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B4/2013/3798

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM GLOUCESTER COUNTY COURT
(HIS HONOUR STEPHEN WADE sitting as a deputy Circuit Judge)

Royal Courts of Justice
Strand
London, WC2A 2LL
Thursday, 28 August 2014

B E F O R E:
LORD JUSTICE LONGMORE
LORD JUSTICE PATTEN
LORD JUSTICE RYDER

IN THE MATTER OF: Y (CHILDREN)

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Ms J Sparrow (instructed by Direct Access) appeared on behalf of the Applicant
Dr F Afzal (instructed by Direct Access) appeared on behalf of the Respondent

J U D G M E N T
(Approved)

[1] LORD JUSTICE RYDER: This is an appeal against an order made by His Honour Stephen Wade sitting as a deputy circuit judge in the Gloucester and Cheltenham County Court on 9 December 2013 dismissing an application for leave to permanently remove two children from the jurisdiction.

[2] The application concerns a boy aged 11 and a boy aged 7. They are the two children of the appellant father and the respondent mother.

[3] The father and the mother were married in 1998, and in 2000 moved to Chicago in the United States of America, where the eldest boy was born. They returned to the United Kingdom in 2003 and the younger boy was born in 2007. In August 2009, the mother left the family home and the relationship between the mother and the father ended. She entered into a new relationship, which continues. The children have since been in the primary care of their father and subsequently the father's new wife, who was initially hired by the father to work as an au pair following mother's departure and who subsequently entered into a relationship with the father, which has also endured and which has led to their marriage.

[4] In August 2011, the father made a residence application in respect of the two children, which was granted by consent in November 2011.

[5] In August 2012, father and his new wife had a child of their own, who is now aged 2. The two boys have a significant relationship with their mother, who they see on alternate weekends and during the school holidays. There is also substantial contact by telephone.

[6] Father made an application for leave to permanently remove both children from the jurisdiction and move to Missouri in the United States of America. The application was made on the basis that his new wife was unhappy in the United Kingdom without the support of her family, who are based in Missouri. Father's case was that the children would have a better quality of life in the United States, not just in relation to extended family support but also in relation to education and healthcare.

[7] A parallel application was made at the same time for father's wife to have parental responsibility for the children, given the nature and extent of the primary care with which she was involved and the implications of the proposed move overseas.

[8] The children's mother resisted the applications, both on the basis that the move would adversely affect her relationship with the children and that the father's commitment to the move was not strong, taking into account the family history when the father and the mother had themselves lived in the United States.

[9] On 9 December 2013, the judge refused leave to remove the children from the jurisdiction but did grant parental responsibility to the father's wife. The judge directed himself and held that, following Payne v Payne [2001] 1 FLR 1052 CA, the paramount principle is the welfare of the children. He followed the guidance contained in that decision. Furthermore, he overtly cited and relied upon the more recent and definitive decision of this court in MK v CK [2011] EWCA Civ 793, where Thorpe LJ said:

"All the rest ... is guidance as to factors to be weighed in search of the welfare paramountcy."

and Black LJ said:

"141. ... the principle the only authentic principle that runs through the entire line of relocation authorities is that the welfare of the child is the court's paramount consideration. Everything that is considered by the court in reaching its determination is put into the balance with a view to measuring its impact on the child. 142. Whilst this is the only truly inescapable principle in the jurisprudence, that does not mean that everything else the valuable guidance can be ignored. It must be heeded ... but as guidance not as rigid principle or so as to dictate a particular outcome in a sphere of law where the facts of individual cases are so infinitely variable. 143. Furthermore, the effect of the guidance must not be overstated. Even where the case concerns a true primary carer, there is no presumption that the reasonable relocation plans of that carer will be facilitated unless there is some compelling reason to the contrary, nor any similar presumption however it may be expressed. Thorpe LJ said so in terms in Payne and it is not appropriate, therefore, to isolate other sentences from his judgment ... for re elevation to a status akin to that of a determinative presumption."

[10] Given that definitive statement of the law, the judge highlighted a number of the authorities which provide helpful statements of guidance. I do not propose to set them out here, as one part of the father's written case in this appeal is that a judge should, in effect, deal with all such guidance and follow that which most closely reflects the facts of his case. That was the father's case when he was putting his arguments himself as a litigant in person. He now has the benefit of counsel who has not laboured the point: but in fairness to the father, I ought to deal with it.

[11] I do not accept that proposition. The statements of guidance to which this court has been referred are no more than that, based on the facts of individual cases. It is simply unhelpful to elevate them into statements of principle, and I decline to do so. In any event, all that the exercise that father wished the judge to perform highlights is that these cases are often very finely balanced, with one welfare factor or another having persuasive force in the judge's evaluation.

[12] That evaluation is influenced by the cogency, that is the quality, of the evidence that was read and, in particular, heard by that judge. Furthermore, it is not necessary for a judge who correctly cites and applies the principles to deal with every case authority cited by a party, most particularly where the propositions relied upon are examples of fact based determinations.

[13] Applying the principles derived from the statute and the authorities, the judge made the following findings. 1. The father's application was genuine; i.e. not an attempt to interfere with the relationship between the children and their mother. 2. The father's application was realistic; i.e. practicable, researched and reasonable and was, in effect, so far as his wife was concerned, a return to a familiar home base. 3. The mother's opposition was reasonable and was motivated by genuine concerns; i.e. the quality of the relationship with the children and a reasonable belief that father was not himself overenamoured with the United States of America. 4. The father's case was supported by his wife. They jointly evidenced her unhappiness, in particular since the birth of their own child; her relative isolation in the United Kingdom from her extended family and any social network; and the important role that she has in the new family unit, i.e. the primary care of all of the children, not just the two children who are the subject of this application.

[14] The key issue which was persuasive in the balance of welfare factors was the detriment to the welfare of the children; i.e. the nature and extent of harm that would likely be caused by interfering with the mother's relationship with the children or, in the alternative, by preventing the relocation thereby causing further unhappiness and harm to the new family unit in which the children are being brought up.

[15] Having heard the evidence, the judge made a value judgment that the harm that would likely be caused to the children by the relocation and their relationship with their mother was greater and/or more important than the harm likely to be caused to their welfare by the pressure caused within the new family unit by a refusal of leave to relocate.

[16] That was a value judgment that the judge was entitled to make. It was based on facts that are not susceptible of being questioned in this appeal. The judge reasoned why he went further than the Cafcass practitioner in the case had done and his analysis was appropriate to the kind of application with which he was dealing.

[17] In that context, one might ask why was permission to appeal granted? The single judge, in a very careful judgment, isolated two arguments that the father, then a litigant in person, advanced before him. They were (a) that the judge had failed to consider the very substantial risk that the family unit would be fragmented or broken apart if relocation was not permitted, and (b) that the circumstances of the new child in that context were not adequately considered by the judge.

[18] There were other ancillary issues in respect of which permission was not formally given but which the father was permitted to raise before this court. These include an assertion that there are documents that the judge saw but the father did not, that there was a factual misapprehension in the judgment about the number of times father had moved home, and that the judge had wrongly characterised the wife's situation as being a medical condition post the birth of the couple's new child.

[19] Before dealing with the two substantive grounds of appeal, I shall consider these ancillary issues.

[20] This court is told that there was a letter from a headteacher, which it transpires at some stage was annexed to a statement from the mother; and a letter from the mother to Cafcass about an asserted change in the eldest child's wishes and feelings. The judge refers to the headteacher's letter in his judgment. No one has copies of either letter. This court is not provided with those letters.

[21] It would not, of course, have been appropriate, save in exceptional circumstances, to withhold any document of the kind described from a party. That said, no application has been made to enable us to see the documents and there was no apparent reliance placed upon their contents by the judge such that he fell into any asserted error. Accordingly, there is insufficient material before this court for us to decide that there has been a procedural irregularity sufficient to vitiate the judge's decision. Quite the contrary.

[22] The factual misapprehension about the number of home moves made by the father may well be correct. It appears to have come from the mother's written evidence. For the purposes of this hearing, I shall assume an error to have been made, although that is not established. It is clear from the judgment that this fact did not materially influence the decision and nothing turns on the asserted error, even if it transpires to have been as such.

[23] The judge was careful to the point of being meticulous about the wife's situation. He did not characterise it as a medical condition, indeed he appears to have taken his description from the father's own written materials about how the wife's unhappiness had increased after the birth of their own child. There is nothing in this assertion that gives rise to a possible ground of appeal.

[24] The first main ground of appeal is whether the judge failed to give consideration to the potential break up of the family unit. If that was so, it would have been fundamental to his decision because a) of the effect upon the subject children if the application to relocate was not granted and b) of the effect on the couple's own child, who may well have been separated from her half siblings and potentially at least from one of her parents in a fractured family unit. The potential for the breakdown of the primary care provided by the existing family unit would have been critical and, if not consider by the judge, would have been fatal to his decision.

[25] Given that this was the primary argument which led to permission being given, I have scrutinised it with some care. I have read each of the witness statements and the position statement provided by the father to the judge. I have read the Cafcass analysis and, of course, the judgment to identify whether it is right to say, as is submitted to this court, that the issue was raised and not dealt with.

[26] I shall quote from how it was put by the father when he was a litigant in person to the single judge. He said:

> "In both written and oral evidence it was made clear on numerous occasions that a refusal of this application carried a great risk of the family becoming fragmented and the siblings being separated and potentially the children being separated from their lifelong primary carer."

[27] It is hardly surprising, given that submission, that permission was granted by the single judge. I say straightaway that this court has not been provided with any transcripts of the oral evidence that was before the judge. I have to assume in that circumstance that the oral evidence went no further than the written evidence of the parties.

[28] In writing, father's evidence was as follows:

> "But most of all it is [the wife]'s welfare that concerns me. She is unhappy and has almost the full burden on her own. She gets little or no respite and has little prospect of that changing. A refusal would be very damaging to her and indirectly this would be damaging to the welfare of the children. A move would be so much better for all of us but for [the wife] I feel it is a necessity."

That was the high point of his case in written evidence.

[29] The wife's written evidence was as follows:

> "Unfortunately, no matter what the outcome, someone is not going to be happy. As [the father] and I are the primary carers and are struggling so much already, I feel that to be denied the right to move to America would be detrimental to our family. I know [the time that is something she can get used to. On the other hand, if [the father] and I have mother] will be very unhappy of the boys moving away from her but I feel that over to stay here, time is not something that can fix our problems, we still won't have the support that we so greatly need with having three small children to look after and that will inevitably have a negative impact on the children."

[30] The Cafcass practitioner's inquiries revealed the following in relation to the eldest child:

> "At times during our chat [A] appeared very close to tears. This situation is having a stressful impact on him, although it doesn't appear any of the adults are putting pressure on him ... However, a few were real and big concerns, such as 'he won't see mum as much, moving house again, worried about calling mum due to the time difference, won't see his friends' ... 'scared', but if the courts do not allow the move to America that 'daddy might not go with us'."

[31] In relation to the father and his wife, the Cafcass practitioner said this:

"[The father] has concerns that his wife [her name], main carer to [the children], has struggled to settle in the UK. She feels isolated and has no support network."

[32] That was the high point of the written evidence before the court. It is right to acknowledge that in his position statement the father went further and identified the hypothetical possibility of the break up of the family unit and one part of the family emigrating to the United States of America. But in conclusion in his position statement the father said this:

"There is a possibility (I hope remote) that being forced to remain here would put such a strain on [his wife] that she would want to return to the USA anyway. This would be catastrophic for all of the children."

[33] As can be seen, the case that the judge was being asked to consider was not a fragmentation or break up of the family unit within which the children were being cared for. At its highest that was a remote possibility. It is incorrect to suggest that the judge had failed to grapple with a fundamental issue which would have been determinative. The judge was asked to consider a different balance of harm and did so with care, loyally reflecting the written evidence put before him by the parties.

[34] I accept that in the father's position statement all of the hypothetical options were fully explored, including the possible break up of the family. But that is a different matter from the evidence actually heard by the judge.

[35] This ground of appeal is therefore based on a misapprehension of fact and cannot be sustained on the material before this court, and accordingly I cannot accept it.

[36] The second ground of appeal is, of course, closely interwoven with the first, namely whether adequate consideration was given to the circumstances of the couple's new child. Ms Sparrow, who appears today for the father, makes her own submissions with rather more care than did the father when he was in person but the essence is the same and is as follows: (a) that the impact on the couple's new child should have included a more formal consideration of that child's best interests, and (b) that the judge failed to consider the Article 8 ECHR rights of all of the children, i.e. including the child who is not the subject of the relocation application.

[37] This is a ground with mixed factual and legal considerations. As to the facts, the submission is dependent on the first ground; that is the extent to which the family unit might be fragmented. I have dealt with that. The case put in relation to the youngest child was no different on the facts from that put in relation to the two subject children: all would suffer from distress and indeed harm if there were to be a separation of the family unit.

[38] It is trite law that a judge must have regard to all the circumstances of the case in coming to a welfare decision of this kind. He is mandated to do so by the factors set out in section 1(3) of the Children Act 1989. Those circumstances include a close consideration of the position of a non subject child who is part of the same family unit as the children whose welfare is being considered. That is not the same as elevating that child's best interests to the point where a paramountcy determination has to be made about her such that the court balances the best interests of a non subject child with the best interests of the subject children. That is not the law and Ms Sparrow was careful not to suggest that it was.

[39] The impact of the decision on the non subject child, like the impact of the decision on the family unit, is a fact and/or a value judgment of considerable importance. But that is where it rests. The authorities that father refers to are simply examples of the importance of sibling relationships within family units. Of course they are important but the interests of the non subject child are not a determinative legal question having regard to the best interests of the subject children.

[40] Ms Sparrow was right to be circumspect in relation to the Article 8 claim. It is self evident that in any application under the Children Act 1989 the Article 8 rights of the subject children and the parents are engaged and the court is a public body whose decisions may interfere with those rights. On the facts of a particular case the application may engage the Article 8 rights of others, for example the father's wife and a non subject child.

[41] Let me assume for the purposes of this discussion that on the facts of this case the youngest child's Article 8 rights were engaged. Any interference with those rights has to be justified in accordance with Article 8(2). The interference has to be, (1), in accordance with the law; (2) be necessary in a democratic society; and, (3), be proportionate to the object to be achieved. Where a child's Article 8 rights have to be balanced against an adult's, the interests of the child will prevail.

[42] There is no suggestion that the 1989 Act, and in particular sections 1 and 8 and the principles extracted from them, are inconsistent with the Convention. Far from it. There is ample jurisprudence to support the proposition that domestic law, as applied by the judge in this case, is Article 8 compliant.

[43] If that is the case, what does the submission made by Ms Sparrow amount to? It can only be an attempt to impose the concept of 'horizontality' into private law children cases where the agency of the state is not the principle actor seeking to interfere in the family or the private life of those concerned. If that is right, the submission is misguided. In private law applications it is a person with parental responsibility who seeks to interfere with the Article 8 rights of the other relevant persons, be they other adults with parental responsibility or the children themselves. Parliament has provided a legislative mechanism for such a decision that is human rights compliant. It is neither necessary nor appropriate for the Family Court in ordinary private law applications where there are no public law consequences to undertake a separate human rights proportionality evaluation balancing the effects of the interference on each person's Article 8 rights so as to evaluate whether its decision is proportionate. Ms Sparrow could point to no jurisprudence to suggest otherwise. That position is quite distinct from public law applications where such an evaluation is required by reason of the fact that a local authority applicant is a public authority seeking itself to interfere in the rights that are engaged.

[44] In my judgment, there are no factual issues relating to the youngest child which provide sufficient complaint for a ground of appeal to be pursued, and the legal basis for that ground is either insubstantial or flawed and accordingly I would reject it.

[45] The appeal to this court was based on a case that at the time of its presentation was a remote possibility. If circumstances subsequently change, the Court of Appeal is not usually the right place to re-evaluate that change. It is to be hoped that there will not be a need for continuing litigation. If there is, then the plans of both parents will need to be scrutinised to see what arrangements are in each of the children's best interests in the

longer term. The labels of residence and contact have now gone subsequent to the order complained of and parents need to understand the equivalence of their parental responsibilities and the equivalent importance of their relationships with their children, all other things being equal.

[46] I would dismiss this appeal.

[47] LORD JUSTICE PATTEN: I agree.

[48] LORD JUSTICE LONGMORE: I also agree.