country. Without the benefit of an interim care order then in the absence of agreement, the local authority would have to make an application to the court asking it to direct that its ward be returned forthwith to the UK. The local authority acknowledges the inconvenience and delay which would be occasioned by having to make such an application which would be unnecessary if the Local Authority had an interim care order and therefore parental responsibility.

61. The Local Authority told the court that their reluctance to have a long distance interim care order was so fundamental that they would be prepared to accept that disadvantage, as they would the additional disadvantage that in the event that M returned to the UK they would have to apply for an interim care order, it having been discharged by the wardship.

62. There is to be an assessment. It is hoped and anticipated by all parties (save the mother) that it will be a success. If however it breaks down, the local authority will immediately want to exercise parental responsibility in respect of M. Whilst acknowledging the love and care maternal grandmother and K have given to M for many months, there are concerns about that placement and consideration would have to be given as to whether he should return to live with his Grandmother if M returned to the UK.

63. I understand the concern of the Children's Guardian and appreciate the experience he brings from other cases. It should be remembered however that for this mother to abduct M she has to be released from custody, get to a remote area of Turkey and then abduct a child who is still of an age where he would never be out of the direct care of an adult.

64. It may well be that in the unlikely event that the mother did somehow manage to abduct M in the next three months then, as the Guardian believes, wardship would be the most effective route to ensure his recovery. These courts are familiar with abduction cases. There is a swift and well recognised procedure and raft of orders which can be obtained almost instantly, day

or night, for use in such situations whether directly through the Central Authority or, (in the event of a country not being a Hague signatory or in exceptional circumstances), under the umbrella of the court's inherent jurisdiction and wardship.

65. Whatever may be the various preferences of the parties, I conclude that the proper order is one made under the Children Act 1989 and not under the inherent jurisdiction. For the reasons set out above I am also of the view that it is also the right order in this child's best interest.

66. This little boy should remain the subject of an interim care order during this period of assessment so that the local authority can exercise parental responsibility in whatever way they think fit between now and the final hearing. If all goes well and M is happy and settles well with his father, the local authority may not have to exercise it at all; on the other hand they may need to take urgent action and send a social worker out to Turkey to bring M back to England. Between those two extremes there are numerous areas of middle ground, one which immediately springs to mind is the regulation of K's contact with M.

67. I therefore make an interim care order and give leave pursuant to paragraph 19 for M to travel to Turkey on 19th November 2010 to be assessed living with his with his father pending the final hearing in February 2011.