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W (A Child)

[2018] EWCA Civ 1904

15/08/2018

Barristers
Henry Setright KC
Michael Gration KC

Court
Court of Appeal

Practice Areas
International Children Law
Court of Appeal judgment commenting on the jurisdiction of the High Court to set aside a final order made under the Hague Convention 1980.

The parties had one child and lived in Spain. In 2016, the mother wrongfully removed the child to England. The father applied under the Hague Convention 1980 for the return of the child. The mother raised Article 13(b) defences. In particular, the mother relied on her mental health and the effect returning to Spain would have on her and the child. At the final hearing, His Honour Judge Bromilow did not find that there was a grave risk of harm nor that the child objected and subsequently ordered that mother and child return to Spain.

Following that judgment however, the mother suffered a marked deterioration in her mental health. She applied to set aside HHJ Bromilow's return order and sought a further psychiatric assessment and a re-hearing. HHJ Bromilow acceded to that application stating that the mother's psychiatric health had "fundamentally changed" and that she was "psychologically overwhelmed by the circumstances".

The father appealed. He made five submissions, [at paragraph 21], as to why the High Court did not have power to set aside a final order made under the Hague Convention 1980.

Given the new evidence concerning the mother's mental health however, the father accepted that the 1980 Convention application would have to be reheard. In practical terms then, the appeal was academic. The Court of Appeal technically dismissed the father's appeal but still proceeded to comment on the important point of whether the High Court had power to set aside a final order.

Lord Justice Moylan, giving the lead judgment, commented that the hurdles to the existence of such a set aside power centre on the effect of Section 17 of the Senior Courts Act 1981, the decision in Re M (Abduction: Undertakings) [1995] 1 FLR 1021 and the meaning of rule 4.1(6) FPR 2010.

Moylan LJ stated that there would be considerable advantages to a judge who made the final order being

asked to determine whether any asserted change of circumstances justifies any reconsideration of the order and, if so, whether it is of sufficient impact to justify a rehearing. This would avoid the need for the parties to come to the Court of Appeal. Moylan LJ expressed that the test for such an application could be: “whether there has been a fundamental change of circumstances which sufficiently undermines the basis of the court’s decision and order to require the application to be reheard”.

The Court of Appeal did not consider the set aside power could be found in rule 4.1(6) of the FPR 2010. As to the conflict posed by s.17 SCA 1981, the Court of Appeal stated that given the development of the legislative history there are arguments for concluding that s.17 SCA 1981 does not apply to orders made by the High Court in particular in respect of children.

The Court of Appeal’s provisional view then was that the High Court does has power under the inherent jurisdiction to review and set aside a final order under the 1980 Hague Convention. This power can be exercised when there has been a fundamental change of circumstances which undermines the basis on which the original order was made.

To read the judgment, click here.