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K (A Child)

[2015] EWCA 352

13/04/2015

Barristers
Henry Setright KC
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Court
Court of Appeal (Civil Division)

Practice Areas
International Children Law

Summary
Appeal against determinations arising from the approach taken by the High Court in respect of issues of forum conveniens and welfare

Facts
M was a child of nearly 3. His father was Singaporean and employed in the UK. His mother was Mongolian and able to live and study in the UK by virtue of her marriage to the father. They had been involved in litigation in both Singapore and England about M for most of his life.

During a period when M was in Singapore, the mother was served with divorce and custody proceedings and orders preventing M's removal. She returned to England and obtained orders under the inherent jurisdiction for M's return. The issue of habitual residence and hence jurisdiction was determined by Russell J in March 2014; she found M to be habitually resident in England and Wales and that the English court therefore had jurisdiction.

The father appealed against this and against Russell J's orders committing him to prison for failure to comply with orders for the return of M.

The appeal was heard in July 2014 ([2014] EWCA Civ 905). McFarlane LJ had also been part of that tribunal. The father's appeal in respect of the committal was granted but that in respect of habitual residence and jurisdiction was dismissed.

In its July 2014 judgment, the court was clear that it was not precluding further consideration of issues of general welfare or issues of forum.

The mother then sought to take matters into her own hands and attempted to snatch M from Singapore, intending to flee by sea; this resulted in her criminal conviction, imprisonment and deportation to Mongolia, from where she eventually returned to the UK.

During her absence there was a hearing within the continuing wardship proceedings at which it was directed that: "All issues in these proceedings are adjourned to 31 October 2014". There was no clarification of what those issues were.

As well as the wardship there were separate divorce proceedings. Each party had issued proceedings; the father in Singapore and the mother, several months later, in England. The issue of jurisdiction in respect of the divorce remained live and had been expressly adjourned (by an order separate from that made within the wardship) for consideration after the determination of the wardship issues, if time permitted.

On 31 October the case came before Newton J who had had no previous involvement and was not provided with position statements until the day and, even then, with no document that provided any clarity as to the issues to be determined.

Both forum conveniens and welfare were flagged up to be dealt with but, unfortunately, in a manner that was confusing and elided the two issues. It was, however, made plain during the course of the hearing that the issues of habitual residence and jurisdiction had already been determined and were no longer live.

Notwithstanding that the agenda for the judge may have been unclear, he nevertheless had responsibility to case manage the hearing so that he understood the issues to be determined and the applicable law. If not familiar with the law, the judge should have sought assistance from counsel.

The legal structure for international private law issues was plain. The court should:

– First (having regard to any relevant international provisions and having regard to the habitual residence of the child) determine whether or not the court had jurisdiction.
– The court might then, if requested, consider the question of what might be the most convenient forum (notwithstanding that the English court has jurisdiction)
– The burden of proving that the convenient forum was elsewhere lay with the party seeking to stay the English proceedings
– The welfare of the child was relevant in determining the forum but the paramountcy principle in S1 CA 1989 did not apply.

In this case, regrettably, this correct approach was not followed and the judgment demonstrated an astonishing lack of grasp of the core concepts in relation to jurisdiction and forum and seemingly made definitive determinations as to both forum and welfare and in respect of the return of M and the father's passport.

The father appealed all the orders made on the basis that the judge had failed to engage properly with the issue of forum conveniens. Those representing the mother, after initial resistance, accepted that this was, indeed, the case and that the appeal should be allowed with the matters being remitted for rehearing by a different tribunal.

The outcome having been conceded, McFarlane LJ went on to explain the reasons for his somewhat trenchant criticism of the approach taken by Newton J.

His judgment contained only a brief passage on the law that was no more than a quote from the case of A v A, an authority which, as it related to habitual residence, was not relevant. He had not set out any of the legal principles relevant to forum conveniens.

The judge had misunderstood both the position that the proceedings had reached and the law relevant to habitual residence and jurisdiction. He had no standing to reconsider or reopen either issue. He had also erred in considering that aspects of welfare or forum could be 'incorporated' in consideration of habitual residence and in having apparently understood that he was being asked to reconsider the issue bearing these factors in mind. He was wrong in his view that "issues of welfare and convenient court are intertwined with habitual residence".

He had also imported issues from the divorce and financial proceedings which could have no relevance to either forum or M's welfare.

Moreover, he incorrectly set out that the court had already made a declaration in respect of forum. It had not – it had determined jurisdiction.

The judgment totally failed to engage with the issue of forum conveniens in a way that was legally correct or procedurally appropriate.

Held

McFarlane LJ did express some sympathy for the judge, who had not been given effective assistance by counsel and had delivered an extempore judgment. Even so, where there was no pressing urgency, judges should take time to consider their judgments and, if necessary, research the law.

None of the determinations made by the judge on 31 October could stand. There would be a rehearing. If the father wanted to litigate the issue of forum, he needed to apply to the English court for a stay and argue his case in accordance with the law.

Having dealt with the main appeal, McFarlane LJ then went on to consider a "narrow point" that was the subject of a second appeal brought by the husband within the divorce proceedings. Having been told that the Form E financial information form had not been filed as directed, without hearing any argument on the point, Newton J had ordered that it should be, notwithstanding that the deadline he provided for was on a date before a hearing already listed to consider whether or not the English court had jurisdiction in respect of the divorce proceedings themselves. Not only was the question of jurisdiction at issue, but the matter had not been properly litigated. In the absence of proper process and reasoned determination, the order could not stand. Accordingly, the appeal on that matter was also allowed.

Permission

Family Law Week

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