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Y (Children)

[2018] EWCA Civ 1208

25/05/2018

Barristers
Henry Setright KC
Michael Gration KC

Court
Court of Appeal

Practice Areas
International Children Law
Appeal from a Circuit Judge's order that two children (aged 7 and 10) should be returned to their home country of Canada pursuant to a Hague Convention application by the "left behind" father.

There had been considerable delay in the matter reaching trial (11 months) and subsequent delay consequent upon the appeal. The Court of Appeal said that the 11 month delay was 'wholly disproportionate and unacceptable'.

At trial the mother had relied upon Article 13(b), asserting that there was a 'grave risk that return of the children to Canada would expose them to physical or psychological harm or place the children in an otherwise intolerable situation', and alternatively she relied upon the children's objections. The judge had rejected both. Because the mother's case at trial had been that if return were ordered she would return with the children the court was persuaded to make orders so that return was not to take place until three conditions had been satisfied : that the mother had obtained a visa to enter Ontario, that the paternal grandfather had provided a formal undertaking to meet financial promises that he had made to provide funds in respect of the mother and children's living costs, and, thirdly, that the father had complied with undertakings that he had given.

There was further delay in resolving the precise terms of the order, which the Court of Appeal also deprecated. Subsequently, although the mother did not appeal the orders, she made an application some four months after trial for the 'the trial judge to stay, suspend, and set aside the order… and permission be granted for a further single joint expert report'. The basic contention was that the mother was now unfit to travel due to a deterioration in her mental health, and she wished to obtain expert evidence to demonstrate that. In support of the application was a report from a consultant psychiatrist, Dr W, that set out the mother's self-report of an adverse reaction some months earlier to receipt of the sealed order.

The judge concluded that the return to Canada without the mother would not be 'intolerable' pursuant to Article 13(b), that further expert evidence was not necessary and he was 'am not satisfied that that [the

report of Dr W], which is the only material before the court, is of such moment or significance as to be a proper basis for the implementation of a process which would lead to a substantial revisiting of earlier decisions'.

The judge rejected the application and at the father's instigation removed the three conditions, allowing a further 3 week window before the order took effect to allow the mother to make arrangements to travel voluntarily with the children to Canada if she so wished.

The mother appealed. On appeal she contended that the judge ought not to have determined the set aside application at this stage without obtaining the further evidence sought, and that he had applied the wrong test to a set aside application.

The Court of Appeal (McFarlane, Coulson and Gross LJJ) dismissed the appeal. McFarlane LJ delivered the lead judgment and considered that the trial judge was entitled to conclude on the basis of the evidence at trial, and the limited evidence in the form of the report from Dr W, that further expert evidence was not necessary. This was a case management decision by a judge wo had a detailed understanding of the parties and the extent of the evidence as to the mother's mental health.

An appeal could only succeed against the refusal to permit the instruction of a further expert if there was cogent evidence to demonstrate that such an instruction was indeed "necessary" and that no judge could have reasonably refused the mother's application. The evidence in the present case fell a long way short of that. Having correctly concluded that no further expert evidence was necessary the judge was therefore entitled to determine the set aside application without it.

The Court of Appeal found it difficult to detect any real distinction between the 'moment and significance' test as articulated by the judge, and the more conventionally expressed test, namely that the application should make out a prima facie case that there had been a change of circumstances. There was no basis for holding he was in error here.

Further, the trial judge had been entitled to conclude without further investigation that the return without the mother would not be 'intolerable' for the children. The Court of Appeal observed that if the mother was 'simply presenting the medical evidence but, expressly, not saying "yes" or "no" to the question of whether she would, in fact, return to Canada, then the assertion that there had been a change of circumstances may fall away in any event'.

The submission that the judge was wrong not to engage from a welfare point of view with the prospect of the children returning to Canada without their mother, could not sit on its own in a vacuum and could only have traction if it was supported by evidence both that the children's welfare might be adversely affected by a move to Canada without the mother, but that that adverse impact might be sufficient to meet the criteria in Article 13(b). There was no such evidence either in the trial bundle or with the application. There was no need for further investigation, particularly since it was clear by the time of the appeal that the mother's position as to her return to Canada was more 'nuanced' than a yes or no.

The appeal was dismissed. The children were to return pursuant to the second order, but with a further short window for the mother to elect to return with them.

A jurisdictional issue was not dealt with by the court.

To read the judgment, please click here.

Permission

Family Law Week