Neutral Citation Number: [2015] EWCA Civ 1272

Case No: B4/2015/1814

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL FAMILY COURT
Her Honour Judge Williams

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 December 2015

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE RICHARDS
and
LORD JUSTICE FLOYD

- -

Re C-W (A Child)

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Mr Edward Devereux (instructed by Dawson Cornwell) for the appellant (C-W's mother)
The respondent (C-W's father) appeared in person assisted by a McKenzie friend

Hearing date : 26 November 2015

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Judgment

Sir James Munby, President of the Family Division :

1. This is an appeal, pursuant to permission given by Macur LJ on 9 June 2015, from an order of Her Honour Judge Williams dated 20 May 2015. The judge was sitting in the Central Family Court hearing private law proceedings in relation to C-W, a girl born in 2005 who was then almost 10 years old.

2. C-W was born in the United States of America. Her father is British; her mother comes from the Caribbean. C-W has both an American and a British passport. Her parents' relationship broke down in early 2010, shortly after the father and C-W had moved to this country from the United States of America. The mother brought proceedings under the Hague Convention. Her application was dismissed by Hogg J in June 2010. In September 2011 the same judge made a residence order in favour of the father. The mother, who has subsequently married and lives in Florida, has staying contact with C-W in this country and talks to her most days by Skype.

3. There has been much litigation which there is no need for me to rehearse in any more detail. All I need refer to is what Hogg J said in a judgment delivered on 9 September 2011:

> "I have to assess the mother and whether she would either return C-W after contact or allow C-W to come to this country for contact. The mother is very angry. She is, as [counsel] for the father says, living below the United States' radar. She is an illegal immigrant. As such, if C-W was with her, she could get up and move and disappear. The father says that if he had residence and C-W went there on a contact visit he would not be able to use the Hague proceedings because the mother would disappear "below the radar" and the American authorities would find it extremely difficult to find her; and the father is not entitled as of now to go to the United States and cannot go until after December 2012, even then it is unknown whether he will be allowed to enter the country. The mother is very angry, living "below the radar", not wanting to come to the attention of the authorities. I have listened to her carefully and I have come to the view that I simply cannot rely on her either to return C-W after contact or to allow her to come to this country. I think she would disappear. She looks on C-W as 'her' child 'my daughter'. She said more than once that "he stole my daughter". It is very revealing. I do not think I can trust the mother not to disappear. I cannot trust her to allow C-W to come back to this country. That is a finding that is a sad one to make but one that impacts on how I view the rest of the case."

4. The matter before Judge Williams was the mother's application for contact with C-W in Florida. The hearing began on 18 May 2015. The judge heard oral evidence from the mother and the father. There was a Cafcass Case Analysis from a Cafcass officer, who also gave oral evidence. The judge's extempore judgment was delivered on 20 May 2015. She dismissed the mother's application. The mother now appeals. The father has filed a respondent's notice.

5. The appeal came on for hearing before us on 26 November 2015. The mother was represented by Mr Edward Devereux (before Judge Williams she had been represented by Mr Edward Bennett); the father appeared before us, as before the judge, in person. At the end of the hearing we announced our decision: to allow the appeal and dismiss the respondent's notice. We now give our reasons.

6. Judge Williams records in her judgment that she had read the transcript of Hogg J's judgment of 9 September 2011 to which I have referred. But, importantly, the judge went on to record how the mother's life had changed since then. She married in March 2013 and lives in Florida with her husband, with C-W's half-sister T, who is aged 17, and, about half the time, with her two step-children, aged 19 and 14 respectively. The mother now has permission to remain permanently in the United States and has a green card. The judge found the mother to be "settled in Florida".

7. Judge Williams summarised the evidence from the Cafcass officer: C-W is an eloquent, friendly and well-rounded girl who easily recalls positive memories of time spent with either parent and who much enjoys the time she spends with her mother. In relation to visiting America, C-W mentioned visiting Disneyland but her main focus was on spending time with her half-sister, T – she was "excited" about seeing her older sister. She would prefer visits to be for two rather than three weeks. In her oral evidence the Cafcass officer said she thought that now was a good time for C-W to go to America, so as to build up a relationship with the maternal family. In her report the Cafcass officer had identified the need for C-W to "continue to develop her relationship with her mother and extended maternal family to ensure her identity needs are met."

8. The judge expressed herself as not being entirely satisfied with the mother's evidence on the details, preferring the evidence of the father, who she found to be, on the whole, a credible witness.

9. Judge Williams records that she had not been referred to any authorities, but it seems that her own researches took her to *Re R (Children: Temporary Leave to Remove from the Jurisdiction)* [2014] EWHC 643 (Fam), [2014] 2 FLR 1402. Mr Devereux questions the appropriateness of the judge's reliance upon an authority relating to a *non-Hague* country, and points to the distinction drawn between the two types of case in *George, Judd, Garrido and Worwood*, Relocation: A Practical Guide, 2013, paras 7.5-7.11. As to that there are two points to be made. The first is that, as her own judgment demonstrates, the judge was well aware of the distinction. The second is more fundamental.

10. The mother's presentation of her case to the judge – and it needs to be borne in mind that the mother had the advantage of representation by specialist and highly experienced solicitors and counsel, respectively Messrs Dawson Cornwell and Mr Edward Bennett – was *not* founded on an assertion that, the United States of America being a Hague country, there was no need for protective measures. On the contrary, in a witness statement dated 20 October 2014 the mother had offered what she described as "a comprehensive range of protective and procedural measures", including registration in America of the English order under the American *Uniform Child Custody Jurisdiction and Enforcement Act*. That stance was repeated by the mother in a further witness statement dated 6 February 2015, in which she said that she was "willing to consider any further reasonable requests … which would assist with

progressing contact … visits to the USA." In his position statement dated 14 May 2015, Mr Bennett made clear that the mother was "offering the full panoply of legal protection."

11. The various protective measures referred to, and offered, by the mother in her two witness statements and by Mr Bennett in his position statement, were supplemented by the proposals put before the court in an email from Mr Bennett sent to the judge (and copied to the father) on the morning of 20 May 2015, before the court sat:

> "Following closing submissions on 19 May 2015, you requested further information to assist the court in the event that the court made an order that [C-W] could spend time with her Mother in the USA. This letter follows up on that request with further details relating to the practical mechanics of ensuring that [C-W] would not be: (a) wrongfully retained in the USA at the conclusion of such contact; or (b) wrongfully removed to a Non-Hague jurisdiction.
>
> … the safeguards and practical mechanics of them as set out in this letter would be in addition to those offered by the Mother in her two witness statements."

12. Mr Bennett's email identified two additional, and, in my judgment, significant, safeguards.

13. First, he proposed that C-W's passport should be held, while she is in Florida, by an independent agent, jointly instructed by both parents but at the mother's expense. He identified two American Attorneys who provide such a service, specifically for use in cases such as this. I take Mr Bennett's description of the service one could provide (the other being similar):

> "He has confirmed that their standard contract could be amended so that it addresses the following:
>
> (a) collecting [C-W's] passport, via a courier, from her at the airport on her arrival in the USA;
>
> (b) holding [her] passport for the duration of any time she spends in the USA;
>
> (c) returning [her] passport to her, via a courier, at the airport at the point of departure at the conclusion of US contact;
>
> (d) confirming to [the father] when the passport is either in [the Attorney's] possession or has been released to the courier for transport to the airport to be given to [C-W].
>
> [The Attorney] has suggested that matters could be arranged so that [C-W's] passport could, in principle, be handed over to an

> air steward or flight attendant when she goes to the airport to return to the UK as an unaccompanied minor."

14. Secondly, Mr Bennett proposed that a 'mirror' order be obtained in Florida, again at the mother's expense, before C-W travels to America. Such an order, he indicated, could contain two further specific provisions:

    i) To address the concern that C-W might be removed to a non-Hague or Caribbean jurisdiction whilst in Florida, both the English order (registered in the Florida courts) and the Florida 'mirror' order could make clear the extent to which C-W is permitted to travel, for what reason, and to where, that is, only to the United Kingdom.

    ii) A further legal layer of protection would be for the 'mirror' order to provide that the Florida court could enter an order requiring the return of C-W without a hearing and upon affidavit if the deadline for her return were not met.

15. Judge Williams correctly directed herself that the application had to be determined by reference to C-W's welfare, a point she made more than once in her judgment.

16. Distilling the findings from various passages in her judgment, the judge's key conclusions can be summarised as follows.

17. First, Judge Williams found that the "risk of [C-W] not being returned and the safeguards not working appears to be overall a relatively low risk" and that there was "little risk" of the mother taking C-W away to the Caribbean, something the judge described as "unlikely" given the mother's "current circumstances and settled life in Florida."

18. Secondly, she said that it is appropriate and in C-W's welfare interests to spend time in her mother's home. C-W, she remarked, has said quite openly that she wishes to visit her mother in Florida.

19. Thirdly, and "importantly" as Judge Williams put it (she used the word twice in her judgment in this context), the father genuinely believes on the basis of what he knows that the mother will try to retain C-W if she visits America, that the proffered safeguards will not prevent it, and that he could not afford to get her back.

20. Fourthly, Judge Williams found that the father's fears would be communicated to C-W "thereby probably jeopardising some of [her] happiness and comfort in travelling abroad to see her mother." The father has been the main source of her security and stability for the greater part of her childhood and that, the judge said, should not be undermined.

21. Fifthly, Judge Williams said that, if the mother was not to return her, C-W "is likely to suffer significant emotional and psychological harm, which could result in the impairment of her health and development." Furthermore, said the judge, this would be a gross breach of trust by the mother "which I suspect [C-W] would find hard to forgive." The judge added, "Not returning [her] would damage her and her trust in her mother."

22. The core of the judge's reasoning is to be found in the following two passages in her judgment:

> "The risk of [C-W] not being returned … appears to be overall a relatively low risk … but in my view it is a risk which I am bound to take into account for all the reasons I have given and I will therefore refuse this application.
>
> … I have found that the proposed safeguards will not alleviate this father's concerns, which I am satisfied are genuinely held for the reasons I have given."

23. The focus of the criticisms which Mr Devereux directs to the judgment is four-fold. First, he complains that the judge failed to give proper effect to her findings (a) that there was "little risk" of the mother not returning C-W, something which the judge found to be "unlikely" and (b) that there was only "a relatively low risk" of the safeguards not working. Secondly, he complains that the judge inappropriately attached excessive weight to the genuineness of the father's concerns. The only relevance of this, as he correctly submits, is insofar as the father's concerns would impact upon C-W. Thirdly, he complains that, whatever she said in her judgment, the judge must have failed to appreciate the true significance of the proposed 'mirror' order and other protective measures and significantly under-estimated their likely efficacy. Fourthly, he complains that the judge never brought into appropriate balance the pros and cons of the various factors going to C-W's welfare: (i) her wish to go to Florida and the benefits to her of being able to do so; (ii) the impact upon her of her father's concerns; and (iii) the damage she would suffer if not returned by her mother to this country. Had the judge properly discounted the likelihood of (ii) and (iii), as he says she should have done following a proper evaluation of the likely efficacy of the package of proposed safeguards, Judge Williams would not, Mr Devereux says, have concluded as she did.

24. In sum, says Mr Devereux, the judge's decision was simply wrong. Given the finding that the risk the mother posed was "relatively low" and the potency of the protective package being proposed by the mother, the welfare balance, says Mr Devereux, pointed decisively in favour of granting the mother's application.

25. I agree with Mr Devereux and essentially for the reasons he gives. The judge was wrong. We are entitled to interfere. In my judgment we should allow the appeal and, subject to appropriate safeguards, permit the mother to take C-W to Florida for staying contact.

26. The father's concerns are two-fold: first, he does not trust the mother to return C-W after contact (and says that the judge was wrong to make the findings in the mother's favour that she did); secondly, he disputes that the Hague Convention will provide either an adequate remedy or one which he can afford.

27. As to the first, the father, in my judgment, is unable to point to any error on the judge's part. The judge heard the evidence; she was well aware of Hogg J's previous adverse findings; she had regard to *all* the evidence; there was evidence before her, which she was entitled to accept, that the mother's life and circumstances had since

changed and that she was "settled" in Florida; she did not misdirect herself or err in principle; in short, she was entitled to find as she did and for the reasons she gave.

28. In relation to the alleged inefficacy of proceedings under the Hague Convention, the father makes two points. The first relates to cost: he suggests that it might cost him as much as £120,000 to bring Hague proceedings in America, money which, he says, he simply has not got. Secondly, and referring to the statistics set out in the November 2011 *Statistical Analysis of Applications made in 2008 under the Hague Convention*, drawn up by Professor Nigel Lowe for the June 2011 meeting of the Special Commission of the Hague Conference on Private International Law, the father draws attention to the Table on page 22, showing that, of a total of 283 Hague applications to courts in the United States of America in 2008, there were 60 judicial orders for return (the corresponding figures for England and Wales being 199 and 92) and to the Table on page 43, showing that the mean time to reach a final outcome in the United States of America was 227 days (the corresponding figure for England and Wales being 88). Mr Devereux challenges what the father says about the costs of Hague proceedings in America, a dispute we are simply in no position to resolve. As well as pointing out the age of the statistics the father relies upon, though they are the most up-to-date from that particular source, Mr Devereux submits that caution is required in their interpretation. For example, as he points out, the Table on page 22 shows that, of the 283 American applications, only 20 were the subject of judicial refusal while no fewer than 87 were withdrawn (the corresponding figures for England and Wales being 15 and 30).

29. In my judgment, the short answer to the father's concerns is that, if a 'mirror' order of the kind Mr Bennett proposed is obtained from the Florida court *before* C-W goes to America, the father will not be dependent upon his remedy under the Hague Convention. He will have available to him a remedy – namely the enforcement by the Florida court of its *own* order – which ought, in principle, to be cheap and straight-forward. Putting the point more generally, implementation *before* C-W goes to America of the "full panoply of legal protection" identified and proffered before the judge by Mr Bennett and, before us, by Mr Devereux will, in my judgment, reduce any risk of the mother being able either to remove C-W to a third country or to refuse to return her to this country to such an extent as to bring the balance of potential benefits and detriments to C-W heavily and decisively down in favour of permitting her to go to America.

30. In giving permission to appeal, and explaining why, in her judgment, the mother's grounds of appeal were arguable, Macur LJ said this:

> "The judge's assessment of the low risk of non return from USA renders father's fear unfounded. The judge has weighted the father's fear above other welfare considerations and has failed to consider the adequacy of safeguards objectively."

I am content to adopt this as a succinct summary of the reasons why this appeal must, in my judgment, be allowed.

31. In a letter dated 16 November 2015, Messrs Dawson Cornwell set out, with helpful precision and detail, the schedule of direct contact, both in this country and in the United States, together with the arrangements for indirect contact, which the mother

would be seeking in the event of her appeal being successful. As we indicated to the parties at the end of the hearing, after we had announced our decision, these are not details which it would be appropriate for this court to examine or rule upon. If the parties are unable to reach agreement on these matters, they will need to be resolved by a judge or deputy judge of the Family Division. Our order will so provide.

32. In contrast, it is in my judgment important that the precise details of the package of protective measures which we think are appropriate are settled by this court, in terms which will then be incorporated in the order to be made by the judge to whom the matter is remitted. The draft we have approved is annexed to our judgments.

Lord Justice Richards :

33. I agree.

Lord Justice Floyd :

34. I also agree.

Annexe

> "THE COURT RECORDING that the father has a Residence Order made in his favour (by order of Mrs Justice Hogg dated 9 September 2011) in relation to C-W ("C-W") that C-W shall reside with him in England and Wales;
>
> AND THE MOTHER AND FATHER AGREEING AND THE COURT DECLARING that the courts of England and Wales are the courts with primary jurisdiction to consider matters relating to the exercise of parental responsibility in respect of C-W on the basis that (as at the date of this order) (i) C-W is habitually resident in England and Wales and (ii) the courts of England and Wales are best placed to make decisions about C-W's upbringing and welfare;
>
> AND THE COURT DECLARING that the mother and father both have "rights of custody" in relation to C-W for the purposes of Articles 3 and 5 of the 1980 *Hague Convention on the Civil Aspects of International Child Abduction*
>
> AND the mother giving the following undertakings to the court, voluntarily and with the benefit of legal advice, and understanding the consequences if she were to be found by a court in England and Wales to have breached such undertakings:
>
> > (i) Not to initiate or issue any proceedings in any court in the State of Florida or elsewhere in the United States of America in relation to C-W except for the purpose of complying with paragraph 5(i)(a) below;

(ii) To return C-W, or cause the return of C-W, to the jurisdiction of England and Wales forthwith at the conclusion of each of the periods of time C-W spends in Florida in accordance with paragraph 4 below;

AND the mother further agreeing and acknowledging that:

(i) C-W lives in the jurisdiction of England and Wales in the care of the father;

(ii) The father is C-W's primary carer;

(iii) She does not seek to challenge (and will not seek to challenge before any court in the State of Florida or elsewhere in the United States of America) the fact that C-W lives in the jurisdiction of England and Wales in the primary care of the father;

IT IS ORDERED that:

1. For the avoidance of doubt, and in accordance with the order of Mrs Justice Hogg dated 9 September 2011, C-W shall reside with the father in England and Wales.

2. Subject to the prior implementation in full and before C-W leaves the jurisdiction of England and Wales of the requirements and safeguards set out in paragraph 5 below, the mother shall have permission to take C-W out of the jurisdiction of England and Wales for the purposes of spending time with the mother in Florida in accordance with paragraph 4 below.

3. The mother shall not be permitted to remove C-W from Florida except for effecting the return of C-W to the jurisdiction of England and Wales at the conclusion of any period of time that C-W has spent in Florida in accordance with paragraph 4.

4. The father shall make C-W available to spend time with the mother in Florida [*as agreed or ordered*].

5. Any time spent by C-W with the mother as provided for in paragraph 4 above shall be subject to strict compliance with the following conditions imposed pursuant to section 11(7) of the *Children Act* 1989:

(i) Prior to C-W leaving the jurisdiction of England and Wales for the first period of contact taking place in Florida the mother shall (a) obtain from a competent court of the State of Florida and at her sole cost an order in the form referred to in paragraph 6 below and (b)

provide the father with a sealed and officially certified copy of such order.

(ii) The mother shall arrange and pay for the air fares for C-W to travel to and from Florida.

(iii) The mother shall provide the father with C-W's flight itinerary not less than 7 days prior to the date of travel (such itinerary to include airline details and flights times).

(iv) The mother shall arrange and pay for the retention in accordance with the following provisions of C-W's passports for the entirety of any period of time that C-W spends in Florida:

(a) The mother shall engage a service in Florida that can retain passports (in the first instance the service shall be that of Maxim Investigations and if that service is no longer available it shall be the service provided by Mr Gary Maisel, Attorney);

(b) C-W's passports shall be collected from C-W at the airport when she arrives in Florida;

(c) C-W's passports shall be held for the duration of any time she spends in Florida and shall not be released to any person save as provided for by (d) below);

(d) C-W's passports shall be returned to her at the airport at the point of departure at the conclusion of contact with the mother in Florida;

(e) The father shall be informed as soon as is practicable that C-W's passports have been retained in accordance with the passport retention service;

(f) The mother shall not retain C-W's passports during the period of time C-W spends in Florida.

6 The order to be obtained by the mother from the Florida court in accordance with paragraph 5(i)(a) above must if the conditions in this order are to be satisfied contain the following provisions:

(i) a provision registering this order pursuant to The *Uniform Child-Custody Jurisdiction and Enforcement Act* 1997 (the mother and father expressly waiving any contest as to registration);

(ii) provisions in mirror form to the recitals to and paragraphs 1-5 inclusive of this order;

(iii) provisions so that the courts of the State of Florida recognise that England and Wales is the State in which this "child custody determination" has been made and is the State of C-W's habitual residence;

(iv) a provision that in the event that the mother does not forthwith return C-W to the jurisdiction of England and Wales in accordance with her undertakings and the terms of this order (ie forthwith at the conclusion of each of the periods of time C-W spends in Florida) the courts of the State of Florida shall, on the provision of affidavit evidence but without a hearing, order the immediate return of C-W to England and Wales;

(v) a provision directing the attention of the immigration authorities of the United States of America and all other relevant authorities in the State of Florida and in the United States of America to the terms of the order of the Florida court."