Neutral Citation Number: [2014] EWCA Civ 989

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Newcastle-upon-Tyne County Court
His Honour Judge Walton
NE13P01662

Royal Courts of Justice
Strand, London, WC2A 2LL

17/07/2014

B e f o r e :

LORD JUSTICE TOMLINSON
LORD JUSTICE RYDER
and
LORD JUSTICE VOS

In the Matter of H (A Child)

Claire Brissenden (instructed by David Gray Solicitors) for the appellant father
Katherine Wood (instructed by Ben Hoare Bell Solicitors) for the respondent mother
Hearing date: 20 May 2014

HTML VERSION OF JUDGMENT

Lord Justice Ryder:

1. On 6 January 2014 His Honour Judge Walton sitting in the Newcastle-upon-Tyne County Court granted a specific issue order permitting the mother of a three year old girl to take her to Iran for a holiday. The application had been opposed by the child's father who brings this appeal with the permission of Macur LJ. The parties have applied for permission to adduce additional evidence on the appeal.

2. The child concerned was born on 13 August 2010. Her parents share parental responsibility for her as a consequence of their marriage. Both parents have indefinite leave to remain in the United Kingdom, the father having obtained asylum as a political refugee. The mother

has two daughters by a previous marriage who live with her in this jurisdiction. The child with whom the court is concerned has been the subject of private law children proceedings since before 11 July 2013 when by agreement a residence order was made in favour of the mother. The same order provided for unsupervised contact for the father but prohibited him from removing the child from this jurisdiction. It permitted the mother to temporarily remove the child from the jurisdiction except to Iran which was prohibited.

3. This court is told that the reason for that prohibition was the 'agreed' risk of travel to Iran for this family. At the time the order was made in July 2013 the apparent solution to the problem presented by the mother's wish to meet her own family with the child was that she could do so in Turkey. Such was the extent of the risk identified on that occasion that by agreement the court prohibited both parents from obtaining an Iranian passport for the child and the father surrendered an existing passport and his own passport which are held by solicitors to the order of the court. Before this court the mother explains that order by saying that she agreed to it as a 'package' not on the merits of the individual clauses.

4. In February 2014 the case proceeded on the evidence of the parties alone. The father was content to rely on the Foreign and Commonwealth Office (FCO) guidance and his own evidence as to how his own relatives and opponents of the regime in Iran had been treated. The mother relied on her own experience of free passage while travelling to and from Iran since she moved to this jurisdiction. There were background issues relating to whether the mother's family worked with or for the intelligence services in Iran but the judge was perhaps unsurprisingly unable to do other than comment on that claim given that it was unsubstantiated.

5. Father's case was that his child's safety would be at risk because of his previous political activity in Iran and that this was not a fanciful risk: his relatives from Sweden had already been detained for six months for no apparent reason while visiting Iran. He sought to substantiate that risk with evidence about the imprisonment of and restrictions upon his relatives in Iran. His subsidiary case was that there was also a possibility that the mother might remain in Iran with their daughter, removing her from the reach of anyone who could assist him.

6. The judge's findings and value judgments on the concessions made and the evidence heard were limited and are as follows:

   a) father is a political refugee i.e. is at serious risk of harm if he returns to Iran;

   b) there is advantage to the child in reinforcing her cultural ties with Iran and meeting her extended family;

   c) mother owns two properties in Iran, one of which was or is being used as a school;

   d) the likely motivation for the visit was one of the mother's other daughters suffering extreme homesickness for her own father and family in Iran; a genuine reason though not one that is directly relevant to the child in these proceedings;

   e) the mother's ties to this jurisdiction are not the strongest (she has a fiancé, a tenancy and is enrolled on a training course);

f) the court is dependent on the mother's word that she does not intend to stay in Iran but it is improbable she would fight for leave to remain in the United Kingdom and then within a short time leave to live in Iran;

g) the father's political convictions and religious beliefs (or lack of them) are an unlikely foundation for actions against his child given that he is living in this jurisdiction and is not at present politically active in Iran.

7. The court accordingly assessed the risk of mother remaining in Iran or of the child being subjected to harm as sufficiently low not to require any safeguards. The FCO guidance which advises against all but essential travel to Iran was discounted on the basis that the mother would not herself be at risk and it was otherwise not thought to be relevant to the application.

8. The judge dealt with the application on the evidence presented to him. He cannot be criticised for the lack of sophistication of that evidence or the analyses that he had relating to the child and the general issues that arise in relation to non-Hague Convention countries and Iran in particular. The question that arises on the authorities is whether sufficient attention was paid to the *prima facie* risks to the child and the consequences for the child if those risks materialised.

9. There was a *prima facie* case from the child's perspective that if the mother left the jurisdiction with the whole of the birth family (i.e. all three children), then unless her less than significant ties to this jurisdiction could be strengthened, she might decide or be persuaded to remain in Iran with the child. Whether that is likely was a value judgment based on very limited fact. A judge exercising a protective jurisdiction should have regard not just to the likelihood but also to the consequences were the risk to materialise and should consider putting into place proportionate protections if an order is to be made.

10. There was also a *prima facie* case from the child's perspective that she and/or her mother may be treated by the authorities at least in the manner warned against in the FCO guidance. The mother is in a relationship out of marriage and the child is related to a political refugee whose family are regarded as antagonistic to the regime. The parents of the child have chosen to seek the protection of the state in this jurisdiction. It may be right that it is unlikely that the child would come to direct harm in Iran but that does not mean that the father would be able to exercise his parental responsibility should restrictions be placed upon the mother and/or the child in Iran.

11. The sensitivity of applications of this kind has been recognised in the decisions of this court which reflect a broad approach to risk and safeguards. In *Re K (Removal from Jurisdiction: Practice)* [1999] 2 FLR 1084 Thorpe LJ flagged up the need to assess not just the risk of a breach but also the magnitude of the consequences of breach for the child. In *Re R (A Child)* [2013] EWCA Civ 1115 this court went further. At [23] Patten LJ held:

"The overriding consideration of 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 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 an order. If the judge decides to proceed in the absence of expert evidence, then very clear reasons are required to justify such a course"

12. When dealing with the risk element in cases such as this, it is important to take into account not just the facts as they appear from the evidence of the parties but also the opinions of those agencies that provide assistance to the court and to individuals when asked to do so. The FCO guidance which was placed in evidence before the court is as follows. The court in this case had no evidence of fact or opinion to contradict the same so that it was at least persuasive on the issues before the court:

    "British nationals – including dual British/Iranian nationals – face greater risks than nationals of many other countries and the security forces are suspicious of people with British connections.

    […]

    Iran doesn't recognise dual nationality and the Iranian authorities will deny that the British Government has any legitimate responsibility for British Iranians.

    […]

    The Iranian authorities have in many cases failed to meet their international obligations to notify Embassies where foreign nationals have been detained. Even if requested, adequate consular access is not always granted. You should therefore keep in close touch with family or friends back home."

13. The risk highlighted in that guidance was independent of the mother's intentions or of the father's assertions. It needed to be addressed in the judge's reasoning.

14. On its face this was a commonplace application in that it involved consideration of an aspect of parental responsibility within the provisions of section 8 of the Children Act 1989 where the parents were not in agreement. On the facts of this case, however, the subject matter of the application called for the expertise of the High Court. This was an application to temporarily remove a child to a 'non-Hague Convention country' that has no other arrangements in place for recognition or enforcement of decisions made by the courts in this jurisdiction. That does not preclude a decision being made on an application such as that made in this case, but it calls for rigorous scrutiny of the risk involved, the consequences of that risk becoming a reality and the safeguards that are available both within the domestic law of the foreign jurisdiction and as between the parties and the court in this jurisdiction. Although such cases involve fact finding, they are often more about issues of comity, the effectiveness of diplomatic or consular assistance in the foreign jurisdiction and the relevance of the facts alleged to the risk, including issues of political and religious conflict. These issues call for the experience of a judge of the High Court and occasionally expert advice in an exceptional case.

15. The issue before this court was not whether expert evidence on the question of risk, consequences or safeguards was necessary. The advantage of a judge of the High Court hearing an application of this kind will be that expert evidence is less likely to be necessary. High Court judges have a good understanding of international cases and are more likely to be able to take judicial notice of international circumstances in an appropriate case. Whether it be by taking such judicial notice or by hearing expert evidence, it is of critical importance that the court gives consideration to the magnitude of the risk if permission is given, the magnitude of the consequences if the child cannot be returned or the order is breached and whether the risk and the consequences can be provided for by the available safeguards.

16. I accept that a court may answer the questions identified above in the context of a welfare analysis based upon the factual evidence that the court accepts from the parties. In this case, given the FCO advice and the lack of any identified safeguards to meet the consequences, I have come to the conclusion that the judge was wrong to have come to the determination that he did without further evidence or analysis of the risk, the consequences and the available safeguards.

17. I have read the additional evidence upon which the parties wish to rely. I make no comment upon it here. If the application is to be re-heard then case management directions will be required to ensure that all relevant evidence is presented to the court.

18. I would allow the appeal, set aside the order and remit the application to be heard by a judge of the High Court sitting in the Family Court.

Lord Justice Vos

19. I agree.

Lord Justice Tomlinson

20. I also agree.