Neutral Citation Number: [2013] EWCA Civ 1115

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE SITTING AT READING DISTRICT REGISTRY
HHJ Oliver of 25th June 2013 sitting as a Deputy Judge of the High Court

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 6th September 2013

Before :

LORD JUSTICE PATTEN

LORD JUSTICE McFARLANE

and

LORD JUSTICE FLOYD

Re: R (a Child)

Peter Newman (instructed by **Fisher Meredith LLP**) for the **Appellant**

Julie Okine (instructed by **Clifton Ingram Solicitors**) for the **Respondent**

Hearing date : 28th August 2013

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Judgment

Lord Justice Patten :

1. This is the judgment of the Court.

2. The issue on this appeal is whether HHJ Oliver was right to discharge a prohibited steps order made by the District Judge in Children Act proceedings concerning a 10 year old girl [N] and to have granted to the child's mother permission to take her to Kenya for a holiday. The father opposed the mother's application on the grounds that there was a real risk of the child being abducted and retained in Kenya which is not a signatory to the 1980 Hague

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Convention and that the retention of the child in that jurisdiction would have very serious adverse consequences for her. The father now appeals against the orders which the judge made on the ground that he failed properly to carry out the assessment of risk and balancing exercise described by this Court in *Re K (Removal from Jurisdiction: Practice)* [1999] 2 FLR 1084. It is also said that the safeguards imposed by the judge as conditions of the specific issue order which he made were ineffective to minimise the risk of abduction and detention and that in exercising his discretion the judge relied on expert evidence which was both inadequate and incomplete.

3. The father and mother married in Kenya in May 2001. The father is British and is now aged 67. The mother was born in Kenya but is now a British citizen and no longer has Kenyan nationality. She is now aged 37. She came to live in England with the father in 2001. In 2009 the father and mother were divorced and there were ongoing Children Act proceedings about the child's residence. In October 2009 the father applied for a residence order and a prohibited steps order ("PSO") to prevent N being removed to Kenya by her mother. At a final hearing on 26th July 2010 HHJ Hamilton made a residence order in the mother's favour with a generous contact order in favour of the father. Then in December 2010 the father made a further application for a residence order and subsequently for a PSO. The mother responded by making her own application for a s.91(14) order.

4. There were various adjournments of those substantive applications and in August 2011 the mother applied for permission to travel with N to her brother's wedding in Kenya. This application had to be adjourned due to problems with the lack of expert evidence and the application therefore lapsed. In February 2012 the residence and the s.91(14) applications were determined but an application made by the mother in December 2011 for permission to travel with N to Kenya for the Easter 2012 holidays was adjourned with directions for further expert evidence. The application then proceeded in the High Court (in accordance with *Practice Direction: Allocation and Transfer of Proceedings* [2009] 1 FLR 365, paragraph 5.2(6)), but was apparently released to be heard by a deputy High Court Judge, if no judge of the Division was available.

5. An expert report by Mrs Wanja Wambugu, a solicitor advocate and notary practising in Nairobi, was filed on behalf of the mother in August 2012. This consists of a two-page letter, addressed to the mother's solicitors, and deals with what remedies the father could obtain from the Kenyan Courts were the mother and N to fail to return to the UK. In short, the letter says that although Kenya is not a signatory to what is described in the letter as the Rome Convention and the direct enforcement of foreign custody orders is not available, there could be what are described as parallel proceedings in the Kenyan Children's Court for an order requiring the child to be returned to the UK at the end of the holiday. The letter refers to the Kenyan Children Act 2001 but does not contain any further information as to the principles which would be applied by the Kenyan Court in considering such an application by the father.

6. On 19th November 2012 HHJ Hamilton made further directions including one which required the mother's solicitors to send a letter of instruction to Mrs Wambugu seeking clarification as to whether mirror orders for the child's return to the UK at the end of the holiday could be obtained prior to her arrival in Kenya; how such orders would be enforced; the scope for the mother to obtain a material variation or the discharge of such an order; and details of the costs, timescales and procedure involved in applying for such an order. Details

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were also sought as to what was meant by the reference to "parallel proceedings" in the first report.

7. In response to this letter, the mother's solicitors received a further two-page report from Mrs Wambugu which states that a mirror order from the Kenyan Court would have to be obtained once the child was in Kenya; that it might be necessary for the parents and the child to attend court and give evidence; that the remedy for non-compliance with the order would be committal; that the mother could apply to vary or discharge the order; and that an application by the father for an order would take about 2 weeks to be dealt with and would cost the equivalent of about £3,500. It contains no further explanation of the earlier reference to parallel proceedings.

8. It was hoped that the mother's application would be heard by Pauffley J, the Family Division Liaison Judge, but this proved impossible and instead it came before HHJ Oliver (sitting as a judge of the High Court) in April 2013. The hearing was spread over three days after which (on 18th April) Judge Oliver gave a judgment in which he stated that he was impressed with the mother's evidence that she was a British citizen who wished to stay here and enjoy the benefits of life in this country and that the risk of N not being returned was not great. He went on to say:

"I believe that [the mother] does want to go and see her family, but she is actually very content with her life in this country and would not want to give that up. Therefore, my decision at this point is that she should be entitled to take [N] to Kenya. However, I do not think it is as simple as that at this stage. There needs to be some more reassurance put in place, because whilst I can see that the risk is not that great, we have to ameliorate that risk as much as possible. It is about reassuring [the father] as much as it is about securing [N's] return.

... However, I do need further reassurance myself by the processes I have described and discussed."

9. Various possible safeguards had been considered during the hearing. The judge accepted that the mother was not in the financial position to provide some kind of deposit against not returning the child. He recognised, based on the expert evidence, that the Father would have no right to apply to the Kenyan Court for an order for the return of the child either under the Hague Convention or by the reciprocal enforcement there of the contact and residence orders made by the English Court. Mirror orders could be made but it appeared that the Kenyan Court would not in practice make them (and perhaps had no jurisdiction to do so) unless and until the child was within the jurisdiction of that court. This means that the safeguard of the orders would not be in place prior to the child leaving this jurisdiction and there was the possibility that the mother would not apply for the orders once in Kenya or that they might not be granted. The father would, according to the first report, have a right to bring proceedings in Kenya under the Kenyan Children Act if his daughter was not returned but the cost of making such an application together with the cost of travel to and accommodation in Kenya meant that this would be an unaffordable option for the father in this case.

10. Two other possibilities were considered. One was for the mother to deposit her and the child's passport with the British High Commission in Nairobi on terms that they would only be used to enable them to return to the UK. But, as the judge recognised, this involved an assumption that the mother and the child should be allowed to travel to Kenya and did not

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offer any protection against the mother's failure to leave that country and return with N to the UK. The Foreign Office has also subsequently confirmed that the High Commission would regard itself as obliged to deliver up the passports to their holders if required.

11. The second alternative which the judge considered was that the mother should enter into a notarised agreement containing an acceptance by the mother that the child's best interests lay in her continuing to be habitually resident in the UK and undertaking to return with her at the end of the holiday period. At one point in his judgment the judge described such an agreement as the nearest one can get to an international order, although at a later point he said that he was not clear how such an agreement would be treated in Kenya. The provision of such an agreement together with the lodging of the agreement and the passports at the High Commission in Nairobi were, in the circumstances, the only safeguards which the mother could offer and the judge (as explained in the passages from his judgment quoted earlier) took the view on 18th April that they were a necessary pre-condition to the grant of permission for the child's removal. The difficulty, however, is that the judge had no information from the expert about how the Kenyan Court would regard such an agreement and what weight it would be likely to give to such an agreement in exercising its own Children Act jurisdiction on any application by the father for the child's return. Further, even if the existence of such an agreement would make it easier and more straightforward for the father to obtain an order for his daughter's return, it would still expose the father to the costs of the Kenyan proceedings which, on the judge's findings, are unaffordable.

12. The judge recognised (and it is common ground on this appeal) that the consequences for the child of the mother failing to return her to the UK would be very grave:

"... It seems to me trite to say, and both parties agree that it is the case, that in relation to [N] in particular the magnitude of the consequences of a breach are great. She would be in a country with which she has no roots other than it is her mother's place of birth, and her aunts and uncles live there. It is a country that [she] has visited on one occasion for a period of a fortnight. It is a country whose culture is unfamiliar to her. It is a country where she would possibly not have the education that she would have in this country. It is a country where her father would not be able to fight to get her back into this country. It would consequently damage and effectively destroy the relationship she has with her father. ... Therefore the consequences of the breach are huge."

13. But, as mentioned earlier, he assessed the risk of the mother not returning the child (based on her own evidence) as not great. He therefore indicated that he was prepared to give the mother permission to take the child on holiday to Kenya if safeguards could be imposed and some re-assurances could be given to the father in the form of lodging of passports at the High Commission and the provision and lodgement of the notarised agreement. His order of 18th April therefore states that the mother is granted permission in principle to remove N from the jurisdiction for a holiday but requires the mother to lodge a notarised agreement with the Court; to obtain from the Kenyan High Commission in London a confirmation of their willingness to accept the lodging of the agreement; and a confirmation from the British High Commission in Kenya that it would accept the lodging of the passports of the mother and the child.

14. The mother filed the notarised agreement as directed but failed to obtain satisfactory confirmations about the lodging of the notarised agreement and passports. The judge therefore made a further order on 25th June 2013 requiring confirmation that the two High

Commissions would accept the lodging of the relevant documents. In his written reasons for refusing permission to appeal from that order the judge recorded that further steps were required to ensure compliance with his April judgment. He added "If no compliance, no permission to go". The matter returned to him on 1st August. By then the Foreign Office had confirmed that the High Commission would be willing to accept lodgement of the notarised agreement and the passports but would not be willing to give any assurance that the passports would be retained. The mother would be able to obtain their return on request.

15. The judge had therefore to decide whether to make an order granting to the mother permission to remove the child where the only safeguard available to the father was the notarised agreement. Ms Okine for the mother submits that the correct reading of the two judgments is that Judge Oliver was satisfied at the conclusion of the hearing on 18th April that he could safely grant the mother permission to take N to Kenya based on his assessment that she would return the child to the UK at the end of the holiday and that the notarised agreement and the lodging of the passports were always seen by him as likely to be of no practical value as a safeguard of the child's return but rather as providing some comfort to the father. She said that the judge would have been justified in concluding that the notarised agreement was of no practical effect in Kenya from the failure of the expert to mention it.

16. We do not, however, read the judgments in that way and if that had been the judge's view then the order which he made on 18th April is a very surprising one. It committed the use of public money for the preparation of the agreement which could only be justified if the judge had concluded that the agreement provided a real, rather than an illusory, form of safeguard and was likely to have some practical value. This is consistent with the order of 18th April; with the passages in his judgment I have quoted; and with his written reasons given for refusing the father permission to appeal against the 18th April order.

17. It is also reflected in his judgment given on 1st August where he makes it clear that the factor which had changed was in relation to the possibility of lodging the passports at the High Commission in Nairobi; not the provision of the notarised agreement.

18. Based on his earlier assessment of her as a witness and the likelihood of her not complying with her undertakings to the Court to return the child to the jurisdiction, the judge decided to make the order:

"... The question I need to ask myself afresh given that the course of action is no longer available is: are there still sufficient safeguards in place to assure me that [the mother] will return with [N] on 22nd August?

8. As part of my consideration I bear in mind everything I said in my Judgment in April, the documents that I have referred to which were given to me today and a draft order prepared by Ms Okine which she handed in this morning. Weighing everything together and bearing in mind my earlier view that [the mother] regards herself as a British Citizen first and foremost and wishes to remain a British Citizen I am satisfied that notwithstanding the British FCO's unwillingness to agree the lodging of the passport that there are sufficient safeguards. I bear in mind again that [the mother] has had the passport since late last year and if she really wished to take [N] away she could have done it long ago. Likewise this application has been before me since last April and [the mother] has worked very hard to put things in place. Everything I see tells me this is a woman who abides by orders and she will return to the jurisdiction."

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19. Mr Newman for the father submits that the judge's exercise of the Court's power to permit the child to be taken to Kenya was flawed for a number of reasons. Consistently with the guidance given in *Re K*, it was incumbent on the judge to weigh up the risk of abduction and the admittedly adverse consequences this would have on the child against the available safeguards which could be put in place in order to eliminate that risk or reduce it to a level which was considered acceptable. He relies on the fact that Thorpe LJ in *Re K*, where the judge also placed reliance on the father to return the child and accepted his undertakings to do so, stated that the seriousness for the child of retention abroad away from its other parent required the provision of security:

"An application of this character is one that requires careful and thorough preparation. This application did not receive care of that standard. It is customary, if there is to be an evaluation of the applicant's trust, for oral evidence to be led so that the judge has an opportunity of assessing credibility and reliability from exposure in the witness box.

Recognising that there may be an absence of authority in this field, it is nonetheless well known to specialist practitioners that the conventional disposal is, at the least, to require all practicable safeguards to be first put in place. Ordinarily speaking, applications of this sort, which involve the consideration of the legal system in a foreign state and which may require the putting in place of mirror orders, should be dealt with by judges of the division. The concentration of this category of work into that limited judicial number ensures the development of expertise as well as consistency of adjudication. No doubt it was pressure of litigation at this time of year which obliged the Clerk of the Rules to list this case before a deputy, but ordinarily that is a course that should be avoided.

As to Mr Perkins' submission that the judge was entitled to reach the conclusion that she did from the husband's impeccable record, I would emphasise 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. As the judge herself rightly noticed, if the contact order were breached despite all the husband's undertakings, then it would, as a matter of reality, be impossible to secure J's return to the country which has been his country almost throughout his life.

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 consequence of breach. Where the consequence of 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.

The judge here, having assessed only the litigation history, concluded thus:

"It therefore seems to me more likely than not that the Father would return with [J] at the end of the proposed holiday."

That is a conclusion with which I would certainly not disagree, but it is an inadequate foundation for the making of the order which followed."

20. He says that in this case the judge either chose to make an unconditional order for the removal of the child which was wrong in principle or relied on security in the form of the notarised agreement where there was no expert evidence to suggest that it would be

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recognised or enforced in the Kenyan Court or what the cost of doing so would be. The notarised agreement is not referred to in either of the expert reports. At page 1088B in *Re K* Thorpe LJ said:

"There is obviously in this case the possibility of notarised agreements. There is the possibility of mirror orders. The financial 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."

21. Mr Newman submits that this is directly applicable to the state of the expert evidence in this case on the only issue which concerned the judge at the 1st August hearing; namely the existence of security in the form of the notarised agreement. Mr Newman also invites us to offer additional guidance for courts facing these sensitive decisions by establishing a structured route to judgment, which would default to refusal of the application unless the existence of legally enforceable safeguards for return are supported by clear and reliable expert evidence. He, rightly, submits that the ultimate determination is a welfare decision governed by Children Act 1989, s 1 and he urges us to hold that, in a case where no adequate safeguards are available, permission to travel should only be granted where the adverse effect on the child of not travelling outweighs the adverse effect of not being returned.

22. We are grateful to Mr Newman for his helpful formulation of the issues, but in our view this appeal can be determined on established principles as described in *Re K* and in *Re M (Removal from Jurisdiction: Adjournment)* [2010] EWCA Civ 888; [2011] 1 FLR 1943. We have already rehearsed the key passages from *Re K*. The decision of the Court of Appeal in *Re M* is relevant both for its approach, and because the proposed safeguard that was in focus in that case, as in this, was a notarised agreement. In *Re M* the judge at first instance did not adjourn the case in order to obtain expert evidence, but seemingly relied upon her own knowledge that the father might go to the High Commission of Cameroon in London and enter a notarised agreement under their jurisdiction. As in the present case, the judge's fundamental thinking was that she could trust the applicant father to return the child. Black LJ's analysis on this issue was:

"[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 [the child]? 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

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it is not necessary, to explain very clearly why what might be classed as normal practice is not required in a particular case."

23. The overriding consideration for the Court in deciding whether to allow a parent to take a child to a non-Hague Convention country is whether the making of that order would be in the best interests of the child. Where (as in most cases) there is some risk of abduction and an obvious detriment to the child if that risk were to materialise, the Court has to be positively satisfied that the advantages to the child of her visiting that country outweigh the risks to her welfare which the visit will entail. This will therefore routinely involve the Court in investigating what safeguards can be put in place to minimise the risk of retention and to secure the child's return if that transpires. Those safeguards should be capable of having a real and tangible effect in the jurisdiction in which they are to operate and be capable of being easily accessed by the UK-based parent. Although, in common with Black LJ in *Re* M, we do not say that no application of this category can proceed in the absence of expert evidence, we consider that there is a need in most cases for the effectiveness of any suggested safeguard to be established by competent and complete expert evidence which deals specifically and in detail with that issue. If in doubt the Court should err on the side of caution and refuse to make the order. If the judge decides to proceed in the absence of expert evidence, then very clear reasons are required to justify such a course.

24. In this case the judge was clearly of the view that there was some risk of abduction and retention, although he assessed that risk as not great based on the mother's evidence. But, as we read his judgment, the risk was still sufficient to require the imposition of safeguards in the form of the lodging of the notarised agreement and the passports. Since the judge had no expert evidence which established that the notarised agreement would provide an effective mechanism for securing N's return to the UK if required, he was therefore wrong to make the order permitting removal on the basis that it did provide such a safeguard. In addition, the judge failed to give any clear reasons to justify his reliance upon the safeguard of a notarised agreement notwithstanding the absence of expert evidence on the point.

25. As the quotation from Thorpe LJ's judgment in *Re K* (see paragraph 19 above) confirms, applications for temporary removal to a non-Convention country will inevitably involve consideration of three related elements:

a) the magnitude of the risk of breach of the order if permission is given;

b) the magnitude of the consequence of breach if it occurs; and

c) the level of security that may be achieved by building in to the arrangements all of the available safeguards.

It is necessary for the judge considering such an application to ensure that all three elements are in focus at all times when making the ultimate welfare determination of whether or not to grant leave. In the present case, HHJ Oliver, having rightly concluded (at paragraphs 39 and 40) that the magnitude of the consequences of a breach were 'great' or 'huge', did not return to that crucial element in his subsequent analysis on 18 April (from paragraph 69 onwards) where the safeguards are evaluated in the context only of ameliorating the risk of a breach occurring ('not that great') but not in the context of the consequences (described by Ms Okine as catastrophic) that would flow for the child if a breach were to occur. Most notably,

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however, the magnitude of the consequences of a breach was not referred to at all when the judge considered the matter 'afresh' on 1 August.

26. If, therefore, Ms Okine is right and the judge made his order solely in reliance on his assessment of the mother's intentions then he was also wrong to do so. Not only was that inconsistent with his view expressed in April that some security was necessary, it was also (as in *Re K*) an inadequate basis for granting permission to remove given the gravity of the consequences for the child if she is not returned. If the highly adverse consequences for the child of a breach had been kept in focus, as they should have been alongside the risk of breach and the available safeguards, the judge would have been bound to conclude that those consequences far outweigh any possible benefits to the child from the holiday and do not justify the making of the order absent security for her return.

27. We would, therefore, allow the appeal, set aside the order permitting the mother temporarily to remove the child to Kenya and reinstate the previous prohibited steps order preventing either parent removing N from the jurisdiction of England and Wales without the express agreement of the other parent or the permission of the court. The permission already given for the father to take N on holiday to Spain will remain.

28. Before leaving this case we wish to draw attention to a real difficulty that seems likely to be a feature of future cases where application is made to remove a child temporarily to a non-Hague Convention state. We have already restated the importance of the court having access to clear and reliable expert evidence before being in a position to determine the application. Both parties in the present case are legally aided but counsel have confirmed that, following recent changes to the provision of Legal Aid, public funding will no longer be available to parents in these applications (save where there has been domestic violence). The question of how the necessary expert opinion is to be paid for is therefore likely to be a real issue in a significant number of cases. We see this as an additional difficulty facing judges and the adult parties (who may well themselves be litigants in person). The questions of how and to whom particular cases are allocated to individual judges are a matter for the President of the Family Division. Our present purpose is not to trespass upon the President's responsibility but simply to flag up this new potential complication for cases which are already at the most difficult end of the spectrum. In doing so we would simply wish to repeat Thorpe LJ's exhortation for these cases ordinarily to be dealt with by the judges of the Division.

Lord Justice McFarlane :

29. I agree.

Lord Justice Floyd :

30. I also agree.

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