Case No: B4/2008/2962
Neutral Citation Number: [2009] EWCA Civ 160

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM NORWICH COUNTY COURT
(HIS HONOUR JUDGE DARROCH)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 28th January 2009

Before:

LORD JUSTICE THORPE
LORD JUSTICE WALL
and
LORD JUSTICE AIKENS

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IN THE MATTER OF W (Children)

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Mr C Hale (instructed by Messrs Turnbull Garrard) appeared on behalf of the Appellant mother.

Ms Bundell (instructed by Messrs Wace Morgan) appeared on behalf of the Respondent father.

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Judgment
(As Approved by the Court)

Lord Justice Wall:

1. On 21 October of last year HHJ Darroch sitting in the Norwich County Court refused an application by the mother of two children, now aged respectively ten and five-and-a-half, for permission to relocate to New Zealand. The mother seeks permission to appeal against that

decision. I saw the papers on 21 January 2009 and I directed the matter should come in for oral hearing with appeal to follow if permission was granted. I made these comments:

"These cases are never easy and the mother faces the difficulty that the judge made a careful discretionary decision apparently applying the correct criteria. However, there is enough in the grounds of appeal and the skeleton argument put in on the mother's behalf to make it appropriate for her to be given the opportunity to persuade the full court that she has an arguable appeal and one moreover which should succeed."

I remain of the view that this is a difficult case and, speaking for myself, I would as a result give permission to appeal.

2. The judge was faced in my view with a very difficult decision. On the one hand he had two children who clearly enjoyed a good relationship with their father. There had historically been disagreements between the parents of the children as to contact, but on the mother's behalf Mr Hale this morning and this afternoon has sought to argue, and has argued persuasively, that, by the time the case reached the judge and certainly for some time prior to that, the difficulties which had surrounded the separation of the parties and the breakdown of their marriage had ameliorated to the point where contact was proceeding relatively normally.

3. The mother has formed a relationship with a new partner who had previously been employed by the father, and it was her plan with her new partner to emigrate to New Zealand with the children, where the partner had obtained employment. His case was that he had attempted to find employment in England and Wales and had not succeeded in doing so. They had moved to Norfolk from Shropshire, where the parents had previously lived, in order to find work and had not been successful. Contact was taking place albeit at some inconvenience to both parties, with the mother and her partner driving across from Norfolk. The father was having fairly regular weekend staying contact but there was no doubt at all that the mother was the residential parent and the primary carer for the two children.

4. As always in these sensitive relocation cases, the arguments which were marshalled on both sides formed fairly familiar battle lines; on the one side, the mother, saying: "This is how I want to live my life, my partner and I wish to emigrate, we have prospects for a good life in New Zealand, there will be employment there, it is a lovely place and the effect on me if we do not go will be devastating. I am suffering", as she told the judge, "from depression, and I am taking medication. Please allow me to go". On the other side, the father says: "Well, if you go it will effectively mean the end of my relationship with the children because I will only see them at most once a year, and in reality I will not see them at all because once you are in New Zealand that will be the end of any form of relationship".

5. The case has a most unfortunate procedural history because it was originally set down on directions for hearing for a single day, which was plainly inadequate on any view, and of course it went part-heard. The fact of it going part-heard meant that the mother had given her evidence by the end of the first hearing. Moreover she had recently shortly before that given birth to a child by her new partner, and we are told by Mr Hale who represented her that she breast-fed whilst giving her evidence to the judge. She was re-called briefly before the judge when the case resumed in October in order to tell the judge that (as it happens learned today, on advice from Mr Hale) she had been to her general practitioner and been prescribed medication for depression. It was on that point, I think, that she told the judge that it would

be horrendous if she was not allowed to go and the effect on her would be devastating. The father also gave evidence, as did his new partner, and the judge also heard from the CAFCASS officer, whose evidence was equivocal, and, I think, to an extent unhelpful.

6. Mr Hale for the mother attacks the judge and the judgment on three particular premises, and I shall go through them in a moment. It is, however, right to say that the judge, not only having had the advantage of good representation, also had cited to him the relevant authorities in this field, the leading case of course being that of *Payne v Payne* [2001] EWCA Civ 166; [2001] 1 FLR 1052. However, the judge chose to deal with the case on the basis of the gloss or the commentary on that case presented by Charles J in the subsequent case of *Re C (Permission to Remove from Jurisdiction)* [2003] EWHC 596; [2003] 1 FLR 1066, and no attack is made by Mr Hale today, nor could there be, I think, on the fact that the judge undoubtedly approached the case on the basis of the authorities as they were presented to him. I summarise the authorities from the judgment of the President, Dame Elizabeth Butler-Sloss in *Payne* at paragraph 85:

> "85. In summary I would suggest that the following considerations should be in the forefront of the mind of a judge trying one of these difficult cases. They are not and could not be exclusive of the other important matters which arise in the individual case to be decided. All the relevant factors need to be considered, including the points I make below, so far as they are relevant, and weighed in the balance. The points I make are obvious but in view of the arguments presented to us in this case, it may be worthwhile to repeat them:
>
> (a) The welfare of the child is always paramount.
> (b) There is no presumption created by s 13(1)(b) in favour of the applicant parent.
> (c) The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.
> (d) Consequently, the proposals have to be scrutinised with care and the court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end.
> (e) The effect upon the applicant parent and the new family of the child of a refusal of leave is very important.
> (f) The effect upon the child of the denial of contact with the other parent and in some cases his family is very important.
> (g) The opportunity for continuing contact between the child and the parent left behind may be very significant."

7. The first point Mr Hale takes this afternoon is that the judge did not properly reflect the oral evidence in his judgment in relation to the history of contact. The father had given evidence that it was a struggle to keep contact going. That, Mr Hale asserts, is plainly wrong. There had been regular contact, contact had been continuing even if it had been on occasions troublesome. That was the father's own evidence, and the evidence of the previous CAFCASS officer was that contact had been maintained in a reasonably appropriate way. There had been a history of domestic violence in the case which was not litigated before the judge, and that was used I think very much by the second CAFCASS officer as a basis for not making any type of recommendation.

8. So that is Mr Hale's first point: that the judge, placing such weight as he did on the father's relationship with the children and the need for a continued relationship between the children and their father, was wrong to find that contact in the past had been difficult and that the mother had been difficult about it.

9. The second point, which is, I think, perhaps the central point of Mr Hale's submission, is that the judge did not properly analyse the effect of a refusal on the mother and, as a consequence, on the children. That, as will be apparent from Payne and Charles J's decision, is a key factor in any equation because if a mother in particular in these circumstances is disappointed by a refusal to allow her to travel, the real prospect is that that disappointment will reflect itself, not only in its psychological effects on her, which can be very serious, but will have knock-on effects on the children. The judge is criticised by Mr Hale for not giving proper weight to the effect on the mother, and not giving a proper analysis of what was likely to happen to the mother if she was not allowed to go. His conclusion, Mr Hale says, was really: "Well, there will be upset on both sides". Mr Hale submits that is a wholly inadequate consideration, given the seriousness of the situation from the mother's perspective.

10. The evidence before the judge was that her partner would in any event go to New Zealand whether or not permission was granted. That was something on which the judge took the view that, as he had a young child, it could be thought to be evidence of lack of commitment to his new family if he were immediately to leave home and go abroad.

11. The third point Mr Hale takes is that the judge really failed to give any proper weight to the wishes and feelings of the children. There is a particular force in this point in relation to the older child, a boy aged now eleven, who had been able to tell his father in terms that he was looking forward to going. The judge was wrong, Mr Hale says, to seek to discount that approach in the way that he did, to which I shall come in just a moment.

12. The judge was plainly of the view, as I read his judgment, that this mother was an excellent mother, she was fully capable of caring for the children wherever they happened to be living and therefore there were, in broad terms, no welfare issues about going to New Zealand. There would be schools, there would be a home and there would funds. Mr Hale, however, criticises the judge for saying that really he should have gone through the welfare checklist, because in the welfare checklist there are issues such as the likely effect of change on a particular child in particular circumstances, which the judge should have investigated, and which he did not.

13. Those are the criticisms made and it is perhaps against that background only fair to look at the judgment. As I say, the case had a procedurally very unhappy history because it started in the summer, it was then adjourned, it came back in October for another day and the judge then had a short period of reservation before he gave his judgment. But I think it right to say at the outset that when he came to approach his task he did so in a perfectly methodical and sensible way. He dealt briefly with the history and the history clearly was not of the greatest materiality because the mother, if I may say so very sensibly in these particular circumstances, did not seek a relitigation of the previous issues of domestic violence which, albeit very serious, did not directly impact on the issue which the judge had to decide.

14. The judge looked at the evidence which the mother gave, and he heard her both, as I say, on the first occasion and when she was re-called; and it is interesting, I think, and important that when she was re-called the judge records what she says in paragraph 14, and I quote:

> "Then after the break of some weeks I picked up the case again and heard from [the mother], who was briefly re-called. She talked about getting depression and she said that the possibility of refusal is horrendous. She said that she was taking some pills for depression."

15. I will return to that because it is one of the considerations. That might seem at first reading a somewhat dismissive approach on the judge's behalf, but it seems to me that when he came to consider the ultimate factors which he had to weigh into the equation, to which I shall turn in just a moment, it is clear from what he said that he did not form a particularly favourable impression of the mother or her condition, or indeed, I think, of her partner and his decision to leave in any event.

16. One has to remember, I think, in hearing these cases in this court that one is at one remove. I was not the judge trying the case. I did not hear the witnesses. I did not hear the evidence. I did not hear the cross-examination. I do not know what impression I would have formed of the witnesses. But here the judge has plainly formed an impression of the mother which is not favourable and he has formed an impression of the father which is plainly more favourable. In the next paragraph from that which I have read, for example, he begins by saying:

> "[The father] gave evidence and he said that he had against the odds kept some sort of contact and it seems to me, and I referred briefly to the history of the application, that there has been a battle on his behalf."

So the judge clearly formed an impression of both parties in the witness box, and that is of course something uniquely that the judge can do and we plainly cannot.

17. I think it fair to say that there is some force, in my view, in Mr Hale's criticism of the judge in the way he does not go profoundly into the likely effect of the move on the mother but, as I say, he records the evidence faithfully and, having recorded it, reaches his conclusions about it. In relation to the children he makes it quite clear that D's willingness to go has to be qualified in several respects. The first respect is that when he was told that it would mean that he would not see so much of his father, his enthusiasm diminished somewhat. Secondly, his enthusiasm to go needed to be diminished by the fact that he had probably been told, or had picked up if not been told, directly by his mother that he was in fact going and therefore regarded it as a fait accompli. And thirdly, he had only seen New Zealand through perhaps slightly rose-tinted spectacles because he had been on holiday and not there for the day to day grind, including, of course, going to school.

18. As far as the younger child was concerned, the judge found that she was too young to express a view although he regarded her relationship with her father as being of considerable importance.

19. Having conducted that exercise, the judge then went through the factors which were listed by Charles J and which appear in Payne v Payne and then reached his conclusions:

> "28. It is a very important consideration. I have to say that I have no medical evidence of significant depression. I heard the mother come back when she was re-called and say that she was suffering and would suffer more if I turned her down. Mr Rowlands put it well when he said there will be very great unhappiness

as a result of my decision one side or the other. The father also has had to have some medicaments for depression. It is not a case where I am able to say that the mother will be so savagely or severely damaged that this will get through to the children. She will be disappointed but she will have to consider what she can best do to overcome it if I turn down her application.

29. 'Tenth, in many cases the opposition is based on the harm that is alleged to flow from a reduction in contact.' That is what the father says largely. It is not only that. He draws attention to the other members of the family. He casts doubt on whether this arrangement will last between [Mr B] and his ex-wife. I cannot predict that and I would not seek to do so. I will just say that I am troubled by the suggestion by both [the mother] and [Mr B] that he will go anyhow and leave a small baby behind, a girl born in June of this year. It does make me wonder what commitment he has to family life, but I can put it no higher than that."

Then at paragraph 31 he draws the threads together and reaches his final conclusions, which are in these terms:

"(1) The mother wants to go. She has not deliberately chosen the furthest place away.

In other words it was a genuine application. That was a highly relevant consideration, and a primary consideration for the judge.

"(2) She will be upset, I express the word 'upset', I cannot say emotionally damaged, if refused."

That in my view is an assessment of the mother which in all the circumstances of the case the judge was entitled to make.

"(3) There is no medical evidence that she will suffer more than disappointment."

That was true, although Mr Hale would say that there simply was not a medical report. She had told the judge how she had been to her general practitioner.

"(4) There is no clear economic advantage in this move. They could, in my view, make a go of it.

(5) The schools in New Zealand I have no doubt are satisfactory.

(6) Ties with New Zealand are slim. This is not a mother returning to her native land having been unable to settle in this country. That would make the case much more powerful.

(7) [Mr B's] attempts to find work are half-hearted. He is widely skilled. He could, in my view, find work in this country if he made more effort. I say he could, I do not overlook the difficulties, he may not find it easy. He does not have to move to New Zealand.

(8) Very significantly, I do not believe that contact will be actively encouraged. There is a history of reluctance and of some control by the mother … I have real doubt about how contact would be maintained."

I pause to interpolate at that point that although Mr Hale attacks the judge's position on this, he did hear the evidence of both parties and in my view that was an impression that he was entitled to form. Next, and most unfortunately, I quote:

"9) There is real hostility between the parties and that increases my fear. I have come to the conclusion that part of the reason for this application is to avoid the inconvenience and unpleasantness of conserving contact.

(10) The mother's proposals for maintaining contact, indeed meeting in America, are somewhat unrealistic. I do not overlook the bond and if I had made this order I would have tied it up with some way of bonding the money.

(11) The loss of the wider family has not been properly considered by the mother, and the grandparents and other cousins and aunts have a part to play in their life.

(12) There has been a previous failure in Norfolk in somewhat similar circumstances. I believe there is a degree of impulsiveness in this application.

(13) The children's views are of limited value. The girl is very young. The boy's views need to be qualified in the way that I have done.

(14) Attitude of [Mr B], 'I will go anyway', is troubling and shows, it appears, a lack of commitment to family life. I cannot see any real reason why they have not married and whilst I cannot draw a specific conclusion from that, I do query his commitment."

20. Those, therefore, were the fourteen factors which the judge tied together from the evidence in order to reach his conclusion. And I have to say, having considered it very carefully, that those are factors which the judge properly could weigh in the equation, they were factors properly taken into account, and they were, moreover, conclusions which he was entitled to reach on the evidence and therefore entitled to put into the scales.

21. One therefore reaches this position, I think: that here we have a circuit judge who has heard the evidence, who has seen the parties, who has formed impressions of the parties and who has made findings of fact, all of which have led him, approaching the authorities in an appropriate way, to refuse the application for permission to relocate. And in those circumstances it seems to me that that is the function of the judge. The judge has fulfilled his role, he has done what he is there to do, he has reached a conclusion which I or another judge might not have reached on the evidence, but that is a matter for him, not for me. I am sitting in the Court of Appeal reviewing his decision, and in my judgment the decision was one which was open to him and in those circumstances one which he was entitled to reach.

22. It follows that, although I do regard this as a difficult case and although by no means is one writing any sort of blueprint for the future, the position, it seems to me, is that the judge was entitled to reach the decision he did reach on the evidence and therefore, although I would give permission to appeal, I would in fact dismiss the appeal.

Lord Justice Aikens:

23. I agree.

Lord Justice Thorpe:

24. I also agree. I have some sympathy for the appellant, whose application in the county court plainly had excellent prospects of success. In many respects the decision may appear counter-intuitive, but any analysis of the grounds advanced by Mr Hale leads to the inescapable conclusion that none can succeed without a clear demonstration that the judge's conclusions were not open to him on the evidence. We have, of course, the written evidence which never carries these issues or determinations very far. What is crucial is the oral evidence, the impression that the witnesses make upon the judge.

25. For very understandable reasons, we do not have transcripts of the evidence. These parties are not publicly-funded, and transcribing evidence over two full days is an expensive business. But none of the grounds advanced by Mr Hale can be made good without some demonstration that the judicial conclusions were impermissible on the evidence adduced.

26. I would only add that Mr Hale has advanced his case in this court with great skill and economy. It could not have been put more attractively or more powerfully than it has been put, and my last observation is: nothing in life is final. An adverse decision in the year 2008 does not preclude another application in years to come if the circumstances support or impel renewed litigation.

Order: Application granted; appeal dismissed