

AJ (Appellant) v JJ (First Respondent) & (1) KK (2) JAJ (3) JUJ (By Their Solicitor NH) (Interveners) (2011)

[2011] EWCA Civ 1448

02/12/2011

Barristers

Private: David Williams QC
Mark Jarman KC
Michael Gration KC

Court

Court of Appeal

Summary

A judge should have made a clear finding on whether children objected to being returned to their father in Poland, and should have at least raised the issue of whether he should meet the children face to face. Judges and practitioners had the responsibility to consider in what way and to what extent the Practice Note (Guidelines for judges meeting children who are subject to family proceedings) April 2010 applied during preparations for trial, and during trial.

Facts

The appellant children, intervening in proceedings between their father (F) and mother (M), appealed against an order that they be returned to Poland. The parents were Polish nationals and the three children had been born in Poland. After the parents separated, custody was granted to F with contact to M. M came to the United Kingdom and obtained a variation of the contact order to allow for holiday contact in the UK. Whilst the children were in the UK on a visit, M applied in the Polish court for custody and relocation of the children to the UK. M failed to return the children at the end of contact and F began proceedings under the Hague Convention on the Civil Aspects of International Child Abduction 1980 for their return to Poland. The children and family reporter filed a statement that the children had expressed a strong wish to remain in the UK with M, and that the eldest boy, who was just over 15 years old, would refuse to get on the plane. The reporter gave her view that joinder of the children as parties with separate representation would not sufficiently enhance the court's understanding so as to justify the additional expense and delay. The judge doubted whether the children's objections were made out, but decided that if they were he should exercise his discretion to order their return. The children then obtained representation and permission to appeal. The children submitted that the judge had (1) failed to make a clear finding on whether they objected to return; (2) erred by not of his own motion ordering separate representation for them, or meeting with them to gauge their true positions.

Held

(1) The judge had been required to make a clear finding on whether the children objected to return, which was in effect the only issue in the case. The evidence of the children's objections was not scant or weak. A clear finding that their objection had not been made good would have been the end of the case. Equally, a proper exercise of the discretion would only be triggered and conducted by an unequivocal finding that the objections had been made good (see para.29 of judgment). (2) In the circumstances, it was hopeless to argue that the judge should have ordered separate representation of his own motion. However, the judge had erred in not at least raising with the parties the need for him to meet the children face to face. The flow of authority pointed towards a meeting, *C v W* (2007) EWHC 1349 (Fam), (2007) 2 FLR 900, *R (A Child) (Abduction: Child's Objections)*, *Re* (2009) EWHC 3074 (Fam), (2010) 1 FLR 1229 and *G (Children) (Abduction: Children's Objections)*, *Re* (2010) EWCA Civ 1232, (2011) 1 FLR 1645 considered. Further, judges and practitioners had the responsibility to consider in what way and to what extent the Practice Note (Guidelines for judges meeting children who are subject to family proceedings) April 2010 applied during preparations for trial, and during trial. A return order in respect of a boy on the threshold of escape from the court's Convention jurisdiction and determined to fight enforcement had to be very carefully thought through by any trial judge. Practicalities, consequences and reassurance could be ventilated in a meeting, and the judge's authority could be an influence for acceptance of return. Importantly a meeting would give the judge an opportunity to directly assess where a return order would lead if enforcement were resisted. The hearing was remitted for reconsideration of the discretion to order return (paras 30, 33-36, 38, 40-41, 43).

Appeal allowed

Permission

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