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United States District Court, N.D. California.
In re Application of Vickrama D.R. KRISHNA, Petitioner,
v.
Bavita Kumar KRISHNA, Respondent.
No. C 97-0021 SC.

April 11, 1997.

ORDER RE PETITION FOR RETURN OF CHILD TO HABITUAL RESIDENCE

CONTI, District Judge.

I. INTRODUCTION

*1 Petitioner, Vickrama D.R. Krishna ("Mr.Krishna"), brings this action for return of his 32-month-old child, Ryan R. Krishna, to Australia pursuant to The Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act, 42 U.S.C. 11601 et seq. Respondent, Bavita Kumar Krishna ("Ms.Krishna"), asserts that petitioner's request should be denied because petitioner consented to respondent's trip to the United States and the return of the child to Australia would expose the child to grave risk of physical or psychological harm. [FN1]

FN1. Respondent also argues that the child is well settled in the United States. This contention is irrelevant, however, unless the petition is commenced more than a year after the child's abduction. 42 U.S.C. <section> 11603(e)(2)(A).

II. BACKGROUND

Mr. and Ms. Krishna were married on December 24, 1992 in Suva, Fiji. Soon after, the couple moved to Australia where Mr. Krishna resided. On or about May 10, 1996, Ms. Krishna left the matrimonial home in Merrylands, New South Wales, Australia, with the child following an argument with Mr. Krishna. During this argument, Ms. Krishna called the Australian police to intervene and the police took Mr. Krishna into custody. According to the police report, Mr. Krishna slapped Ms. Krishna across the face and threatened her

with a knife and a belt; however, the police did not find any visible injuries to Ms. Krishna. Mr. Krishna returned to the matrimonial home on May 11, 1996, where he discovered that Ms. Krishna had left the home with the child and a number of the family items. The charges against Mr. Krishna were dismissed on August 6, 1996, as Ms. Krishna had left Australia prior to the hearing on the case.

On May 12, 1996, Ms. Krishna departed from Australia with the child to Union City, California, to live with the maternal grandparents. Prior to Ms. Krishna's departure for the United States, Mr. Krishna gave Ms. Krishna the child's passport after one of Ms. Krishna's relatives in San Francisco requested that he do so during a phone conversation with him. Ms. Krishna alleges that Mr. Krishna gave her the child's passport with the knowledge that Ms. Krishna was planning to travel to the United States. Mr. Krishna alleges that he gave Ms. Krishna the child's passport with the understanding that she planned to move elsewhere in Australia. The evidence, however, indicates that he understood that she planned to leave the country. On May 12, 1996, Mr. Krishna attempted to speak to his wife through his wife's brother, but his request was denied. Mr. Krishna has spoken to his wife and son on a number of occasions since she has resided in the United States.

The evidence of Mr. Krishna's abuse of Ms. Krishna is relatively limited and there is just one statement by Ms. Krishna alleging any direct threat Mr. Krishna posed to the child. Ms. Krishna alleges that Mr. Krishna has regularly beat her since her son's first birthday and that Mr. Krishna beat her seriously on five separate occasions. The police were first notified of these incidents on May 5, 1996. The May 10, 1996, incident is the only time that Ms. Krishna's allegations have been corroborated, although this "bad beating," according to the police report, did not leave any visible signs and the charges against Mr. Krishna were later dismissed, as described above.

*2 Ms. Krishna alleges that her son's health and emotional well being have dramatically improved since she left the matrimonial home in Australia. Moreover, the child has become attached to his grandparents and his uncle and aunt. Ms. Krishna and the child have lived in the United States for almost a year and Ms. Krishna greatly fears returning to Australia--where she has no immediate family members upon which she can rely. Ms. Krishna is in the process of applying for citizenship through her parents and has applied for a divorce, including resolution of child custody rights, in Alameda County. According to Ms. Krishna, the custody and visitation issues can be resolved in the Superior Court of California. Similarly, Ms. Krishna asserts that Mr. Krishna is in a far better position to resolve the dispute in California, rather than Australia, because of his greater financial resources. Mr. Krishna, however, asserts that Ms. Krishna could receive support from the Australian welfare system.

Mr. Krishna concedes that long-standing marital problems have plagued his relationship with Ms. Krishna and that these problems were serious. Mr. Krishna asserts that he never gave Ms. Krishna permission to take the child outside of Australia. Mr. Krishna also alleges that he was exercising full rights of custody and guardianship of the child at the time Ms. Krishna left Australia. Mr. Krishna is asking for the return of his son to Australia in order to resolve the custody issues there, not the return of Ms. Krishna and the child to the matrimonial home. Moreover, Mr. Krishna asserts that the Australian government has numerous social programs that will safeguard and support Ms. Krishna during custody proceedings in Australia, i.e., Ms. Krishna could live on welfare through the course of the proceedings.

III. LEGAL STANDARD

Under the Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act, 42 U.S.C. 11601 et seq. ("ICARA"), Mr. Krishna has the burden of showing by a preponderance of the evidence that the removal was wrongful. 42 U.S.C. <section> 11603(e)(1). As a threshold matter, Mr. Krishna must show that: (1) Ms. Krishna removed the child from his habitual residence; [FN2] and (2) Mr. Krishna was exercising his right of custody.

FN2. United States courts have determined that:

[o]n its face, habitual residence pertains to customary residence prior to the removal ... [and that] habitual residence can only be 'altered' by a change in geography and the passage of time ... The change in geography must occur before the questionable removal.

Friedrich v. Friedrich, 983 F.2d 1396, 1401-1402 (6th Cir.1993).

If Mr. Krishna meets his burden, the burden shifts to Ms. Krishna to show:

- (1) by clear and convincing evidence that the return of the child to his or her country of habitual residence presents a grave risk of physical or psychological harm to the child, 42 U.S.C. <section> 11603(e)(2)(A);
- (2) by clear and convincing evidence that the return of the child would violate principles of human rights and fundamental freedoms, 42 U.S.C. <section> 11603(e)(2)(A);
- (3) by a preponderance of the evidence that, where the petition was commenced more than one year following the abduction, the child is settled in his or her new home, 42 U.S.C. <section> 11603(e)(2)(A); or
- *3 (4) by a preponderance of the evidence that Mr. Krishna was not exercising his custodial rights at the time of removal or had consented to or subsequently acquiesced in the removal or retention of the child, 42 U.S.C. <section> 11603(e)(2)(B).

If Ms. Krishna demonstrates that any one of these affirmative defenses is applicable, the mandatory return of the removed child is made discretionary. This discretion, however, is generally limited:

The affirmative defenses ... offer an opportunity, in extraordinary cases,

for a court in the country of flight to consider the practical realities of the situation. However, it is the clear import of the [ICARA] that in most cases the duty of that court, when the niceties of the convention are met, is to return the child to the country of habitual residence for resolution of the custody dispute under the laws of that country.

Friedrich, 983 F.2d 1403.

IV. DISCUSSION

In the extant case, Mr. Krishna has provided ample evidence for the court to conclude that he was exercising his custodial rights at the time the child was removed to the United States; specifically, the child lived with Mr. Krishna and Mr. Krishna was the primary means of support for the child. Mr. Krishna has also supplied a letter from the Solicitor of the Supreme Court of New South Wales stating that under Australian law Mr. Krishna was exercising his custodial rights.

Mr. Krishna provides compelling evidence to support his contention that Merrylands, Australia, was the child's habitual residence at the time the child was removed to the United States. Other than one (or perhaps two) brief trip to the United States, the Merrylands' home was the residence in which the child had lived until that point in time. Accordingly, the court finds that Mr. Krishna has met his burden with respect to the threshold issues required under ICARA.

As discussed above, the burden then shifts to Ms. Krishna to show that one (or more) of the four exceptions to ICARA is applicable to her case. Ms. Krishna argues that the first and fourth exceptions apply to this case. First, Ms. Krishna contends that the violence that Mr. Krishna has exhibited in the past is a prima facie basis for concluding that return of the child to Australia would pose a grave risk to his well being. Moreover, Ms. Krishna asserts that, because of her limited means and her family being based in the United States, she would be almost entirely reliant on Mr. Krishna or the Australian welfare system were she to return to Australia.

Mr. Krishna contends that he has never posed a direct threat to the child and that, in any event, the child would never be threatened by him because he is not requiring Ms. Krishna and the child to return to the matrimonial home to live with him. Moreover, the court is empowered to condition the child's return on specific undertakings which would safeguard the child. See *Feder v. Evans-Feder*, 63 F.3d 217, 227 (3rd Cir.1995).

*4 In light of the prior history of alleged abuse and discord that has existed between the parties, the court finds that the return of the child to Australia would pose a grave risk to the child's well being. Although there is little evidence that relocation of the child to Australia poses a grave

threat of physical harm to the child, the court finds that there is compelling evidence establishing the potential for serious psychological harm. It is clear from the evidence that the relationship between Mr. and Ms. Krishna is a tempestuous one, which has caused considerable psychological stress to both parents and child. Return of the child to Australia would only serve to reinstate the child in a highly stressful and psychologically damaging environment, particularly because Ms. Krishna has relatively limited familial support in Australia. Moreover, the child is currently well settled in United States where a divorce proceeding has been filed and can be expedited to minimize the costs to Mr. Krishna.

Second, Ms. Krishna argues that Mr. Krishna either consented to the child's removal or acquiesced to it by virtue of his alleged silence following her departure to the United States. Mr. Krishna disputes both of these contentions on the basis that he never consented to the removal, though he did anticipate her moving out of the family home to a residence elsewhere in Australia, and that he attempted to contact Ms. Krishna immediately following her departure and has spoken to her on several occasions since her relocation to the United States.

Mr. Krishna, however, freely provided Ms. Krishna with the child's passport after a discussion he had with one of Ms. Krishna's relatives who resides in the United States, who informed him of Ms. Krishna's intention to come to the United States. The court can find no reason for this action other than that Mr. Krishna was acceding to the child's removal from Australia, as it would be unreasonable to transfer the child's passport to Ms. Krishna for any other reason. The court, therefore, finds that Mr. Krishna either implicitly or explicitly consented to the child's removal to the United States.

Finally, there is no evidence that Ms. Krishna is forum shopping, which is one of central issues the Act was designed to mitigate. Rather, she moved to the United States because her parents and brother, upon whom she now relies, are domiciled in Union City.

Accordingly, the court finds two bases upon which to deny Mr. Krishna's motion: First, the child's return to Australia would expose him to grave psychological harm because of the discord and alleged abuse that exists between the parties. Second, Mr. Krishna consented to the child's removal to the United States by transferring the child's passport to Ms. Krishna.

V. CONCLUSION

For the foregoing reasons, Mr. Krishna's request for return of his child, Ryan R. Krishna, to Australia is DENIED.

IT IS SO ORDERED.

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