Clint Raymond Walley v Melanie Moira Walley (Forrester)

	No Substantial Judicial Treatment

Court
Court of Appeal (Civil Division)

Judgment Date
22 June 2005

B4/2005/1247

Court of Appeal (Civil Division)

[2005] EWCA Civ 910, 2005 WL 1586308

Before: Lord Justice Thorpe , Lord Justice Wall , Lord Justice Neuberger

Wednesday 22nd June, 2005

On Appeal from the High Court of Justice Family Division (Mrs Justice Baron)

Representation

Ms Allison Ball QC (instructed by Messrs Bindman & Partners) appeared on behalf of the Appellant.
The Respondent appeared in person.

Judgment

Lord Justice Thorpe:

1. This case comes before us this morning in the shape of an appeal, permission having been granted by Baron J by paragraph one of her order of 16 May 2005. The judgment that she granted permission to appeal was her judgment of 28 May 2004. That was a judgment upon a father's application for the summary return of his daughter to the Republic of South Africa, pursuant to the provisions of the 1980 Hague Child Abduction Convention .

2. The mother appealed that order and her appeal was dismissed by this court on 6 July 2004. That left in place Barron J's return order. However, her order was essentially a provisional order, since she set a considerable number of conditions which had to be satisfied by the father before the way became clear for implementation of the return.

3. Miss Alison Ball QC, who appears this morning for the appellant mother, has put before us a schedule of compliance and non-compliance with the conditions and undertakings in the order of 7 May. She identified a number of conditions which had to be satisfied before the child's return. They are nine in number and, as Miss Ball analyses the intervening months she says that seven of those have not been complied with at all. There has been some opaque compliance with an eighth, and the ninth has been partly complied with on 14 May.

4. Inevitably the father's failure to comply presented the mother with an opportunity to return to the court. Accordingly, on 16 May there appeared before the judge Mr Anthony Kirk QC for the mother, and Mr Henry Setright QC for the father. Mr Setright did not rely on any evidence on 16 May, he merely put before the judge a position statement by his client on which he sought an adjournment of the application to set aside the return order to enable him to file evidence to show the attempts which his client had made to comply with the order of

7 May 2004. His client then said that in so far as there had been non-compliance, it was for reasons beyond his control. That was elaborated. The majority of the undertakings relate to applications in the South African jurisdiction. The father was unable to make those applications because he was unable to instruct a solicitor. He was in dispute with his previous solicitor. There is a universal practice in South Africa that if a solicitor and client were in dispute, no other attorney would take on the client until the dispute was resolved. Therefore it was said in the position statement, he was unable to comply with undertakings and he wished to produce evidence of his communication with central authorities and others in respect of his endeavours to comply. That resulted in paragraph 4 of the order of 16 May 2005, which provided:
"The father is to file and serve such evidence upon which he proposes to rely both generally and in reply to the mother's Affidavit sworn on 7th April 2005 to include, if so advised, any expert evidence by no later than 4.00pm on Monday 16 June 2005."

5. In drawing that timetable, the leaders had not perhaps anticipated the speed with which this court lists any appeal in a Hague abduction case. So effectively we are sitting today (on 22 June) before the timetable set by the judge has run its course. But that is no prejudice to the father who not only failed to file and serve by Monday 16 June, but he still has failed to file or serve any evidence to support the submissions advanced by Mr Setright founded on his position statement. He has said to us this morning that he relied upon Dawson Cornwell and that they only ceased to act for him because of the withdrawal of public funding on Thursday of last week. That, unfortunately, does not impress. Dawson Cornwall could not have prepared an effective written evidential case without the raw material from their client. If Mr Walley had that raw material he could obviously have put it together since the withdrawal of public funding and presented it to us for consideration this morning.

6. The reality of the present circumstances was clearly put to Mr Walley this morning by my Lord, Wall LJ, who simply assessed the future by saying, hand on heart, Mr Walley could not advance any realistic future date by which he would be in a position to comply with the judge's conditions.

7. Mr Walley accepted that realistically. Accordingly, it seems to me that the route to conclusion is simple. The return order was properly made, subject to a series of stringent conditions. The conditions have not been complied with. There is no reasonable time limit within which there is the least possibility of compliance, ergo the order for return is empty and should be set aside.

8. Another powerful consideration to the same effect is that we have before us today evidence from a CAFCASS officer who, in compliance with paragraph 6 of the order of 16 May, has seen Savannah and has ascertained her present wishes and feelings. He has reported to us fully and powerfully as to the extent to which she has hardened against return and against relationship with her father since May 2004.

9. Mr Walley has emphasised this morning how profoundly distressing it is for him to read that material, particularly in the light of completely unsuccessful attempt to bring about a meeting between Savannah and her father, pursuant to the order in paragraph 7. Mr Walley in the end could do no more than say that there was an area of live dispute in relation to his assertion that he was effectively blocked from instructing a lawyer in South Africa.

10. The assertion advanced by Mr Setright has not been substantiated by any documentary or other evidence. It has, however, been rebutted by the mother's legal team, who have produced a letter from a past President of the relevant South African Law Society, which establishes that the general rule is subject to exemption, and that in this particular case an application for exemption would undoubtedly have been granted, given that the issues to be litigated involved the interests of a minor child. That factor, says the writer, Mr Randles, makes it
"inconceivable that our Council refused permission in circumstances such as those that I understand exist in this case."

Well, Mr Walley has said that that would be an assertion that would be hotly debated in the legal community in Durban; and he says that he wishes 30 days in which to go back to the legal community to test the validity of Mr Randles' assertions. That seem to me a plea of desperation and one that could not be seriously entertained, given the overwhelming reality that I have already identified, and given the complete absence of any evidence to support the assertion that he is blocked from instructing lawyers in South Africa.

11. For all those reasons, I am in no doubt that our duty today is to allow the appeal and set aside the return order made on 7 May 2004. In so ordering, I recognise the sadness of Mr Walley's position and his inability to consent to such an outcome, since he would regard that as a betrayal of his obligation to fight for a relationship with his daughter. It does seem to me, as a generalisation, that almost inevitably Savannah's present emotional state has been contributed to by her fears and anxieties at the prospect of the implementation of the return order and the uncertainties attendant upon continuing litigation. There must, therefore, be at least a possibility that the reassurance which she will derive from the outcome of this appeal will enable her to calm down emotionally and to begin to understand the importance for her of re-establishing a normal relationship with a devoted father who, although effectively prevented by this order from establishing a pattern of conventional weekend access, will at least be able to set up proposals for extensive periods of contact in school holidays, which are the ordinary substitute in these cases where parents are living in different continents. He can at least take some comfort from the knowledge that the effect of this order will be to establish Savannah's habitual residence in this jurisdiction, which will cast upon the London judge the responsibility of promoting or restoring contact between father and daughter.

12. Before leaving this otherwise straightforward case, there is a point of general application which it is necessary to deal with. The skeleton arguments presented to the judge on 16 May persuaded her that she had no jurisdiction to set aside her previous return order. That persuasion came from dicta in judgments of this court, particularly that of Butler-Sloss LJ in *Re M (Abduction Undertakings) [1995] 1 FLR 1021* . At 1024 Butler-Sloss LJ said:
"The order to return, or not to return, is final in the Hague Convention proceedings brought by the Central Authority, and disposes of those proceedings. Any proceedings dealing with the custody, residence or other needs of a child are between different parties, with considerations wholly different from those relevant to a Convention application to return the child.

Now I have heard further argument on the issue, I am not persuaded that my earlier view that a Hague Convention order is a final order is wrong.

In *Re M (A Minor (Child Abduction) [1994] 1 FLR 390* , I said at 397E:

> 'A decision to return children made on an application under the Convention procedure is in my view a final order not capable of variation save as to implementation such as already happened earlier. In the absence of full argument on the point an application to set aside on order to return the children under the provisions of the Convention should in my view be by way of appeal to the Court of Appeal and the deputy High Court judge was right not to entertain the application.'

The disadvantages suggested in the requirement that the decision whether or not to set aside an order to return should be made in the Court of Appeal are overstated. All the evidence is written, and if it becomes necessary the Court of Appeal can remit the matter to a High Court judge."

13. Now, whilst all that Butler-Sloss LJ said in the two cases of *Re M* (1994 and 1995), may have been apt to the issues that they raised, the present case is clearly distinguishable.

14. What Baron J did in 2004 was to make a return order which was expressly conditional. The order was not to take effect unless and until certain conditions were fulfilled. Any question as to fulfilment is a question of implementation which is to be determined by the trial judge. In the same category, in my opinion, falls a question as to whether or not the return order can stand, given the almost complete absence of compliance with the conditions set. It is not setting aside a final order clearly made. The order was never a final order; it was always a provisional order. Accordingly, it does, in my opinion, lie within the jurisdiction of the trial judge to entertain and determine any application brought by either party which puts in question whether the extent of compliance has been sufficient to convert what was a provisional order into a final order. This is simply not business for the Court of Appeal. It places an unnecessary burden on the resources of this court. The appeal constituted by the judge's order has had to be given priority, and it requires three judges rather than one to dispatch it. I can further fortify my position by reference to *TB v JB [2001] 2 FLR 515* , in which this court allowed an appeal and itself made the order for return that had been refused in the court below. In making that order this court set conditions. There were then subsequent applications to this court, and this court did not hesitate to classify them as implementation applications and to deal with them on the merits. Were the seeming

principle that was advanced to Barron J to be a sound one, it would follow that the *Court of Appeal in TB and JB* would have said that the order made was a return order, a final order, and if there were issues as to compliance with conditions the appeal must lie to the House of Lords. That proposition is obviously absurd.

15. In saying what I say about the issue of jurisdiction I am not in any manner criticising Baron J, who was not asked to rule on the point; it was simply an agreed position adopted by counsel, and she simply followed the path that they invited. That is all I would say on the general point, and I only conclude by repeating that I would allow this appeal and set aside the return order now some 13 months old.

Lord Justice Wall:

16. I agree that this appeal should be allowed and the order set aside.

17. I would like to add a very short adjournment on two points. Firstly, the point of procedure: I start exactly where my Lord left off. Given that Baron J had before her a skeleton argument from leading counsel with which a second distinguished member of the Bar agreed, it is entirely unsurprising that she came to the conclusion on the procedural point that she had to refer the matter to this court and that it was not a matter for her.

18. I also agree that nothing in what my Lord has said, or in what I am about to say, is, in my view, inconsistent with the two decisions of this court to which my Lord has referred. It is, however, I think significant that when one looks at *Re M (Abduction: Undertaking) [1995] 1 FLR 1021* , one sees that although it was a case in which undertakings were required for the return of the children to Israel, the application to set aside the return order was not related to the effectiveness or otherwise of the undertakings; it was an application by the mother to set aside the return order on fresh evidence which she said vitiated the decision to return. Unsurprisingly, the judge refused to entertain that application and said that in a summary procedure an application should be made to the Court of Appeal for permission to appeal and to adduce fresh evidence, the court at first instance having fulfilled its function and exhausted its jurisdiction in making the return order.

19. It is, in my judgment, in that context that the observations of Butler-Sloss LJ (as she then was) need to be read. Plainly, in a case where a judge makes a return order simpliciter the remedy for the disappointed litigant is to appeal; it is not to apply back to the judge to set the order aside. But where, as here, the return order is heavily dependent upon important conditions which the judge has made, and if those conditions are then not fulfilled, it is, to my mind sensible both, as a matter of logic and as a matter of law, that the application to set aside the order should be made to the trial judge, who can then grant it on the basis that the conditions set for the return have not been implemented, or refuse it. That grant or refusal can then be appealed if necessary to this court.

20. In my judgment, therefore, Baron J did have jurisdiction to deal with the matter and could have done so. But as my Lord said, she is in no sense to be criticised, because she relied on two extremely experienced members of the Bar, well versed in this jurisdiction, who thought that she was bound by the authority to which they referred.

21. My second point has less to do specifically with the decision which we are making and is more addressed to Mr W. The tragedy of international cases of this nature is that the breakdown in the relationship between a child's parents and the breakdown in the relationship between a child and one of those parents, in particular, is exacerbated by distance, by different systems of law and by all the complexities involved in international travel — finance, distances, differences in life-style, general uncertainty and so on. This court readily understands that. That is why the Hague procedure is a summary one, designed to deal with these cases swiftly and for there to be swift resolution in the country of habitual residence. That, as Mr W. if I may say so very frankly acknowledged today, is simply no longer possible. More than a year has gone by since the judge's order. Savannah is now 11 and the Hague Convention procedure simply is no longer applicable.

22. But what matters in these cases at the end of the day is not the legality. What matters is the relationships; and Savannah has a lifetime, and Mr W. has a lifetime in which to try and repair the damage which has been done over the last few years.

23. I fully understand his inability to agree to what we are doing today. But I do urge him simply to re-think the proposition that he is fighting for his daughter. It may be — I do not know enough about the facts — that the process of fighting for his daughter is the one factor at the moment which is continuing to alienate her from him. If he can bring himself to accept the verdict of this court with which he has not agreed, and if he can reassure Savannah that she will now be living with her mother and that she is at no risk of removal from this country except by agreement for future holidays, and if she can be reassured that Mr W. is at no sense a threat to her stability as she sees it, then that is the first step towards reconciliation. Equally I say to Savannah's mother that now she has secured Savannah's secure future in this country she, too, should begin to think about how bridges can be rebuilt and restored, because it is in her interests, as well as Savannah's, that Savannah should have a proper relationship with her father and should grow up as a balanced adult with a decent knowledge of both parents. I apologise if that sounds something of a homily, but in these international cases one becomes easily absorbed with the technicalities and sometimes forget that underneath it all are profound human relationships which do need to be restored.

24. Having said that, I am in no doubt that the right course here is to allow this appeal; to put this litigation to bed; to set aside the Hague Convention order; and, as my Lord has indicated, if agreement cannot be reached, this jurisdiction is now fair and square in the saddle, Savannah is habitually resident here, and if there are issues about her future which cannot be agreed, then they will be adjudicated upon by an English judge.

Lord Justice Neubereger:

25. There is nothing I can usefully add to the judgments of my Lords, Thorpe and Wall LJJ, the contents and conclusions of which I fully agree.

(Application allowed; Appeal allowed; no order for costs).