[2017] JMCA App 21

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 69/2017

APPLICATION NO 127/2017

BETWEEN LASHOY REMOUNA CLACKEN-CAMPBELL APPLICANT

AND GLENFORD GEORGE CAMPBELL RESPONDENT

Miss Averine Bernard instructed by Wilson & Franklyn for the applicant

Mrs Denise Senior-Smith and Miss Olivia Derrett instructed by Oswest Senior-Smith & Co for the respondent

21, 25, 31 July and 14 August 2017

IN CHAMBERS

MORRISON P

[1] The applicant and the respondent are the parents of a minor child, who was born on 21 November 2011. For present purposes, I will refer to her as 'GC'. GC currently lives with the applicant, in Atlanta, Georgia, in the United States of America ('the USA'), while the respondent lives in Kingston.

[2] The applicant and the respondent are in dispute as to who should have custody of GC and proceedings with regard to this are currently pending in the Supreme Court. On 29 June 2017, on the application of the respondent, Palmer J (Ag) ('the judge')

ordered, among other things, that the applicant should return GC to the jurisdiction by 31 July 2017, pending the determination of the proceedings in that court.

[3] With the leave of the judge, the applicant filed an appeal against his order on 13 July 2017 and, by notice of application for court orders filed on 14 July 2017, sought an order staying the judge's order pending the hearing of the appeal. I heard oral submissions from counsel for both parties on 21 and 25 July 2017 and, on 31 July 2017, I granted a stay of the judge's order for a period of 14 days to allow time for proper consideration of the application.

[4] Having considered the matter further, I made the following order on 14 August 2017:

> "1) For reasons which will be made available to the parties by Friday of this week, execution of the judgment of Palmer J (Ag) given on 29 June 2017 is stayed, pending the hearing of the appeal. The costs of the application will be costs in the appeal.
>
> 2) In order to expedite the hearing of the appeal, the appellant is hereby ordered to prepare, file and serve the Record of Appeal on or before 4 September 2017.
>
> 3) The appellant shall file and serve full written submissions in support of the appeal, together with supporting authorities, on or before 18 September 2017.
>
> 4) The respondent shall file and serve full written submissions in response, together with supporting authorities, on or before 2 October 2017.
>
> 5) The appellant will have liberty to file a reply, if necessary, on or before 9 October 2017.

> 6) The appeal is set for hearing on 17 October 2017 for one day, with each party having 90 minutes for oral submissions.
>
> 7) Pending the hearing of the appeal, the parties will have liberty to apply generally."

[5] These are the promised reasons for my decision.

[6] The background to the matter is as follows. The applicant and the respondent were married to each other in July 2008. Their marriage broke down in 2014 and since that time, there have been the inconclusive divorce proceedings between them in Jamaica. (The applicant has now produced evidence which suggests that subsequent divorce proceedings in the USA have resulted in dissolution of her marriage to the respondent and that she has since remarried. The respondent disputes this, and contends that he has never been served with any divorce papers issued out of a United States Court.)

[7] Up to January 2016, GC lived with the applicant here in Kingston. Proceedings brought by the applicant in the Family Court for the parishes of Kingston and Saint Andrew had resulted in a consent order being entered on 11 May 2015. That order recorded the parties' agreement that joint legal custody of GC be granted to the applicant and respondent, with primary care and control to the applicant. It was also ordered that the respondent should have residential access to GC on alternate weekends, plus half of all major school holidays.

[8] The applicant filed a petition for divorce in July 2015 (M 01948 of 2015), but the respondent disputed the date of the separation between the parties upon which it was

based. In the interim, on 28 October 2015, the applicant made a further application to the Family Court for an order that she be granted sole, custody, care and control of GC, with access to the respondent for half of each school holiday. One of the stated grounds of this application was that "[t]he Applicant is migrating from Jamaica and needs sole custody of the said child so that she may better order her affairs overseas". The respondent objected to this application, on the grounds that the applicant had failed to satisfy him as to where she would be residing and how she would take care of GC; and that, in any event, as far as he was aware, neither the applicant nor GC was a citizen of the USA. The respondent was accordingly concerned about the safety of GC, as also about how his access to her would be affected.

[9] Directed by the court, the parties attempted mediation at the Dispute Resolution Foundation on 13 January 2016. But a couple days later, on 15 January 2016, the applicant's attorneys-at-law advised the respondent's attorneys-at-law that the applicant and GC had left the island. And, on 20 January 2016, the applicant's attorneys-at-law filed a notice of discontinuance of the divorce proceedings in M 01948 of 2015.

[10] The respondent has since made various attempts to secure GC's return to Jamaica and/or to gain access to her, including further proceedings in the Family Court. On 16 May 2016, the applicant filed an amended petition for divorce bearing a new claim number (M 01207 of 2016) in the Supreme Court. While it appears that this petition bore the correct date of the parties' separation (30 March 2015), the

respondent nevertheless filed an answer to it on 29 June 2016, in which, among other things, he denied having threatened the applicant, requested proof of her employment and requested full disclosure of the details of the care and upbringing of GC.

[11] On 4 July 2016, after a further appearance before the Family Court, the respondent's application to that court for a return of GC was, on his request, withdrawn for it to be filed in the Supreme Court. That application was duly filed on 17 August 2016. Several months then elapsed, during which there appears to have been much correspondence between the parties' attorneys-at-law, in which the respondent continued to protest against his inability to gain access to GC; as well as correspondence between the respondent and the Jamaican Ambassador to the USA, in furtherance of the respondent's efforts to secure the return of GC to Jamaica. There was also some talk of the possibility of a settlement.

[12] On 28 April 2017, the respondent filed a relisted notice of application for court orders, in which he sought the following:

> "i. The [applicant] return the minor child, GC, to the jurisdiction of Jamaica and that the child be produced to this Honourable Court;
>
> ii. Passport, Immigration and Citizenship Agency (PICA) disclose all relevant information pertaining to the departure and arrival of the [applicant] and the relevant child GC;
>
> iii. The [applicant] discloses documentary proof detailing the care, upbringing and abode of the minor child including the school in which the minor child is now enrolled, the minor child's health, social and

educational progress and proof of gainful employment for the [applicant];

iv. The [respondent] is permitted to have access to the minor child via telephone and video conference until the determination of this matter;

v. Costs to be costs in the Claim.

vi. Such further and other relief as this Honourable court deems just."

[13] Among the matters relied on by the respondent in support of this application were the inherent jurisdiction of the court over disputes involving the welfare of children; the Family Court order granting the parties joint legal custody of GC, with generous access the respondent; the applicant's removal of GC from the jurisdiction without the respondent's consent; the denial of access to GC by the respondent; and the applicant's refusal to provide any information regarding the welfare of GC to the respondent.

[14] On 10 May 2017, the applicant filed notice of discontinuance of the proceedings in claim number M 01207 of 2016. On that same date, the applicant filed an affidavit, in which she stated that "the Divorce proceedings between the Respondent and I which is [sic] before this Honourable Court has [sic] been discontinued and I am informed by my Attorneys, and do verily believe that all consequential reliefs sought under such proceedings would also cease to exist or be terminated". But, perhaps anticipating that the court might not be so easily moved to stay its hand in a matter involving the welfare of a minor child, the applicant went on to say this:

"4. That in the event this Honourable Court does not deem the above to be relevant I aver as follows:

There is no court order whatsoever which prevents either [GC] or myself from travelling or living outside of Jamaica and further due to the uncontrollable and erratic behaviour of the Respondent in general and most particularly in respect of the child, [GC] and myself I have found it necessary to leave Jamaica and refuse to have any further contact with him.

My experience with the Respondent has been as follows:

a. That the Respondent's erratic behaviour in general has been the cause of concern for a number of years. Most particularly, at our daughter [GC's] school in Jamaica he caused great disturbance and significant concerns on the part of staff members and management of her school. The Respondent would often create an ugly scene on each occasion he was there ensuring that he embarrassed [GC], myself and my family members. Attached hereto and marked **"LC 1"** is a copy of letter received from our daughter's school regarding the aforementioned.

b. That due to the Respondent's malicious behaviour I have been forced to make Police Reports against him on more than one occasion. Copies of receipts of Police Reports made by me concerning the Respondent are attached hereto and marked **"LC 2"**.

c. That the Respondent provided absolutely no maintenance or support for [GC]; but instead wrote to the United States Embassy and various government institutions claiming that I had breached various Court Orders which restricted me and [GC] from travelling. **This was a malicious lie** specifically geared at restricting our travel and attempting to destroy our ability to seek viable opportunities

outside of Jamaica. **I have not breached any such order**.

d. That if the Respondent receives details regarding the whereabouts of [GC] and I, the Respondent is likely to create major disturbances and harass persons at my daughter's school. He is likely to create major disturbances and harass persons at my daughter's school. He is likely to create difficulties for my child and myself with the State Department and endanger the life we are building for ourselves in the United States.

e. That because of the said letter I am fearful of sending my daughter out of the United States for fear that the Respondent will prevent [GC] from returning to that jurisdiction. It is my fervent view that [GC] should not be subjected to any more instability at the hands of the Respondent.

f. That [GC] is now settled into life in United States of America to remove her to live with the Respondent is not in her best interest with regards to her welfare and schooling. At no time has the court determined that he should have care and control of the said child.

g. That the Respondent accompanied by others has appeared at various family member houses, as recent as March 1, 2017 and on several other occasions harassing them and also has made telephone calls to other family members outside of Jamaica. My family members feel constantly harassed by the Respondent.

5. That Respondent's behaviour has been unpleasant and malicious. He has failed to foster any sort of comity between us in raising our daughter. Neither I or [sic] [GC] are [sic] in a position to travel to Jamaica as he is likely to try and have me detained and my daughter taken away from me. Our lives will

be disrupted and torn apart." (Emphasis as in original)

[15] In a further affidavit filed on 25 May 2017, the applicant added the following:

"3. That my daughter [GC], the child of the marriage, has been residing with me in the United States of America, and she has settled to life in the said country. We are soon to have our permanent residence as we are in the process of securing same.

4. That I have been advised by my Attorney-at law in the United States by way of Letter and verily do believe that due to having pending Applications to Register Permanent Residence, [GC] and I must remain in the United States until the application is adjudicated as to do so would cause the applications to be deemed abandoned. Attached hereto and marked **"LC1"** is a copy of the said Letter.

5. That [GC] has become accustomed to the system of education in the United States and is excelling at school. Attached hereto and marked **"LC2"** is a true copy of the Report Card from [GC's] school.

6. That the Respondent has written to the United States Embassy and various government institutions claiming that I had breached various court Orders which restricted me and [GC] from travelling. **This was** a **malicious lie** specifically aimed at restricting our travel and attempting to destroy our ability to seek viable opportunities outside of Jamaica. I have not breached any such order.

7. That because of the said letter I am not able to travel or to send my daughter out of the United States for fear that neither of us will be in a position to return to our home and my employment in that jurisdiction.

8. That the Respondent has to date provided absolutely no maintenance or support for [GC] and he has perpetually been in clear breach of the said

Maintenance Order against him to provide for the said child of whom he now seeks to have custody.

9. That at no time has the Court deemed the Respondent fit or capable of having care and control of the said child and to my knowledge, information and belief the Respondent has failed to prove that he is able or in a position to be made the primary care giver of [GC] by the Court.

10. That the Respondent lives in a one bed room apartment and if our daughter cannot return to live with me in the United States, there will be no proper accommodation for her in the Respondent's home.

11. That to remove [GC] from her home in the United States to live in Jamaica with the Respondent would not be in the best interest of the child as the Respondent seeks to bring her back to an uncertain and unsecure life here within his reach. She is only five (5) years old and I do not believe that she should be subjected to any more instability at the hands of the Respondent.

12. That while it is not in the best interest of the child for her to return to Jamaica, I am willing to provide the Respondent with medical reports and school reports for my daughter in order to show that she is in good health and a cell phone number on which she can be called.

13. That the Respondent has never proven himself to be truly interested in [GC's] welfare and schooling but only seeks and attempts to curtail the life and opportunities available to me and my daughter in the United States and make things extremely uncomfortable and difficult as he had done to us before in the past in Jamaica.

14. That in light of the above mentioned, neither I nor [GC] are [sic] in a position to travel to Jamaica as the Respondent is likely to try and have me detained and my daughter taken away from me and ultimately disrupt our lives permanently." (Emphasis as in original)

[16] The applicant exhibited to her affidavit a letter dated 17 May 2017, purportedly originating from the law offices of Patricia A McKenzie, Esq., Attorney at Law. I will set it out in full below:

> **"TO WHOM IT MAY CONCERN**
>
> **RE: LASHOY R CLACKEN**
> **[GC]**
>
> Dear Sir/Madam:
>
> I am writing this letter on behalf of Lashoy Clacken and [GC] (by and through Lashoy Clacken, her mother), a client with whom I have consulted and given legal advice relating to the immigration process necessary to become a permanent resident of the United States. Ms. Clacken provided all the necessary facts and circumstances for her case.
>
> At my client's request, I have prepared the below details and opinion regarding both Lashoy Clacken and [GC's] pending matter before USCIS and ability to travel.
>
> Neither Ms. Clacken nor [GC] are (sic) able to travel at this time as they have pending Applications to Register Permanent Residence or Adjust Status in the United States.
>
> The relevant petitions and applications were submitted to the United States Citizenship and Immigration Service of the Department of Homeland Security on April 14, 2017.
>
> 1. Each of these petitions or applications were submitted with the applicable fees.
>
> 2. An applicant with. a pending Application to Register Permanent Residence or Adjust Status must remain in the United States until the application is adjudicated.

3. If the applicant leaves the United States while the application to Register Permanent Residence or Adjust Status is pending adjudication, the application is deemed abandoned and will be denied as such.

6. The processing time for the Application to Register Permanent Residence in the applicable field office is approximately (11) months at this time.

7. It is not recommended for either applicant, Lashoy Clacken or [GC] to travel while these petitions and applications are pending.

I can foresee no issues, based on the facts and circumstances known to me, that would prevent Ms. Clacken and her daughter [GCl from being approved for immigrant visas using the process outlined above. I do not guarantee that outcome. However, based on my experience I do not anticipate any issues that would prevent their approval and eventual entry." (Underlining as in original)

[17] A 'Four Year Old Progress Assessment' form exhibited to the applicant's affidavit, represented GC as having made "good progress" in the range of skills assessed.

[18] In affidavits filed on 19 May 2017 and 25 May 2017 respectively, the respondent strongly denied many of the allegations made by the applicant in her affidavits. In particular, he denied that he had ever acted towards GC or the applicant "in a manner that could be described as erratic or uncontrollable in any way". He asserted that he had never "acted or demonstrated any behavior that would embarrass either my daughter or [the applicant], even though [the applicant] has done embarrassing things to me many times during the marriage". The applicant's reports to the police about his behaviour were, he said, based on false accusations. He gave a detailed, different account of the encounter with GC's school principal described by the applicant. He

maintained that he had at all times honoured his maintenance obligations in relation to GC. He described his unsuccessful efforts to make contact with GC at the telephone number supplied by the applicant's attorneys-at-law. He reiterated that his only concern was for the welfare of his daughter and concluded as follows (paragraphs 21-24 of the affidavit of 19 May 2017):

> "21. To this date, I have never acted maliciously or unpleasant in any way towards my daughter, [GC] or her mother, Mrs. Lashoy Clacken-Campbell, or to any members of her family. Instead I have ensured that [GC] at all times felt that her father loves her and that I was there for her, no matter what happened! I have also accommodated all of Mrs. Clacken-Campbell's requests and communicated with her with respect at all times. I have never limited myself in my provisions for [GC] in any way.
>
> 22. [GC] can travel, and I am available at any time to go and pick her up, for her safe return to Jamaica.
>
> 23. Most importantly, [GC] has not seen or her father for over one (1) year and five (5) months now. This is a cruel act being performed by Mrs. Clacken-Campbell to [GC]. No child should be asked to endure such a fate. The interest, wellbeing, health, schooling and general care of my daughter, [GC] is first. I do not know if they are being taken care of.
>
> 24. ... The [applicant] is only concerned about her interest and not that of [GC]. My actions are only geared towards having access to my child. My actions are not malicious but a [sic] show a determination to be a father to my only child."

[19] On 26 May 2017, the respondent filed an amended relisted application for court orders, to include an application for an order that the notice of discontinuance filed by

the applicant on 10 May 2017 be set aside. The stated ground of the application for this order was that it was an abuse of the process of the court.

[20] As already indicated, after hearing counsel for the parties, the judge made the following orders on 29 June 2017:

> "1. The Notice of Discontinuance filed herein is set aside;
>
> 2. [GC] is to be returned by July 31, 2017;
>
> 3. The [applicant] discloses documentary proof detailing the care, upbringing and abode of the minor child including the school in which the minor child is now enrolled, the minor child's health, social and educational progress and proof of gainful employment for the [applicant];
>
> 4. The [respondent] is permitted to have access to the minor child via telephone and video conference until the determination of this matter;
>
> 5. Leave to Appeal granted to the [applicant];
>
> 6. Stay of Execution of these Orders denied;"

[21] On 13 July 2017, the applicant filed notice of appeal against the judge's orders setting aside the notice of discontinuance and requiring GC's return to the jurisdiction by 31 July 2017. The grounds of appeal are as follows:

> "a) That the Learned Judge erred in not finding that it was in the best interest of the minor child, [GC] to remain with her mother, [the applicant] who has had primary care and control of the said minor and that having regard to this relationship between mother and child, it is in the best interest of the child to remain in the United States of America where her mother was establishing a permanent home.

b) That the Learned Judge erred in not taking into consideration, that the Order for the minor child, [GC] to return to Jamaica would cause undue hardship for the [applicant] who has custody of the minor child, to wit, that the said [applicant], in the absence of Orders for another party to have custody of the said child, would have to return to Jamaica in order to maintain such custody and which would impair the [applicant] in maintaining employment in order to provide for the said minor child as well as thwart the [applicant's] capacity to provide *'proof of gainful employment'* as ordered by the learned judge on the said 29th June 2017.

c) That the Learned Judge erred in not finding as a fact, that on a balance of probabilities, the [applicant] had filed applications to regularize the immigration status of both the [applicant] and the minor child, [GC], and that the order for the said child to travel to Jamaica prior to the final determination of that application would abort the processing of said applications.

d) The Learned Judge also erred in not finding that it would not be in the in the best interest of the minor child, [GC], for her to travel to Jamaica prior to the outcome of an application to regularize her immigration status in the United States of America, where her return to Jamaica would abort the said application in circumstances where, if she is subsequently ordered to reside with the [applicant], it would present undue hardship for the [applicant], if she having already attained status as resident of the said country, would be forced to either relocate to Jamaica or bear the costs of making another application for residency for [GC]. That the learned judge, therefore, erred in exercising his discretion to make the Order for the said child to travel to Jamaica without considering the potential harm and/or difficulty in making future arrangements for the minor child/her;

e) That the Learned Judge wrongfully exercised his discretion in ordering that the said minor child be produced to the Honourable Court for the reasons set out in the foregoing Grounds of Appeal and in

circumstances where the [applicant] was ordered to provide Affidavit evidence of the '*health, social and educational progress*' of the said minor child and where the Respondent was ordered to have access to her *via telephone and video conference until the determination of this matter* '.

f) That in the instant circumstances, the Court's permission was not required to file a Notice of Discontinuance and the [applicant] could lawfully discontinue the said ***Claim No. M 01207/2016*** by filing a Notice of Discontinuance. That the learned Judge, therefore, erred in both adjudicating on the filing of the said Notice and in making an order to set aside same."

[22] The application for a stay pending appeal was initially supported by an affidavit sworn to by Mr Delano Franklyn, attorney-at-law for the applicant, on 14 July 2017. Mr Franklyn exhibited to his affidavit copies of the letter from Patricia A McKenzie, Esq., Attorney at Law, set out at paragraph [16] above, as well as appointment notices from the US Citizenship and Immigration Services addressed to GC and one Lashoy Remouna Harvey, in care of Ms McKenzie.

[23] In a long affidavit filed on 21 July 2017, the respondent strongly objected to the application for a stay. He complained that the applicant had prevented him from having access to GC and had failed to provide him and the court with information about the specific arrangements for her care, upbringing, educational progress, diet and well-being. He questioned whether the applicant had in fact made any application for permanent residency in the USA. He described his unsuccessful attempt to see GC in Florida as recently as June 2017. He reiterated that all he wished to do was to see his

daughter and that he had no interest in the applicant returning to Jamaica. He concluded as follows:

> "51. I love our daughter and I wish that she is returned to Jamaica for reasons aforementioned. It is unfair and unjust that the [applicant] can deny me access to our daughter, provide no information as to her whereabouts or her care and act in breach of the Court Order on more than one occasions and still withhold [GC] from me. It is as if my rights as a father are of no moment; they are not important. It cannot be that only the [applicant] has the right to make decisions concerning the welfare of my child.
>
> 52. That the [applicant] has failed to satisfy this Court that a Stay of Execution should be granted."

[24] When the matter came on for hearing before me on 21 July 2017, Miss Bernard for the applicant pointed out that GC has now been in the USA since January 2016 and submitted that, given her current immigration status, it would not be in her best interests for her to be taken from the USA at this time. For her part, Mrs Senior-Smith highlighted the importance of a father's access to a child and pointed to the various difficulties which the respondent has had with regard to that over the last couple years. Mrs Senior-Smith also raised other issues relating to the genuineness of the material supplied by the applicant and accordingly opposed the application for a stay.

[25] During the course of this hearing, it occurred to me, partially as a result of some of the respondent's concerns, that there were some gaps in the information before the court regarding GC's present circumstances. I was particularly concerned that, apart from the material filed in the court below, there was nothing before me from the

applicant herself. I therefore adjourned the hearing until 25 July 2017, to permit the applicant to provide the court with further information about GC's current whereabouts and circumstances. In doing so, I directed that the applicant should address the issue of access to the respondent in the event that I was minded to stay Palmer J (Ag)'s order. In recognition of the possibility that it might not be possible to secure a fully executed affidavit from the applicant in the time available, I indicated that it would be sufficient for the applicant's attorneys-at-law to provide a draft affidavit prepared by them on her instructions.

[26] Accordingly, Mr Franklyn filed a second affidavit on 24 July 2017, to which he exhibited the applicant's first draft affidavit. In it, the applicant confirmed that:

i. Her current address is 2620 Haynes Club Circle, Grayson, Atlanta, USA, and that GC resides with her at that address.

ii. GC previously attended First-light Weekday Pre-School, but is now enrolled in Kindergarten at Grayson Elementary School (both schools are in Atlanta).

iii. Applications for resident status in the USA have been submitted on behalf of GC and herself.

iv. She is one and the same person as Lashoy Remouna Harvey, she having divorced the respondent and remarried (to Sydney Wilberforce Harvey) since coming to the USA in 2016.

v. She will abide by all orders for access to GC by the respondent in the event that the court was to permit GC to remain in the USA.

[27] The applicant's first draft affidavit in turn exhibited copies of (a) a diploma in the name of GC from First Light Weekday Preschool dated 12 May 2017, (b) a general welcome letter to parents from Grayson Elementary School for the 2017-2018 school year; (c) a Judgment of Divorce issued out of the New York Supreme Court, evidencing the dissolution of her marriage to the respondent; and (d) a marriage certificate evidencing her marriage to Sydney Wilberforce Harvey on 15 January 2017.

[28] The respondent responded with a second affidavit of his own, in which he continued to complain of an inadequate level of access to GC and questioned the authenticity of the documentation put forward by the applicant in support of her assertion that GC had been enrolled in school in Atlanta. He also reiterated that he had never been served with any divorce documents emanating from a court in the USA. He set out the arrangements which he proposed for the care of GC when she is returned to Jamaica. He disclosed the advice which he had received from an attorney-at-law in Atlanta which indicated that it was possible for GC to come to Jamaica to visit him during the application process without jeopardising her immigration status. And, after providing information which suggested that the applicant's so-called second husband had a criminal record, he stated that, "I am very concerned for my daughter".

[29] This last allegation sparked yet another draft affidavit from the applicant (exhibited to Mr Franklyn's third affidavit filed on 28 July 2017), in which she contended

that the respondent had from time to time had access to GC and stated her willingness to facilitate further access to him by way of video or telephone calls each evening and during school holidays. The applicant reiterated her earlier evidence that, without a stay, GC's residency application would be negatively affected and she would be forced to return to Jamaica, "without her primary caregiver and without definite orders and/or arrangements being finalized for her care". Finally, the applicant minimised the significance of her new husband's criminal record, pointing out that, although he had been arrested once for possession of a quantity of marijuana found in his home, she did not know him to abuse or handle drugs in any way.

[30] In skeleton submissions filed on 31 July 2017, counsel for the applicant referred me first to my own previous decision in **Channus Block & Marl Quarry Ltd v Curlon Lawrence** [2013] JMCA App 16, in which I had expressed the view (at paragraph [10]) that the question of whether or not to grant a stay pending appeal is –

> "... essentially a balancing exercise, in which the courts seek to recognise the right of a successful claimant to collect his judgment, while at the same time giving effect to the important consideration that an appellant with some prospect of success on appeal should not have his appeal rendered nugatory by the refusal of a stay."

[31] On this basis, it was submitted that the appeal in this case was one with a prospect of success and that, without a stay, it would be rendered nugatory. As regards the prospect of success, it was submitted that the judge did not give adequate consideration to what was in the best interests of GC, given her age, the fact that she

has resided with her mother in the USA since January 2016, is enrolled in school and has a pending permanent residency application which may be jeopardised by her having to leave the USA at this time. In these circumstances, it was submitted, preservation of the current status quo was desirable.

[32] In support of these submissions, the applicant referred me to section 18 of the Children (Guardianship and Custody) Act, which provides that, in any proceeding before the court regarding the custody or upbringing of a child, the court "... shall regard the welfare of the child as the first and paramount consideration ..." I was also referred to the decision of Daye J in the Supreme Court in **Krainz v Krainz** (Claim No HCV 190/03, judgment delivered 18 July 2003), as an example of a case in which, although the mother had removed the child of the marriage from Germany to Jamaica without the father's consent, the court permitted the child to remain under the mother's care and control, based on its assessment of what was in the child's best interests.

[33] In the skeleton submissions filed by Mrs Senior-Smith on 28 July 2017, emphasis was also placed on the need for an applicant for a stay of execution to show an appeal with some prospect of success. The respondent relied on a number of authorities, in particular on **Sherika Dare v Israel Carmet-Cachadina** [2015] JMCA App 27, in which, on an application for a stay of execution in proceedings concerning a minor child, Phillips JA said this (at paragraph [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 the paramount consideration being what is in the best interest of [the child]."

[34] Treating firstly with the appeal against the judge's order setting aside the notice of discontinuance filed on 10 May 2017, Mrs Senior-Smith rehearsed the procedural history of the matter, to make the point that the applicant's motive in filing it was to deprive him of access to GC or knowing her whereabouts. While she accepted that the applicant needed no leave to file the notice of discontinuance, Mrs Senior-Smith nevertheless contended that it was an abuse of process for the applicant to have filed the notice in the circumstances of this case.

[35] In this regard, reliance was placed on the decisions of the House of Lords in **Castanho v Brown & Root (UK) Ltd and anor** [1981] AC 557; and of Robert Walker J (as he then was) in **Ernst & Young (A Firm) v Butte Mining PLC** [1996] 1 WLR 1605. The question in the former case was whether the court had the power to strike out a notice of discontinuance in circumstances in which no leave was required to file it. It was held that it did and Lord Scarman, who delivered the only substantive judgment, observed as follows (at page 571):

> "The court has inherent power to prevent a party from obtaining by use of its process a collateral advantage which it would be unjust for him to retain: and termination of process can, like any other step in the process, be so used ... service of a notice of discontinuance without leave, though it complies with the rules, can be an abuse of the process of the court."

[36] And, in the latter case (at page 1610), citing the former, Robert Walker J described the plaintiff's apparently unfettered right under the rules to file notice of discontinuance as being "subject to the overriding rule that discontinuance will not be permitted if it is an abuse of process".

[37] In the light of these authorities, Mrs Senior-Smith submitted that the applicant does not have a real prospect of success on appeal from the judge's decision to set aside the notice of discontinuance filed on 10 May 2017 as an abuse of process.

[38] Turning next to the appeal from the judge's decision that GC should be returned to Jamaica by 31 July 2017, Mrs Senior-Smith directed my attention to the Children (Guardianship and Custody) (Amendment) Act 2017 ('the 2017 Act'), which came into force on 10 February 2017. The 2017 Act incorporates the Hague Convention on the Civil Aspects of International Child Abduction 1980 ('the Convention'). (The Convention entered into force on 1 December 1983 and, with the coming into force of the 2017 Act, Jamaica became a contracting party with effect from 1 May 2017.[1])

[39] In particular, I was referred to section 7C of the 2017 Act, which provides, under the rubric, 'Wrongful removal or retention of a child', that:

> "7C. – (1) For the purposes of this Act, the removal to, or retention of a child in, a Contracting State is considered wrongful, where–

[1] See http://mfaft.gov.jm/wp/jamaica-takes-action-on-international-child-abduction/

(a) such removal or retention is in breach of rights of custody or rights of access of an individual or institution or other body, whether attributed to the individual, institution or body either jointly or solely; and

(b) at the time of such removal or retention, those rights were actually exercised either jointly or solely, or would have been so exercised, but for such removal or retention.

(2) The reference in subsection (1) to rights of custody is to such rights–

(a) as determined under the law of the Contracting State in which the child was habitually resident immediately before such removal or retention; and

(b) arising by–

(i) operation of law;

(ii) judicial or administrative decision; or

(iii) an agreement having legal effect under the law of the Contracting State."

[40] Mrs Senior-Smith submitted that the respondent falls within this section by virtue of the consent order for joint custody of GC made by the Family Court on 11 May 2016. She therefore prayed in aid especially section 7M of the 2017 Act, which provides that "the [Supreme] Court may at any time order the return of the child wrongfully removed or retained as determined in section 7C". She submitted that the wide power given to the court by the 2017 Act to preserve and protect rights of access to and rights of custody of children is subject only to exceptions set out in section 7N, none of which

apply to this case. Mrs Senior-Smith also pointed to section 7P(1)(a), which provides that, where the court receives notice that a child has been wrongfully removed or retained in a Contracting State, "[it] shall not decide the merits of any claim to rights of custody ... until there has been a determination of the question as to whether or not the child should be returned, and that determination is that the child is not to be returned ..."

[41] Finally, Mrs Senior-Smith very helpfully brought to my attention the decision of the United Kingdom Supreme Court in **In the Matter of KL (A Child)** [2013] UKSC 75, in which the Supreme Court ordered the return to Texas of a child who had been taken by his mother from his residence there with his father. As Lady Hale observed (at paragraph 36), "[t]he crucial factor, in my view, is that this is a Texan child who is currently being denied a proper opportunity to develop a relationship with his father and with his country of birth". Lady Hale therefore concluded that, in those circumstances, the child's "best chance ... of developing a proper relationship with both his parents, and with the country whose nationality he holds, is for the Texas court to consider where his best interests lie in the long term".

[42] Accordingly, taking the provisions of the 2017 Act into consideration, especially as regards its strengthening of rights of access to children, as well as the applicant's "chronic non-compliance and disregard for the Orders made by the Court", Mrs Senior-Smith submitted that:

> "... the return of [GC] at this stage is ideal as she has not started school. She has not settled in her environment and

> her father is prepared to take care of her until the Court below decides on the merits. [GC] will not be committing any breach of US Immigration Law as averred by the [applicant]. It is the [applicant] who has done that. The Respondent has sought the help of two Courts of this land by virtue of several Applications to give effect to his rights of access arising from a Judicial decision. The Respondent has acted within the law at all times."

[43] Having regard to all of the above, Mrs Senior-Smith concluded, the appeal from the judge's order that GC should be returned to Jamaica did not have a real prospect of success. Further, that the return of [GC] will not stifle the appeal or the matter, as the merits of the case will have to be determined.

[44] As the submissions on both sides demonstrate, the test that I am required to apply at this stage is uncontroversial. Adopting Phillips JA's formulation in **Sherika Dare v Israel Carmet-Cachadina** (see paragraph [33] above), I take the relevant question to be whether the applicant has shown that she 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. But this case is to some extent complicated by the fact that GC is a minor child, which means that, (i) as Phillips JA put it in, "the paramount consideration [is] what is in the best interest of [the child]"; and (ii) the incorporation in the 2017 Act of Convention principles, which, as the preamble to the Convention declares, seek "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence".

[45] In considering whether the applicant has shown that she has a real prospect of success on appeal from the judge's order, it is regrettable that I have had to do so without the benefit of knowing his reasons for making those orders. While I appreciate that the judge was no doubt pressed to decide this matter on an urgent basis, I hope that the parties will be able to ensure that this omission is cured by the time the appeal comes on for hearing.

[46] I will first consider whether the applicant has a real prospect of success on appeal from the judge's order striking out the notice of discontinuance. The complaint in ground of appeal (f) is that the judge erred in making the order, since the applicant did not need permission to file a notice of discontinuance and therefore did so lawfully. No submission was made to me in support of this ground and it appears to me that, in the light of the authorities upon which Mrs Senior-Smith relied, it is not well founded.

[47] In determining whether there has been an abuse of process, compliance with the rules is not a decisive consideration. As Lord Denning MR observed in **Goldsmith v Sperrings Ltd** [1977] 2 All ER 566, 574-575):

> "On the face of it, in any particular case, the legal process may appear to be entirely proper and correct. What may make it wrongful is the purpose for which it is used."

[48] After citing this dictum in his dissenting judgment in the Court of Appeal in **Castanho v Brown & Root (UK) Ltd** [1980] 3 All ER 72, 80, Lord Denning MR went on to explain that "[i]f it [the legal process] is used for the purpose of the party

obtaining some collateral advantage for himself, and not for the purpose for which such proceedings are properly designed and exist, he will be held guilty of abuse of the process of the court". This is the view which ultimately prevailed in the House of Lords, as can be seen from the judgment of Lord Scarman to which I have already referred (see paragraph [35] above).

[49] In this case, on the same day on which her notice of discontinuance was filed (10 May 2017), the applicant asserted on affidavit that, the matter having been discontinued, "all consequential reliefs sought under such proceedings would also cease to exist or be terminated". From this, it seems to me to be strongly arguable that the notice was in fact filed for the collateral purpose of achieving this very result. If that was so, then that would in my view have been a clear abuse of process fully justifying the judge's decision. Accordingly, I do not think that the applicant has shown an appeal with a real prospect of success on this ground.

[50] But the real objective of this application is to achieve a stay of the judge's order that GC should be returned to Jamaica by 31 July 2017. In considering whether the applicant has a real prospect of success on appeal from this order, one factor which looms large, and was probably influential with the judge, is the applicant's behaviour in unilaterally removing GC from the jurisdiction, despite her own recognition of the fact that the prudent course was to seek the approval of the Family Court to do so. There can be no doubt that this may ultimately prove to be a highly significant consideration

in arriving at whatever orders are ultimately made in respect of GC's custody, care and control.

[51] However, at this stage, I have found it helpful to bear in mind the procedural and factual context in which the judge's order was made. The proceedings in the Supreme Court are still very much at an interlocutory stage, so a final decision on which parent is to have custody of GC has not yet been made. The judge's order was therefore an interim order. At the time of the order, GC had been in the USA with her mother, whom the parties' acknowledged from the time of the consent order in the Family Court in May 2015 to be GC's primary caregiver, for a year and a half. There was some evidence, albeit not accepted by the respondent, that she was enrolled in school and enjoyed reasonable living accommodations. There was also some evidence, again disputed by the respondent, that it would be inimical to GC's immigration status and prospects for her to leave the USA at this time. It is clear from all the material filed by him that the respondent's principal objective was the perfectly laudable one of gaining suitable access to GC. No doubt because of that, there was nothing before the judge from the respondent indicating the nature and suitability of any accommodation that he would be able to offer GC were she to be returned to Jamaica. (I note that, as part of his objection to the grant of the stay, the respondent did give an indication of the arrangements which he would make for GC's care and comfort if she were allowed to come to him. However, for present purposes, I am concerned with the evidence which was before the judge.)

[52] So the question for the judge was whether, on this state of the facts, and bearing in mind the stage at which the proceedings had reached, it was in GC's best interests to order her virtually immediate return to Jamaica. This was, of course, a matter for the discretion of the judge and when the appeal is heard the court will no doubt be concerned to see whether a case has been made out to disturb the judge's exercise of his discretion. But it nevertheless appeared to me to be arguable that, even taking into account the enhanced emphasis on rights of access under the 2017 Act, the judge's exercise of his discretion was flawed, given that both sides had not yet had an opportunity to ventilate fully all considerations, factual as well as legal, material to GC's welfare. I therefore considered that, on this basis, the applicant did have an appeal with a real, as distinct from fanciful, prospect of success and that the first hurdle for the grant of a stay had therefore been crossed.

[53] As far as the risk of injustice is concerned, I was also greatly influenced in this regard by the interim state of the proceedings. I was unable to exclude the possibility that, if GC were returned in compliance with the judge's order by 31 July 2017, this court might rule in the applicant's favour on the appeal, thus possibly obliging the respondent to return GC to the applicant's care in the USA, with the consequent disruption of the living, educational and immigration arrangements now being put in place for her. In my view, none of this would be in GC's best interests. Nor would that be the end of the matter, as the question of who should ultimately have custody of GC in the longer term would still remain pending in the Supreme Court.

[54] But it is, of course, necessary to consider the real risk of injustice to the respondent, who, from all that I have seen, has been making a sincere attempt to have access to GC, his only child, for the purpose of contributing meaningfully to her upbringing and development as a person. Despite this, given my strong reservations as to whether GC's best interests would be served by obliging her return to Jamaica while the appeal remains pending, it accordingly seemed to me that the best course to adopt in all the circumstances would be to direct the hearing of the appeal as soon as possible. So it was that the learned Registrar, in response to my enquiry as to whether it was possible to secure an early date for the hearing on an urgent basis, was able to fix it for 17 October 2017. In the light of this, I therefore proceeded to make the necessary case management orders to ensure that the appeal can in fact be heard on that date.

[55] However, I cannot leave the matter without pointing out that there is no appeal from the judge's orders that (a) the applicant is to disclose documentary proof detailing the care, upbringing and abode of GC, including the school in which GC is now enrolled, GC's health, social and educational progress and proof of the applicant's own gainful employment; and (b) the respondent is permitted to have access to GC by telephone and video conference until the determination of this matter. Although some information pertaining to (a) was in fact provided as part of the material relied on in support of the application for a stay, I would urge the applicant (and her legal advisors) to ensure full compliance with these orders in all respects, particularly as regards the respondent's rights of access.

[56] These are the reasons for the decision given and the orders made on 14 August 2017.