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Re W (Children : Abduction: Implementation of Return Order) V

[2019] EWHC 357 (Fam)

22/02/2019

Barristers
Christopher Hames KC

Court
Family Division

Practice Areas
International Children Law

Application before Mrs Justice Knowles for directions to implement a return order in child abduction proceedings, the outcome turning on construction of the order as amended by the Court of Appeal.

The case concerned two children, now aged 6 and almost 5, who had been removed from Texas by their mother in December 2016. A return order was made on 30th November 2017 by Mrs Justice Knowles, having rejected the mother's defences, firstly of consent/acquiescence and secondly that a return to the USA would place the children in an intolerable situation within the meaning of Article 13(b) of the 1980 Convention.

Her Ladyship had acknowledged that ideally the mother, who faced immigration difficulties in securing her own entry to the US, would accompany the children and accordingly deferred the operation of the return order until after the US authorities had considered the mother's application for a humanitarian parole visa.

The expert evidence before the court was that this was the most appropriate route as the mother was unlikely to secure a B1 or B2 visa. If the mother did not succeed in this application, which she undertook to make, Mrs Justice Knowles made it clear that the children should return without her and gave permission to the parties to apply for implementation of the order in the event of such rejection.

The mother appealed to the Court of Appeal (see Re W (Children) [2018] EWCA Civ 664) where she was partially successful in that she persuaded the Court of Appeal that if she was unable to obtain entry clearance, it would be intolerable for the children to return without her. At paragraph 59 of the Court of Appeal judgment it was made clear that "providing a visa is granted to the mother by the authorities in the requesting state, the children will return" and that "if there is any indication that the mother is not pursuing her visa application, the matter can be restored to the judge for further directions." The return order of 30th November 2017 was substituted by a different one (see below), although the recitals and undertakings of 30th November remained in force.

The mother complied with her undertaking to apply for a humanitarian parole visa, which was refused in April 2018, with no right of appeal. In July the father proposed that the mother apply for a B2 visa, relying on an email from an officer of the US Embassy in London stating that a visa for certain purposes such as participating in custody proceedings in a US court might be available to the mother and that in fact a person must have been denied a visa before seeking humanitarian parole. The mother stated that she did not intend to apply for a visa.

The application
The father sought a direction or order requiring the mother to apply for a B1/B2 visa. The precise wording of the Court of Appeal's substituted return order was crucially important:

"3. Paragraphs 11 and 17 of the order made by the Honourable Mrs Justice Gwyneth Knowles on 30 November 2017 are hereby set aside and replaced by the provisions set out in paragraphs 4 and 5 respectively.

4. The subject children, [Y] and [Z] shall be returned to the jurisdiction of the USA, provided that their mother is granted permission by the US immigration authorities to return to and enter the United States of America with them, and such return shall take place by no later than 14 days after the determination of the mother's application for a humanitarian parole visa to re-enter the US jurisdiction. The mother shall return, or cause to be returned, the children in accordance with this paragraph.

5. There is permission to each party to apply to the High Court (the Honourable Mrs Justice Gwyneth Knowles if available) as to the timing and implementation of the said return."

The father invited Mrs Justice Knowles to vary the second clause of paragraph 4 so that it read "and such return shall take place no later than 14 days after the mother is notified that she has been granted entry clearance to enter the USA" and argued that she could direct mother to make a visa application pursuant to s37 Senior Courts Act 1981, a power that is ancillary to or supportive of a separate substantive legal right. (see Goyal v Goyal[2016] EWCA Civ 792)

Held
The question of whether the court had jurisdiction pursuant to section 5 of the CA's order in respect of timing and implementation was answered by careful scrutiny of paragraph 4. The first clause sets out a condition precedent, namely the granting of permission to the mother to return to and enter the USA, which must be fulfilled before the return order becomes operation and capable of implementation. The second clause is subordinate and deals with matters of timing over which Mrs Justice Knowles had jurisdiction by way of paragraph 5. That jurisdiction would only arise after entry clearance was granted.

Accordingly, as entry clearance has not been granted, there is no jurisdiction to make directions pursuant to paragraph 5. There was no explicit permission from the Court of Appeal for its order to be varied as the father proposed.

As the return order is not capable of operation, there is no substantive right which would enable directions to be made under s37 SCA 1981 to compel mother to make a visa application.

Each party can consider whether to return to the Court of Appeal, which has a residual power to deal with some exceptional change in circumstances which might make the implementation of its order impossible to fulfil.

In conclusion
The court deprecated the ongoing litigation and urged the parties to put their emotions on one side and

co-operate in the children's interests to find a consensual outcome. Accepting the Court of Appeal's decision that the children should remain in their mother's care, and given the continuing doubt about whether she would be able to enter the USA and if so live there for the children's minority, the suggested solution was that the children live with their mother here and visit the USA to spend holiday periods with their father.

To read the judgment, please click here.

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