



Neutral Citation Number: [2021] EWHC 1716 (Fam)

Case No: FD21P00355

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 25/06/2021

**MR JUSTICE MOSTYN**

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**Between :**

**A**  
**- and -**  
**B**

**Applicant**

**Respondent**

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The Applicant appeared in person

**Mr Baldip Singh** (instructed by **Charles Allotey Solicitors**) for the Respondent

Hearing date: 11 June 2021  
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**Approved Judgment**

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MR JUSTICE MOSTYN

The judge has given leave for this anonymised version of the judgment to be reported. In no publication can the parties or the child be identified. Breach of this restriction will be contempt of court.

**Mr Justice Mostyn:**

1. This application concerns Z, a boy born in 2016 (now aged 4). Z's parents are A ("the father") and B ("the mother"). The father finally ended the parties' relationship in June 2020, but the parties had previously separated, before then reconciling.
2. The father is 36 years old, and is a UK national. The mother is 32, and is a Slovakian national. Both parents live in south London.
3. Z currently lives with the father, and spends time with his mother on a supervised basis only. Z's British passport is in the father's possession and I was told that Z has no other identity or travel documents which would enable him to leave the jurisdiction.
4. On 3 June 2021, the father applied without notice to the mother for an order making Z a ward of court, a prohibited steps order preventing the mother from withdrawing funds (in the sum of circa £3,000) held in an account earmarked to pay the fees for the private school attended by Z ("the school fee account"), and a port alert order. That application was first heard without notice to the mother by Peel J, who listed the *inter partes* hearing which then came before me.
5. Although Z is only 4 years old, this is already the third set of proceedings that has come before the English courts in relation to his welfare. The first set of proceedings took place in 2019 in the High Court, under the Children Act 1989. The parties reached agreement in those proceedings, and a consent order was made by Cobb J on 21 May 2019 which provided, *inter alia*, that Z would live with both parents in the same property in south London, and that both parents were prohibited from removing Z from the jurisdiction without the written consent of the other or an order of the court. There was no time limit contained in that order and therefore the prohibited steps order made by Cobb J in relation to taking Z out of the jurisdiction remains in force.
6. The second set of proceedings concerning Z is currently ongoing in the Central Family Court, under the Children Act. I have not seen the relevant application(s), and neither has Mr Singh, who appeared on behalf of the mother. Mr Singh speculates that there are cross-applications for live-with orders. It appears from an order made by DDJ Cassidy on 14 May 2021, which has been provided to me, that a three-day hearing is due to commence on 18 August 2021. DDJ Cassidy has directed that the hearing will be used as a fact-finding hearing in the Children Act proceedings, and as a final hearing in relation to Family Law Act 1996 proceedings.
7. Those Family Law Act proceedings concern the parties' cross-applications for non-molestation orders and occupation orders. Again, I have not seen those applications, but it is evident from the order of DDJ Cassidy that a non-molestation order was made against the mother on 14 April 2021, following which DDJ Cassidy made a non-molestation order against the father on 14 May 2021. The cross-applications for occupation orders have been adjourned until the final hearing in August.

**Application for a wardship order**

8. I asked the father what he was trying to achieve by having his son made a ward of court. The father told me that he wanted to ensure that no steps are taken unilaterally by the

mother in relation to Z's education at his current school, or in relation to any medical treatment.

9. I referred the father to s.8(1) of the Children Act 1989, which states:

““a prohibited steps order” means an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court’.

I explained to the father that taking a child out of school is a step that can be taken by a parent in meeting their parental responsibility, and is therefore within the power of the Family Court to regulate by the making of a prohibited steps order, as is taking a child for a medical examination or treatment.

10. In *AS v CPW* [2020] EWHC 1238 (Fam), I stated:

‘31. In many of cases of this type wardship is sought almost as a reflex. I refer to FPR PD 12D para 1.3 which states:

"The court's wardship jurisdiction is part of and not separate from the court's inherent jurisdiction. The distinguishing characteristics of wardship are that (a) custody of a child who is a ward is vested in the court; and (b) although day to day care and control of the ward is given to an individual or to a local authority, no important step can be taken in the child's life without the court's consent."

32. This needs to be borne in mind carefully by anybody seeking to make a child a ward of court in a case such as this. They need to ask: what does wardship add to the invocation of the inherent and/or statutory jurisdiction? The answer is, in many cases, nothing. I accept Ms Chaudhry's submission that in some non-Hague abduction cases (surely a minority) there are features where wardship may assist a return, but they would have to be clearly identified and justified by evidence, rather than by mere assertion.’

11. In my judgment, this is one of those many cases in which wardship would add nothing to the invocation of the statutory jurisdiction. The father applied for a wardship order to prevent steps being unilaterally taken by the mother in relation to Z's education and medical treatment, but wardship would not add any power in relation to those issues that is not already vested in the Family Court under the Children Act 1989. Wardship provides no magic solution to the father's concerns over and above what can be ordered by the Family Court. In such circumstances, it would be wholly inappropriate for me to make Z a ward of court.
12. The application for a wardship order is therefore dismissed.

### **Application for a prohibited steps order**

13. It is a basic rule that litigants in family proceedings should only make applications to the High Court where the relief sought does not lie within the statutory powers of the Family Court, or where procedural law or caselaw allows or requires the application to be made in the High Court. As the most recent President's Guidance on '*Jurisdiction of the Family Court: Allocation of cases within the Family Court to High Court judge level and transfer of cases from the Family Court to the High Court*', dated 24 May 2021, states at paragraph 30:

‘It is very important that the Family Court is seen as the sole, specialist, court to deal with virtually all family litigation. Except as specified in the Schedule to this Guidance, cases should only need to be heard in the High Court in very limited and exceptional circumstances.’

14. At the beginning of the hearing, I therefore asked the father why his application for a prohibited steps order in relation to the school fee account should not be dealt with in the Central Family Court, like the existing Children Act proceedings taking place there. The father conceded that that would be an appropriate way forward and explained that he had only sought to pursue that particular application before me because he had already secured the hearing before me as a result of his wardship application.

15. There is some justification for the father's stance. FPR 5.4 provides:

(1) Where both the family court and the High Court have jurisdiction to deal with a matter, the proceedings relating to that matter must be started in the family court.

(2) Paragraph (1) does not apply where –

(a) proceedings relating to the same parties are already being heard in the High Court;

(b) any rule, other enactment or Practice Direction provides otherwise; or

(c) the court otherwise directs.

On the face of it, therefore, where the wardship application had to be issued and heard in the High Court, it was legitimate for the father to tack onto it this application for a prohibited steps order.

16. In my judgment, the rule allows the father in these circumstances to issue this prohibited steps application in the High Court. However, where I have dismissed the wardship application I am clear that it would not be appropriate for me to deal with it. There are no exceptional circumstances justifying its resolution in the High Court. It is precisely the sort of application which is dealt with on a daily basis by District Judges sitting in the Family Court up and down the land, and can easily be heard alongside the existing Children Act proceedings.

17. I therefore dismiss the prohibited steps order application that has been made to the High Court. Everything the father seeks can be ordered by the Family Court. Whether it does so is, of course, quite another matter.

### **Application for a freestanding port alert order**

18. In this part of the judgment when I refer to a “freestanding port alert order” I am talking about a discrete order for a port alert. I am not talking about a port alert order which is an ancillary term of a Tipstaff Order. I discuss this distinction below.
19. In the order made at the without notice hearing before Peel J on 3 June 2021, a recital was included which stated that it appeared to the court that ‘there may be a case for making a port alert, if the evidence so warrants, but there is no justification for doing so on a without notice basis’. I therefore asked the father what his evidence was for a port alert needing to be issued.
20. The father told me that a port alert should be made to ensure that Z is not removed from England and Wales by the mother, as he fears the mother will return with Z to Slovakia, her homeland, or to the Czech Republic, a country to which she also has connections.
21. I explained to the father, showing him Reunite’s ‘International Parental Child Abduction: Prevention Guide for England and Wales’, that to be successful in his application he had to prove that there was a “real risk” that the mother would abduct Z. The father said that the mother has frequently made threats to abduct Z. He further submitted that the mother has no reason to stay in England since she has lost her job, is awaiting charging decisions on three matters from the CPS in relation to allegations the father has made about domestic violence and the mother’s alleged breaches of the non-molestation order made against her on 14 April 2021, and has a lucrative business based in Europe. The father cited the fact that the mother has tried to withdraw funds from the school fee account as a sign that she was thinking of leaving the country.
22. I raised with the father the fact that a port alert usually only lasts for 28 days, at which point, if desired, the applicant has to come back to court and ask for the alert to be renewed. The father requested that I order a port alert to stay in place for longer than the usual 28 day period, and that I should direct that his application for a port alert order should be listed to be reconsidered at the same time as the existing Children Act 1989 proceedings taking place at the Central Family Court.
23. This raised an interesting question, namely whether the Family Court has the power to issue a freestanding port alert order.
24. The current standard, *pro forma* draft order template for a port alert order suggests that such an order should be made in the High Court, for it is headed ‘In the High Court of Justice, Family Division’. Furthermore, the Reunite Prevention Guide, referred to above, says under the ‘how to get it’ section of the entry on port alert orders that ‘an application should be made to a High Court Judge sitting at the Royal Courts of Justice, or to a High Court Judge that is sitting in a court more local to you’. These materials suggest that the Family Court does not have the power to issue a freestanding port alert and that such a step can only be taken by the High Court.

25. I disagree. An order for a port alert is not a substantive Tipstaff Order made pursuant to the inherent jurisdiction of the High Court. As is well known, there are three types of Tipstaff Order: the passport order, the location order and the collection order. Each of these contains, as an ancillary term, a port alert order. These Tipstaff Orders can only be made by the High Court. They are independent forms of relief. Strictly speaking an application for a Tipstaff Order should have its own case number and should not bear the same number as the cause of action which it is seeking to support.
26. The President’s Guidance dated 24 May 2021, at para 17, states that the Family Court does not have jurisdiction in respect of the matters in Part A of its Schedule; those matters must be commenced in the High Court. Further, while the Family Court does have formal jurisdiction over the matters in Part B of the Schedule they must nonetheless be issued in the High Court. Item No. 2 in Part A is: “cases in which a Tipstaff Order is applied for.” Thus, the Family Court has no jurisdiction to grant a Tipstaff Order.
27. I repeat that an application for a freestanding port alert order is not a Tipstaff order. It does not fall within Part A or B of the Schedule to the Guidance. True, an order for a port alert is made pursuant to the inherent power of the High Court. But it is not an independent, substantive form of relief. It is an incidental or supplemental measure designed to give effect to a substantive order made by the court, or to protect a substantive claim made to the court. It is of the same character as an interlocutory injunction or a bench warrant, both of which I discuss below.
28. Section 31E(1)(a) of the Matrimonial and Family Proceedings Act 1984 is headed “**Family Court has High Court and County Court powers**” and provides that “in any proceedings in the Family Court, the court may make any order ... which could be made by the High Court if the proceedings were in the High Court”. This provision is in the same terms as s.38(1) of the County Courts Act 1984.
29. This general ancillary jurisdiction of the County Court to exercise High Court powers has been in place for decades. So far as I can tell the earliest expression of this jurisdiction was in s.71 of the County Courts Act 1934 which provided that:
- ‘Every county court, as regards any cause of action for the time being within its jurisdiction, shall in any proceedings before it—
- (a) grant such relief, redress or remedy or combination of remedies, either absolute or conditional; and
- (b) give such and the like effect to every ground of defence or counterclaim equitable or legal (subject to the provisions of section sixty-three of this Act);
- as ought to be granted or given in the like case by the High Court and in as full and ample a manner.’

The current wording first appears in s.38(1) of the County Courts Act 1984, and has been in place for nearly 40 years.

30. As stated in the Family Court Practice 2020 at pp 809 and 1163, the most obvious example of a High Court power being exercised by the County Court is the award of an interlocutory injunction. The County Court Act 1984 does not directly spell out a power to award an interlocutory injunction. But interlocutory injunctions are made by the County Court every day. They are made by the County Court exercising the High Court's powers to grant an injunction (contained in s.37 of the Senior Courts Act 1981) pursuant to s.38 of the County Courts Act 1984.

31. Plainly, the County Court can only exercise the High Court's ancillary powers where it is determining a matter in respect of which it has substantive jurisdiction: see *Westwood v Knight* [2012] EWPC 14 where it was held that the County Court had power to issue a bench warrant against a contemptuous absent defendant. Judge Birss QC (as he then was) at [136] cited Butler-Sloss LJ in *Re B* [1994] 2 FLR 479 where she described the power to issue a bench warrant as one made under the inherent jurisdiction of the High Court and ancillary to the investigation by the court of the relevant issues before it. At [140] Judge Birss QC therefore held:

‘It is clear that the High Court has the jurisdiction to issue a bench warrant in appropriate circumstances. It is part of the inherent jurisdiction of the court, particularly to ensure that other orders it makes are complied with.’

And at [147] he held that whilst s.38 of the County Courts Act 1984 does not confer on the county court a jurisdiction to hear a case it has no jurisdiction to hear, it supplies remedies and orders which the court can make in proceedings properly before it. This allowed the issue of a bench warrant by the County Court.

32. This decision was followed by Peter Jackson J (as he then was) applying s.31E(1)(a) of the Matrimonial and Family Proceedings Act 1984 in *Re K (Remo: Power of Magistrates to issue Bench Warrant)* [2017] EWFC 27).

33. Thus, the President's Guidance dated 24 May 2021, referred to above, explains at paragraph 15:

‘Section 31E(1)(a) of the 1984 Act provides that “In any proceedings in the Family Court, the court may make any order ... which could be made by the High Court if the proceedings were in the High Court.” This does not permit the Family Court to exercise original or substantive jurisdiction in respect of those exceptional matters, including applications under the inherent jurisdiction of the High Court, that must be commenced and heard in the High Court. It does, however, permit the use of the High Court's inherent jurisdiction to make incidental or supplemental orders to give effect to decisions within the jurisdiction of the Family Court. Thus, for example, the family court can:

(a) issue a bench warrant to secure the attendance of a judgment creditor at an enforcement hearing: see *Re K (Remo: Power of Magistrates to issue Bench Warrant)* [2017] EWFC 27); and

(b) require a party to use his or her best endeavours to procure the release of the other party from mortgage covenants: see *CH v WH* [2017] EWHC 2379 (Fam).’

34. It is therefore clear that the Family Court is able to use the High Court’s inherent jurisdiction to make incidental or supplemental orders to give effect to decisions which are within its own jurisdiction. But, to state the obvious, s.31E(1)(a) does not give power to the Family Court to make a Tipstaff Order.
35. I have discussed this issue with the Tipstaff, Mr Richard Cheesley MBE. He has told me that the *pro forma* port alert order was designed to be used where there is no requirement for the Tipstaff’s involvement in a case. He is of the view that the Family Court does have the power to issue a freestanding port alert, and has informed me that he knows of two cases where freestanding port alerts have been issued in the Central Family Court, and another case where such an alert was issued by a Circuit Judge in the Family Court sitting at another location. He is of the view that the High Court heading of the current *pro forma* port alert order is misleading. I agree.
36. Moreover, it is not only the courts (whether the High Court or the Family Court) which have the power to issue port alerts. As I explained to the father, referring him again to the Reunite Prevention Guide, the police have the power to put in place port alerts for children under the age of 16, since under s.1 of the Child Abduction Act 1984, the removal of a child under the age of 16 from the UK without the consent of everyone with parental responsibility or a court order is a criminal offence. It is not clear to me why the Family Court should not have the power to issue freestanding port alerts if the police can do so.
37. In my judgment, therefore, the Family Court plainly does have the power to issue a freestanding port alert order, where such an order is justified on the facts and is an incidental and supplemental order to give effect to a decision of the Family Court.
38. The most obvious example is the situation where the Family Court has made a prohibited steps order preventing parents from taking a child out of the country without the other’s consent or a court order. A port alert in such circumstances is simply acting as a supplemental safety net to ensure the efficacy of the prohibited steps order. It would be highly anomalous if the Family Court had power to issue a bench warrant to bring a parent who had gone on the run with the children before the court but did not have the power to issue a port alert order to prevent the children leaving the country.
39. I would not expect freestanding port alert orders to be made by the Family Court routinely. Such an order should only be made where the applicant demonstrates with clear evidence that there is a real and imminent risk that the children in question will be removed from England and Wales. When assessing that risk the court will not demand proof that it is more likely than not that the children will be removed; it will, nonetheless, still expect proof of a degree of probability not far short of that standard. It is important that applications for these orders are not made in reliance on evidence which amounts to no more than mere assertion or which is otherwise flimsy or unsubstantiated.
40. When such an order is made the default position should be that it lasts for only 28 days in the first instance and that any extension of that period should only be ordered on a



subsequent *inter partes* hearing. In my opinion this is a key provision which needs to be adhered to strictly.

41. I revert to the case before me. My decision is that I should dismiss the father's application for a port alert order, first because it should have been made to the Family Court and not to the High Court, and second because I am not satisfied that there is a real and imminent risk that the mother is going to remove Z from the jurisdiction and return with him to Slovakia or the Czech Republic. The father holds Z's British passport, and I accept that the mother has not covertly obtained a Slovakian passport or any other travel or identity documentation for Z that would enable him to leave England and Wales. Furthermore, the mother's only contact with Z is supervised, and I find it unlikely that the mother would be able to thwart the watchful eye of her supervisor in order to abduct Z.

### **The correct method of applying for a freestanding port alert order**

42. The initial application for a port alert order will almost invariably be made *ex parte* for obvious reasons. Although arrangements will vary between Designated Family Judge ("DFJ") areas of the Family Court, there should always be a transparent and accessible facility to make an urgent *ex parte* application.
43. An application for an *ex parte* port alert order (or, for that matter, any urgent *ex parte* order) should always be made, if possible, to a hearing centre in the applicant's local DFJ area. But if a DFJ area for one reason or another cannot provide an urgent business judge on the day to hear the application then there is no reason why the applicant cannot make the application in another area. The geographical divisions of the Family Court are purely administrative. Regardless of the actual location in which the judge is sitting, it will still be the single Family Court that makes any order which it is appropriate to make. In the Guidance dated 24 May 2021, at paragraph 8 it is stated:

‘The Family Court is a single court with power to sit and conduct business at any place in England and Wales: section 31B(1) of the 1984 Act. It is therefore a solecism to refer to “the Barchester Family Court” or to head orders “In the Barchester Family Court.” The correct heading is “In the Family Court sitting at Barchester.”’
44. If they do not exist already I would expect that local agreements would be reached so that a number of adjacent DFJ areas combine to provide an urgent business judge rota.
45. The Family Court (Composition and Distribution of Business) Rules (2014 No.840), Rule 15 and Schedule 1 do not specify, even by implication, the allocation of a case where an application is made for a freestanding port alert order. I would expect therefore that each DFJ will want to consider how an application for such an order should be allocated to be heard in their DFJ area. My own view is that such applications should be allocated to a judge of circuit judge level, or, in a complex case, to a judge of High Court judge level.
46. I attach the *pro forma* port alert order modified for use in the Family Court.
47. That is my judgment.



*Port Alert Order*



**In the Family Court**  
**sitting at [Court name]**

**No: [Case number]**

**[The Children Act 1989] /**  
**[The Family Law Act 1986]**  
(DELETE OR ADAPT AS NECESSARY)

**The child[ren]**

**[Name of child]**

**[Girl] / [Boy] [dob dd/mm/yy]**

**[Name of child]**

**[Girl] / [Boy] [dob dd/mm/yy]**

After hearing *[name the advocate(s) who appeared]*

After consideration of the documents lodged by the applicant

After reading the statements and hearing the witnesses specified in paragraph 4 of the recitals below

**PORT ALERT ORDER MADE BY [NAME OF JUDGE] ON [DATE] SITTING IN [PUBLIC] / [PRIVATE]**

**The Parties**

1. The applicant is *[applicant name]*

The respondent is *[respondent name]*

[SPECIFY ANY ADDITIONAL RESPONDENTS]

[SPECIFY IF ANY ADULT PARTY ACTS BY A LITIGATION FRIEND]

[SPECIFY IF THE CHILDREN OR ANY OF THEM ACT BY A CHILDREN'S GUARDIAN]

2. Unless otherwise stated, a reference in this order to 'the respondent' means all of the respondents.

**Recitals**

3. This order was made at a hearing without notice to the respondent. The reason why the order was made without notice to the respondent was *[set out]*.

4. The Judge read the following *[affidavits] / [witness statements] [set out]* and heard oral testimony from *[name]*.

**IT IS ORDERED THAT:**

5. The *[name]* Police *[Constabulary] / [Force]* in conjunction with the National Border Targeting Centre do implement an **All Ports Warning** in respect of *[name of child]* (a *[boy]* / *[girl]*) born on *[insert]* [and *[name of child]* (a *[boy]* / *[girl]*) born on *[insert]*]. This All Ports

Warning shall remain in place for a period of 28 days from the date of this order being made, unless extended by further order of the court.

6. For as long as the All Ports Warning is in force pursuant to para 5 above, *[name of child]* *[and [name of child]]* *[is] / [are]* not permitted to leave the jurisdiction of England and Wales.
7. In the event that *[name of child]* *[and [name of child]]* *[is] / [are]* found to be at any port within the jurisdiction of England and Wales and are booked to travel by air, sea or rail out of England and Wales, a Police Officer is ordered to and must remove the passport, identity card and any other travel document to prevent *[name of child]* *[and [name of child]]* from leaving the jurisdiction of England and Wales.
8. Any passport, identity card and any other travel document seized under para 7 above must be delivered to the solicitors acting for the applicant by way of Royal Mail Special Recorded Delivery as soon as practicable after seizure.
9. The solicitors acting for the *[applicant] / [respondent]* shall forthwith serve a sealed copy of this order on the National Border Targeting Centre by email to NBTCsafeguarding@gmp.pnn.police.uk and the relevant Police *[Constabulary] / [Force]*.
10. The solicitors acting for *[applicant] / [respondent]* shall provide in writing to the National Border Targeting Centre by email to NBTCsafeguarding@gmp.pnn.police.uk and relevant Police *[Constabulary] / [Force]*, 24 hour contact details of the solicitor with conduct of this matter ("the nominated person") so that, in the event of *[name of child]* *[and [name of child]]* being found at a port, the National Border Targeting Centre can inform the nominated person immediately.
11. Permission is granted to the National Border Targeting Centre and the relevant Police authority to apply on written notice to vary or discharge paragraphs 5 - 8 of this order.

Dated *[date]*