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Re K (A Child) [2014]

[2014] EWCA Civ 905

15/07/2014

Barristers
Mark Jarman KC

Court
Court of Appeal Civil Division

Practice Areas
International Children Law

Summary
Appeal against orders in wardship proceedings in which the judge found that the child was habitually resident in this jurisdiction, made a return order and subsequently committed the father to prison for failure to comply with the return order. The Court of Appeal upheld the judge's finding on habitual residence and the resulting return order but criticised the committal process and ordered the father's immediate release from custody.

Facts
This was an appeal against orders made by Russell J in wardship proceedings in which the judge found that the child was habitually resident in this jurisdiction, made a return order and subsequently committed the father to prison for failure to comply with the return order. The Court of Appeal upheld the judge's finding on habitual residence and the resulting return order but criticised the committal process and ordered the father's immediate release from custody.

The mother is a Mongolian citizen and the father a Singaporean citizen. They met in Singapore in late 2010 and the following year married and relocated to London where the father worked. The child was born on 5 July 2012. The relationship deteriorated, the mother made allegations of domestic violence and social services carried out an assessment. In July 2013 the parties travelled to Singapore and agreed to leave the child in the care of the paternal grandparents while they returned to London. The purpose and duration of this arrangement was in dispute between the parents.

In January 2014 the parties travelled to Singapore where the mother was served with divorce and custody proceedings issued in the High Court of Singapore. The mother subsequently made an emergency application in this jurisdiction and, on the father's return to London (without the child), he agreed not to pursue the custody proceedings in Singapore pending the determination of the child's habitual residence in this jurisdiction.

On 7 March 2014 the contested hearing took place before Russell J. She heard evidence from the parties

and handed down a reserved judgment 7 days later finding that the child's habitual residence was in this jurisdiction, requiring the father to return the child by 18 March 2014, requiring the father's passport to remain with the Tipstaff until the child had been returned and making a costs order against the father in the sum of £51,800.28; the return order was endorsed with a penal notice. The Court of Appeal declined to interfere with any part of that order. It held that the judge had applied the correct test on habitual residence as set out by the Supreme Court judgments in A v A and Re LC. It also rejected the father's criticism that the judge had failed to deal with the issues of welfare and forum given that (a) the child is being cared for by the paternal grandparents, (b) Singapore is a signatory to the Hague Convention, and (c) the Singaporean court was seized of the custody dispute at the time of the mother's application. The Court of Appeal held that, the judge having satisfied herself of the child's habitual residence and the father having undertaken not to pursue the proceedings in Singapore, the judge was entitled to conclude that the child's welfare needs were best served by restoring him forthwith to the mother's care.

In respect of costs, the judge's finding that the father's behaviour had been unreasonable by consciously misleading the mother and concealing his intention to pursue proceedings in Singapore, justified the making of an order.

A further hearing took place on 19 March 2014 in which the father represented himself and produced evidence that he had emailed his parents imploring them to return the child and that he had booked tickets for them to travel to London with the child, but that the flights had not been taken. The judge told the father that he had one last opportunity to secure the child's return and for him to remain at liberty and so made a further return order requiring the child's return by 8am on 21 March 2014 and listed the matter for a committal hearing that day.

The father then booked tickets for the paternal grandfather to travel with the child to London and explained the position he was in. The paternal grandfather replied saying that although he and the grandmother were very worried about him they would not return the child.

At the hearing on 21 March 2014 the judge made a further order requiring the father to return or cause the return of the child by 28 March 2014. The order contained the following recital:

"AND UPON the court repeating to [the father] that if the paternal grandparents refuse to return the child to this jurisdiction then the court expects the Respondent Father to make applications to the Singaporean court to ensure [the child] is returned to this jurisdiction pursuant to this Court's Order"

Held

The Court of Appeal held that this recital was wrongly included in the order as it amounted to an attempt to coerce the father into taking unspecified steps which the judge was not prepared to order and yet it was always likely to be used, as it was in fact used, as support for the judge's subsequent findings of contempt.

The next hearing took place on 3 April 2014 at which the father appeared in person, albeit the judge had invited him to seek public funding for representation as his liberty was at stake.

The Court of Appeal upheld four grounds of appeal in respect of this order:

Ground 1: Actual or apparent bias

The father asked the judge to recuse herself on the grounds of actual or apparent bias; the judge declined. The Court of Appeal noted that, at the hearing on 19 March 2014, the judge had told the father that he had "one last opportunity" to secure the child's return to the UK and "to remain at liberty"; and that he was "likely to be imprisoned" if he failed. On 21 March 2014 the judge told the father it was

"likely the period of imprisonment would be lengthy"; that his breach of the order of 14 March 2014 was "plain" and that he was required to take action against his parents in Singapore and yet he had done "Nothing. Nothing".

In applying the test set out by Lord Hope in *Porter v Magill*, *Weeks v Weeks* [2001] UKHL 67 [2002] 2 AC 357 'that the court must first ascertain all the circumstances which have a bearing on the issue and then consider whether those circumstances would lead a fair minded observer to conclude that there was a real possibility that the judge was biased', the Court of Appeal concluded that the judge's comments suggested that she had made up her mind before the committal hearing and that she should have directed that another judge hear the committal application.

Ground 2: Unfair conduct of the hearing

The Court of Appeal held that the conduct of the committal hearing was unfair and that it failed to adhere to the principles set out in *Hammerton v Hammerton* [2007] EWCA Civ 248. During the hearing the father was not warned that he was not obliged to give evidence; in fact he was asked to give evidence and immediately cross-examined first by the mother's counsel and then by the judge. He was only asked if he wanted to give any evidence on his own account after the cross-examination had taken place.

Ground 3: Did the evidence support a finding that the father had deliberately failed to comply with the return orders?

In this respect the Court of Appeal reiterated that the burden of proving contempt lies on the applicant, to the criminal standard. A contempt of court involves a deliberate failure to comply with an order, which must be an order with which the alleged contemnor had the ability to comply. In this case the father had delivered up his passport and so could not return to Singapore and he maintained that he had done all he could to arrange for his parents to return the child to London. There was no evidence before the court as to Singaporean law and the Court of Appeal found that the judge appeared to have assumed that the father could have commenced proceedings in Singapore from this jurisdiction and that such proceedings could have led to an order securing the child's return within the timeframe stipulated by Russell J's orders.

Ground 4: Unfair approach to sentence

The judge went on to determine sentence without giving the father any further opportunity to secure representation or to address the court on the gravity of the contempt or by way of mitigation. The Court of Appeal indicated that Russell J fell into error by proceeding straight to sentence without affording the parties such an opportunity.

In conclusion McFarlane LJ said [77]:

"The situation that faced Russell J in the various hearings leading up to the final committal hearing not infrequently arises in the context of international children cases before a High Court judge. A judge may be required to deploy the court's considerable powers to compel parties or others to attend court or to bring about the return of the child to this jurisdiction. At a hearing in which pressure is brought to bear on an individual, and injunctive orders are made, the judge may be justified in presenting a very robust demeanour and, in so doing, making reference to the potential consequences if court orders are disobeyed. In the present case the judge did just that, and no criticism has been sustained in relation to her actions.

The difficulty that can arise, and did arise in this case, occurs if and when the court is later required to hear committal proceedings arising out of an alleged breach of an earlier order made in the circumstances that I have described. The more robust the judge has been in delivering a coercive

message at the earlier hearings, and the more the judge has emphasised the consequences of breach, the more inappropriate (or impossible) it will be for the same judge to conduct the committal process."

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