Case No: B4/2009/2255
Neutral Citation Number: [2010] EWCA Civ 888

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE PRINCIPAL REGISTRY OF THE FAMILY DIVISION
(HER HONOUR JUDGE VALERIE PEARLMAN CBE)
[Neutral Citation No FD08P01670]

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: Tuesday, 22 June 2010

Before:

THE PRESIDENT OF THE FAMILY DIVISION
(SIR NICHOLAS WALL)
and
LADY JUSTICE BLACK

IN THE MATTER OF M (A Child)

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Mr Matthew Hellens (instructed by Messrs Rowberry Morris Solicitors) appeared on behalf of the Appellant Mother.

The Respondent Father appeared in person.

Judgment

(As Approved by the Court)

Lady Justice Black:

1. This is a mother's appeal against the order of Her Honour Judge Pearlman on 24 September 2009. The judge granted permission for the father to take the child, A, who was born in 2003 and is therefore seven, on holiday to France and/or Cameroon.

2. At the time of the hearing in front of Judge Pearlman, the father had not got details of the holiday that he proposed. Today he has produced to us details of the proposed holiday, which he now says he would wish to limit, for financial reasons, to a trip to Paris.

3. The parties were married in 1999. They separated in 2004 when A was in his second year. They were divorced in 2006. Ancillary relief proceedings were still continuing at the time of the hearing before Judge Pearlman. I do not know whether they are yet concluded.

4. In May 2008 the father had applied for a residence order and various other section 8 orders. That application culminated in an order in July 2009 for defined contact. At the time of the hearing before Judge Pearlman contact was basically working well. The father was seeing his son on alternate weekends and for half of the school holidays. Collection and return was at a contact centre.

5. Just before the September hearing there had, unusually, been some difficulty over the August Bank Holiday weekend with contact when the Contact Centre was closed on the Bank Holiday Monday, when the father would normally have returned the child. The Contact Centre were meant to ask the father to return the child on the Sunday, but failed to do so. The mother's sister did ask the father to do that (or told the father, on the father's case), but he did not do so; he returned the child on the Tuesday. There was no other evidence of difficulty over contact before the judge.

6. The father had applied unsuccessfully to Singer J in August 2008 for permission to take A to Cameroon. The question of a trip abroad then came up again in the course of the section 8 proceedings and was referred by the District Judge in July 2009 to a section 9 judge, and so it was that it appeared in Judge Pearlman's list.

7. We are told that at the outset of the hearing the central authority of in *Re K (Removal from Jurisdiction: Practice)* [1999] 2 FLR 1084 in the Court of Appeal in 1999 was handed to the judge and she was invited by the mother the only one of the parties who was represented both in front of Judge Pearlman and today, the father appearing in person to adjourn the case for expert evidence to be obtained on the legal situation in Cameroon and how the child could be recovered from that country in the event that the father retained him there. The judge declined to adjourn. If she gave reasons at that time, at the outset of the hearing, then they have not been transcribed, and I suspect from argument that in fact she did not give any reasons at that point but merely announced her decision. She did, however, comment at the end of the hearing, when responding to a request by the mother's counsel for leave to appeal, that, with regard to adjourning the case and having an expert, "I took the view that it was the least expensive and most convenient way to deal with the problem." She had also said, in the course of her judgment at paragraph 18:

"…when the question of getting expert opinion was raised by Mr Hallens, I still was not given an unconditional agreement by the mother to the child going out of the jurisdiction; and certainly that was one of the reasons why this case had to proceed."

8. The judge had statements from both parties and she heard oral evidence. The hearing lasted half a day and the judge gave her judgment directly at the end of it. The mother's statement, and no doubt her oral evidence as well, raised a number of anxieties which she had and which led her to oppose the father taking the child to Cameroon or to France, which she considered to be just as risky because flights to Cameroon depart from Paris and the father could therefore use a trip to France as a route to an unauthorised departure for Cameroon.

9. The father comes from Cameroon and has family there, including, I think, still his parents. He wanted to take A to Cameroon to meet them and to show him his cultural heritage. It would not be the first trip that A has made. He went there in 2004, but he was of course only very young at that time. The mother's case before Judge Pearlman was that the conditions in Cameroon were unsatisfactory on that trip and both she and A had been ill.

10. The mother advanced a number of arguments why it would not be in A's best interests to go on holiday abroad with the father. She said Cameroon is not a Hague Convention country and she believed that if the father retained his son there it would be very difficult to get him back. She argued that she had reason to believe that the father may not bring A back after the holiday as the father had threatened to take his son there and leave him in the care of his mother. Her case was that he had made quite a recent threat of that kind to her cousin on 9 August 2008, at that time threatening to take A to Cameroon and not to return him. The cousin was not called to give evidence. The evidence was contained in a hearsay form in the mother's evidence.

11. She also said that living conditions were very poor in Cameroon. She argued that her son would be harmed if he were to be retained there. She pointed out that he was now settled in England. She had taken him for periods to Jamaica (from where she comes), once at least for a prolonged period without the father's consent. But, she pointed out, A had been attending the same school in England since May 2008 and was thriving. She did not say so (she did not need to do so as it was self evident) but of course his relationship with her would be disrupted if he were to be kept in Cameroon without her agreement.

12. She pointed out also that the ancillary relief proceedings, which had been going on for about two years by that point, had run into difficulties because the father had failed to obey the court's orders, despite penal notices and committal proceedings which had been sought to secure his compliance with the orders. This, she said, indicated that he could not be trusted to respect the orders of the English courts. She drew attention to the poor state of the father's business here and argued that he may have nothing to come back to if he went abroad.

13. The judge had some information about the ancillary relief proceedings. Counsel is unable to remember whether that was directly from papers or from excerpts quoted by him in his position statement on behalf of the mother, but one can see that during the ancillary relief proceedings the father was acknowledging that he was significantly in debt. He has told us in his skeleton argument for today that that is still the position. At that time, he had said in his position statement that he was heavily steeped in debts and that his business was at the brink of collapse. The properties which he owns in this country, of which he had a number, were also said to have negative equities. That was the mother's case.

14. The father's case was that there was no reason to be anxious about him returning. He said in his statement that all his financial and economic interests were in this country where he had lived by that point for 15 years and which he saw as home. He had a fiancée and a child

who he had had with her who, at the time of the hearing before Judge Pearlman, was 20 months old. Both the fiancée and the child are British nationals. The father also offered to give an undertaking to the court to return A at the end of the holiday. He considered that the mother was opposing the trip as part of a campaign to marginalise him in A's life, although the mother did not accept that that was the motivation behind her opposition.

15. The judge referred to *Re K* and quoted from it, but it is argued on behalf of the appellant mother that she did not follow the authority from which she had quoted. In *Re K* the father was seeking to take a child to Bangladesh on holiday and the mother was opposing that. The judge had heard no oral evidence and dealt with the matter on the documentation and submissions, granting the father's application and accepting his undertaking. The Court of Appeal allowed the mother's appeal and indicated that the case had not received as thorough consideration as would normally be required. The father's argument to the Court of Appeal was that the judge was entitled to repose trust in the father bolstered by his undertaking, and not explore any further or require any further safeguards.

16. Thorpe LJ gave guidance about the proper approach to issues of this sort. He said:

"…the conventional disposal is, at the least, to require all practicable safeguards to be first put in place."

He also said that:

"…in these difficult cases it is for the trial judge to assess not only the magnitude of risk of breach of the contact order but also the magnitude of the consequence of breach of the contact order."

17. In the *K* case, if the child were not brought back it would be impossible as a matter of reality to secure the child's return to this country. Thorpe LJ said that:

"Of course the father's impeccable record as a carer was highly relevant to an assessment of the risk of breach. But it was irrelevant to an assessment of the magnitude of the consequences of breach. Where the consequence of the breach would be the irretrievable separation of the child from previous roots, then in my opinion it is for the court to achieve what security it can for the child by building in all practical safeguards."

18. The judge had concluded in the *K* case that the father was more likely than not to return the child to this country and Thorpe LJ indicated that he did not disagree with that conclusion, but that "it is an inadequate foundation for the making of the order which followed".

19. Thorpe LJ commented on the difference between the approach of the legal system in Bangladesh and here and said that:

"Accordingly, it seems to me that to preclude the possibility of competitive litigation within two systems, reflecting different traditions and cultures, it is desirable to confine the risk of competitive litigation by putting in place, wherever possible, whatever buttresses can be devised for the primary adjudication in this jurisdiction."

He went on to say:

"There is obviously in this case the possibility of notarised agreements. There is the possibility of mirror orders. The final circumstances of the parties put beyond reality the adoption of a monetary bond. There should have been an exploration of those practicalities in this case through expert evidence, and there was not. That should have been seen by the judge as a fundamental deficiency that was not to be cured by an evaluation of the father's responsibility, drawn from the history, nor a judicial evaluation of probabilities in relation to the performance of the contact order."

20. Little explanation was given by Judge Pearlman in this case as to why she did not adjourn for expert evidence pursuant to the guidance in *Re K*. The clues were that she was considering expense and convenience, as we see from the end of the hearing, and also that she was influenced by the fact that it appears that she was looking to the mother to give a prospective agreement to allow the child to go to Cameroon and/or France if the expert did not raise difficulties. The mother would not agree to that.

21. It appears from the judgment that the judge's fundamental thinking was that she could trust the father. She evaluated properly the incident with regard to contact over the Bank Holiday and took a view that was open to her that that was not a major problem. She found the father to be a responsible man with regard to his son.

22. In imposing the extra safeguard of a notarised agreement, the judge appeared to be relying on her own knowledge that the father could go to the High Commission of Cameroon in London and make the agreement under their jurisdiction, saying that he would return the child from Cameroon on the due date. However, in fact, this may be one illustration of the particular difficulties in not seeking expert evidence because the material now produced by the father has demonstrated to us that the course that the judge thought would be possible with regard to a notarised agreement is not in fact possible. The Embassy here cannot arrange for the course of action that the judge had relied upon.

23. It is not at all clear from the judgment what the judge thought would be the means of enforcing a notarised agreement in Cameroon, in any event. One might have thought from the judgment that she had some knowledge of the situation in Cameroon, but, if she did, she did not spell it out. It is precisely the sort of matter -- the question of enforcement in the Cameroon -- that an expert would have assisted with. How was the child to be returned to this country if the father did not comply with his obligation to return A? Would a notarised agreement be possible at all and, if so, would it help? Would a mirror order in the Cameroon courts be possible and/or desirable, and so on? Those are the questions that needed to be answered.

24. Whilst I would not want to be thought to be saying that no application of this type can proceed without expert evidence to deal with the practicalities of the foreign legal system and how a return from a non Hague Convention country could proceed if the child were not returned, it is in my view incumbent on a judge to approach the matter in accordance with *Re K* with an inclination that such expert evidence will be necessary and, if he or she concludes it is not necessary, to explain very clearly why what might be classed as the normal practice is not required in a particular case. The judge did not do that here.

25. I think that there is force in the appellant's argument that this is a case in which, without expert help, the judge could not address the question of what the practical safeguards for the child were to avoid the harm of an irretrievable separation from his roots and one of his

parents.

26. As to the judge's approach to the mother having declined to give prospective consent to removal if the expert was able to deal with the practicalities, that was not, in my view, a factor that should have carried weight in determining whether to grant the adjournment for expert evidence. As the appellant argues, requiring prospective consent would have deprived the mother of the opportunity of evaluating the report, subjecting it to cross examination, exploring the options that the report contained, and seeking to put the advice into the context of the entire case as the judge would have had to do.

27. The appellant complains that the judge did not consider the harm that would be caused to the child if her trust in the father turned out to be misplaced. It is certainly true that she did not deal with that sort of harm at all in her judgment. Indeed, the only thing she said about harm related to the damage that would be caused to A if he was not able to have the opportunity to know about his dual heritage. However, I cannot believe that an experienced judge such as this one did not take into account the very significant harm that would be suffered by A if he were to be retained in Cameroon. Indeed, that harm is something described in the appellant's counsel's skeleton argument as "self evident", and I think it is a consideration that clearly underlies the way in which the judge expresses herself in her judgment, even if not spelt out word for word. That ground of appeal is not, I think, made out.

28. It is argued that the judge failed to analyse the father's links with this country sufficiently critically and, by extension, wrongly trusted him. Together with this, goes the final ground of appeal, namely that the judge failed to consider sufficiently, or at all, the father's conduct in the ancillary relief proceedings. The judgment does not contain an evaluation of the father's links with this country. It was an important part of the mother's case that they were not as strong as they might have been, and this was an area that did need to be covered in the judgment, especially where trust in the father was so fundamental to the judge's decision.

29. The father's financial difficulties needed to be considered as part of this evaluation, just as on the other side there needed to be considered his links with his new family which might have been considered to bind him to this country. Equally, the judge did need to weigh the father's failure to comply with orders in the ancillary relief proceedings. It is implicit in what she says that she did do this. She refers to having evaluated the father as a loving and responsible father who has, certainly insofar as the child is concerned, kept to what he said; but it would have been helpful if she had spelled out a little more explicitly what her view was about the weight of the father's behaviour in the ancillary relief proceedings.

30. However, the fundamental problem with the judge's approach in this case was, in my judgment, that she dealt with the application without expert evidence. It is understandable why she did that. She was responding to the inevitable pressures of time and money in the Family Division, but the case of *Re K* demonstrates the importance, even in a case where the judge feels able to repose trust in the parent who will be taking the child on holiday, of considering what can be done if the child is not actually returned. It is only with that information that the court can decide on the magnitude of the risk of the child being kept irretrievably away from its other parent and from this country and determine whether it is in the child's best interests to take that risk.

31. Accordingly, I would allow this appeal.

Sir Nicholas Wall:
32. I agree. My Lady has covered the ground very fully. I would simply say to the father that I do not myself see this as the end of the road. A fresh application, properly launched, following the guidance given by Thorpe LJ in *Re K*, would be considered afresh by a different judge on its merits and might well succeed; but it is quite clear from my Lady's analysis of the judgment that the judge fell into a trap identified by Munby LJ when listing this application for PTA plus A, and that the procedures laid down in *Re K* were not followed. On that basis, I respectfully agree that the appeal has to be allowed.

Order: PTA granted; appeal allowed