Case No: B4/2014/4069

Neutral Citation Number: [2015] EWCA Civ 286

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE FAMILY DIVISION
MR JUSTICE MOSTYN
FD12P01226

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2015

Before :

PRESIDENT OF THE FAMILY DIVISION
LADY JUSTICE BLACK
and
LORD JUSTICE BRIGGS

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RE B (CHILD)(RELOCATION: SWEDEN)

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Mr Henry Setright QC & Ms Roshi Amiraftabi (instructed by **Dawson Cornwell**) for the **Appellant**
Mr John Vater QC & Mr Andrew Leong (instructed by **Broadway Solicitors**) for the **Respondent**

Hearing date: 17th March 2015

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Judgment

Black LJ:

1. On 21 November 2014, Mostyn J made an order permitting the mother of a five year old girl, N, to remove her permanently from this country to live in Sweden. N's father appealed against that order. At the conclusion of the appeal hearing, we dismissed his appeal and said that we would give our reasons in due course. My reasons are set out in this judgment.

The ambit of the appeal

2. The appeal revolved entirely around the particular facts of this case, focussing on the judge's evaluation of them and the decision that he made in the light of them. There is no criticism of his summary of the legal principles which he had to apply and which he considered to be clear and stable in the light of K v K [2011] EWCA Civ 793 [2012] Fam 134 and Re F (Relocation) [2012] EWCA Civ 1364 [2013] 1 FLR 645. He set himself the task of deciding what was in N's best interests.

3. There is no need, in the circumstances, for me to rehearse the law but I will need to go into the facts in a little more detail than I might otherwise choose to do.

The factual background

4. The mother is in her early thirties. She was born in Sweden of Finnish parents. Her family have lived in Sweden since before 1980. She moved to England in 2007 and began a relationship with the father who is a few years older than her. In 2008, she moved in to live with him in his parents' house in south-west London where he still lives. In January 2010, N was born.

5. The cracks in the relationship were apparent relatively soon thereafter. There was a row in July 2010, during a family visit to the mother's parents in Sweden, which resulted in the father returning to London alone. The mother and N stayed on for about a month before coming back to England and living again with the father.

6. However, by July 2011, the situation was very unhappy. The mother wrongfully retained N in Sweden following a holiday there. The father brought a 1980 Hague application which resulted in the mother and N returning here in January 2012.

7. The judge described the unstable situation following the return from Sweden. As he put it:

> "22. …almost from the moment of return, these parents have engaged in an attritional war about N. Each has accused the other of negligence and worse. The father told me that he has made no fewer than six complaints to the police about the mother's care of N. Some of those complaints have been, up to a point, justified. Some were plain over-reactions and some were, in my view, inventions. ….
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> 23. For her part, the mother breached the agreed contact regime almost as soon as she stepped off the aeroplane. She herself has insinuated that the father has been guilty of neglecting N."

8. On 23 May 2012, the mother applied for permission to relocate to Sweden. The proceedings were protracted because there were repeated adjournments as the court and the authorities responded to matters arising in relation to N. Between late 2012 and late 2013, N suffered a number of minor injuries, principally bruises. In September 2013, the nursery reported that she had behaved in a sexualised way. In February 2014, it was reported that the mother had attended the nursery smelling of alcohol. Tests then carried out showed that she had been using alcohol chronically and excessively between August 2013 and February 2014.

9. The Local Authority became involved from November 2013 in the context of a child protection plan. On 3 July 2014, a child protection conference was held at which the family situation was reviewed and it was decided that N no longer needed to be subject to child protection, although she remained a child in need. I looked in vain in the record of the conference for the conventional list of those attending. It seems that both parents and the social worker, Ms Khalifah, were there. There were available for the conference a chronology of significant events and various assessments and reports. I will return to these later.

10. On 31 July 2014, directions were given for the disclosure of police records in preparation for the final hearing. The information made available as a result led the judge to make findings adverse to both parents.

11. The father had made serious allegations to the police about the care of N on three occasions. In November 2013, he complained to the police that he had seen bruises on N's neck. When the police examined her, a tiny bruise was observed and the father was told she was safe and well. Notwithstanding this, in January 2014 he complained to the police that he believed she may have been strangled by the mother because of bruises on her neck. The judge found that this was "an example of the father jumping on the bandwagon and exaggerating and presenting in the worst possible light the mother and her care of N" (§34). This was similar to the father's reports to the CAFCASS officer, Ms Odze, to whom he had made allegations about the mother's family which were untrue, and allegations about the mother which were "highly exaggerated" (§35).

12. As for the mother, the judge said that the police information revealed "much new information" (§36). This revolved around Mr L, with whom the mother had started a relationship during 2013 and against whom she made allegations of sexual misconduct on two occasions. On neither occasion had the mother reported matters to the police immediately.

13. The first incident was in June or July 2013 and involved Mr L injuring her by raping her anally. She did not make a complaint to the police about this until 20 August 2013, withdrawing it a week later and thereafter carrying on seeing Mr L.

14. The second incident took place on 29 March 2014 at the mother's home but was not reported to the police until 5 June 2014. The police statement that the mother made that day described how Mr L appeared in the property with his friend. The mother had not let him in and believed that the front door must have been unlocked by N. Mr L and his friend were drinking alcohol. The mother said she went into the shower room with Mr L where, against her will, he took down his trousers and pants, pressed up against her and touched her over her clothes.

15. There was a third incident involving Mr L which the judge described in §39 of the judgment. Following the mother commencing a relationship with another man, Mr L attended at her property in May or June 2014 and made threats to kill the other man.

16. The judge said that none of these events had been reported by the mother to the Local Authority, to the father or to other professionals and that they only came to light because, on 10 June 2014, the police notified the Local Authority of the complaint made by the mother on 5 June 2014. The mother told the judge that she had not made any report because she feared that it might imperil her application to relocate or might even lead to the removal of N from her care.

17. §43 of the judgment is important. In it, Mostyn J set out his summary of the troubled period in the mother's life from about April 2013 to the middle of 2014 and his conclusion that things were rather better in the latter half of 2014. He said:

> "43. It is plain that from about April 2013 to the middle part of this year, 2014, the mother's life has been very disturbed and disordered indeed. The excessive drinking, which has been confirmed by the test results, and the formation of at least one highly inappropriate and unsuitable relationship imperilled her and also imperilled N. However, it is fair to say that in the second part of this year stability seems to have taken hold. Indeed, the mother has allowed the father far more contact than the operative provisions of the order stipulate. She has done so up to a point through motives of self-interest, in order to pursue her relationship with [a new boyfriend] but it is also perhaps a sign that this mother has started to turn her anarchic and dysfunctional life around."

<u>The mother's case for relocation and the judge's approach to it</u>

18. The mother's case for a return to Sweden had two limbs. First, she believed that she could offer N a much better way of life in Sweden. Secondly, she was totally isolated here which would not be the case in Sweden.

19. She exhibited to her statement a letter dated 11 October 2013 from Dr Draper, a psychologist who had been treating her. He said she was suffering from symptoms as a result of the strain she was under. He said that it was clear to him that she had not settled in London and was genuinely unable to foresee a happy future for herself and N here and that he considered that being compelled to live in London would precipitate a substantial decline in her emotional well-being and, as a consequence, long term counselling might be necessary. Even if such treatment were provided, the outcome would remain uncertain and "it was possible that chronic low mood may impact on the quality of parenting" she was able to provide to N. His view appeared still to be similar in June 2014 when he communicated with the social worker, Ms Khalifah.

20. The judge treated Dr Draper's view as highly relevant and said it was confirmed by his own observation of the mother in the witness box. The judge said that "the mother's reaching out for ephemeral relationships, her use of drink, all seem to me

to be symptoms of a deep inner unhappiness." He thought the unhappiness considerably aggravated by what he described as her "dire housing position".

21. For the first twelve months after she returned from Sweden in January 2012, the mother and N had lived in accommodation provided by the father. When this ceased in January 2013, they moved into a bed-sitting room provided by the Local Authority as temporary accommodation and by the time of the hearing the position remained unresolved. If the mother had to rely upon the Local Authority for housing, there was an appreciable risk that she would have to live a long way from south-west London. If she turned to the private sector, there were also practical difficulties, notwithstanding the father's offer to fund the deposit needed for private rented accommodation. The judge found that the mother's future housing position was "very uncertain, whichever angle it is viewed from" (§55).

22. The judge considered the mother's support network in south-west London very limited. The treatment she had been having from Dr Draper had ended by the time of the hearing. She had also been receiving help from Ms Butterfield, a family psychotherapist, but that too had ended. She had professional contacts only with the Integrated Drug and Alcohol Service, the social worker, and victim support.

23. As for income, the mother was on benefits and the judge found that there was no evidence that she could find employment in this country.

24. In contrast, in Sweden, the mother would stay with her parents or with her sister and her husband for a limited period and then move into a flat with the rent paid by the Swedish local authority. She had an offer of employment from her sister's husband's father. Her sister and her husband were offering financial support.

25. §58 of Mostyn J's judgment sets out very important findings about how the proposed move was likely to work out. He said:

> "58. Notwithstanding the fractures and rifts within her family in [Sweden], I just [sic, but may perhaps be a mis-transcription of "judge"] that the mother's proposals in relation to Sweden are realistic and well-researched. I think that a return would bring a welcome stability and security into her life and would give her a sense of purpose and of responsibility. I think that the life of conflict and chaos that she has lately been living would be replaced by something more healthy and purposeful. Fundamentally I consider that there is a good prospect of the unhappiness and anxiety, as so vividly described by Dr Draper, being replaced by, if not happiness then certainly contentment."

26. The reference in §58 to "fractures and rifts" was a reference to the troubles of the mother's family in Sweden. Earlier in the judgment, Mostyn J had accepted that the family was "riven by disputes and feuds" (§12). The mother has three sisters but is only in touch with one of them. Although she is close to that sister, and also to her parents, the sister and the parents have fallen out and have nothing to do with each other. The judge's sense was that if she returned to Sweden, the mother may find herself embroiled in a festering dispute between her sister and her

husband on the one hand and her parents on the other. This divided family contrasted with the father's family, which the judge said was plainly a "loving and stable family unit".

27. The judge had evidence from Ms Odze and Ms Khalifah.

28. Ms Odze was not in favour of the proposed move and recommended that the mother's application be dismissed. She told the judge that her concerns centred principally on the mother's vulnerability. She said in her final report that she feared that whilst this remained, the mother was likely to enter into unsuitable relationships and/or fall prey to consuming alcohol under stress. She considered that further work needed to be done with the mother by Ms Butterfield and also work to improve the parents' parenting together. Like everyone, she considered that great strides had been made recently by both parents but she was afraid that if the mother went to Sweden, they may end up back at square one. She also felt that life in Sweden might be "harmful" because she did not know what the family dynamics were over there.

29. Ms Khalifah said that if she had known about the conduct of Mr L, she might well not have supported the child protection plan being brought to an end in July. Her principal objection to the mother's move centred around her "lifestyle".

30. Mostyn J said that he had found the case an exceptionally difficult one and acknowledged that his view had fluctuated during it. His final conclusion was not in line with the recommendation of Ms Odze or the view of Ms Khalifah. He summed it up follows:

> "70. …. I am satisfied that it is more in N's interests for her to live with her primary carer in a place where she (the mother) can be happy and fulfilled. It is more in her interests than the continuance of the instability, uncertainty, conflict and misery that presently pertains. That conflict and misery has been the hallmark of the mother's life since her return. I say this acknowledging that this decision will compromise, up to a point, the father's relationship with his daughter and that it will be bitterly disappointing for him…
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> 71. I am satisfied that N has a better prospect of a healthy and safe life in Sweden than if she remains here. I am satisfied that her dual heritage is better promoted were she to return to Sweden. Like all Swedes, she will end up fluent in English."

<u>The grounds of appeal examined</u>

31. The father advanced a large number of grounds of appeal but they can conveniently be grouped together. I will summarise them broadly then return to look at them in a little more depth, albeit that I will not separate them out entirely in so doing as they interlock.

32. The main strands were that the judge:

i) failed to give proper weight to the views of Ms Khalifah and Ms Odze and to give sufficient reasons for not following their advice;

ii) was wrong to find that the mother's disturbed and disordered life here was a symptom of her unhappiness and that a move to Sweden would improve matters whereas in fact the move would give rise to risk for N;

iii) wrongly relied upon the maternal family to support the mother and safeguard N when it was itself troubled and when, furthermore, the mother had not been open with her relatives about the child protection concerns in England and the abuse she had suffered at the hands of Mr L;

iv) was wrong in his assessment of the father, erroneously finding that he would monitor every aspect of the mother's life and make endless complaints and allegations if she remained here; and in failing to consider the father's protective role in N's life;

v) failed to take into account the impact of the relocation on N's relationship with her father and the risk that the mother and her family would not promote N's relationship with him.

33. I start with the judge's treatment of the evidence from Ms Khalifah and Ms Odze.

34. In relation to Ms Khalifah, reliance was placed particularly upon her oral evidence that had the participants in the July child protection meeting known of the information contained within the police disclosure they may not have supported the discharge of the child protection plan. She took the view that the mother had minimised the extent of the abuse by Mr L and that the picture that had since emerged was different.

35. The foundations for this assertion on the part of Ms Khalifah were distinctly shaky. The chronology provided for the July meeting was compiled by Ms Khalifah herself. From it, it is clear that social services were aware, and made the meeting aware, of a number of matters to do with Mr L. They knew about an incident on 2 May 2014 when Mr L came to the mother's home and was abusive and threatening to her friend and she called the police (reported by the mother to social services by telephone). They knew of the mother's complaint that she was sexually assaulted by Mr L on 29 March 2014, as to which the mother had said, presumably to the social worker, that she had her clothes on at the time. They also knew of Mr L having raped the mother prior to the Local Authority being involved (information which also came from the mother herself). As to the rape, it is recorded that the mother had said that she did not report the matter to the police because of the court proceedings and because she did not want to create a negative image of herself.

36. From this, it will be clear that Ms Khalifah and the other participants at the meeting had a good picture of Mr L's activities, knowing sufficient about each of the three incidents involving him to appreciate that he had been seriously abusive and knowing also that the mother had not reported the rape because she feared its impact on the case. It was not possible for this to be put to Ms Khalifah in cross-examination because the information did not become available until after she gave

her evidence but it would inevitably have undermined her stance. It can properly be inferred that the discharge of the child protection plan reflected a diminution in child protection concerns for N despite what had happened with Mr L. No doubt the judge also considered the child protection concerns in the light of the unchallenged statement of Mr Walesby, who had been N's social worker since 7 August 2014. He gave a rather positive account of matters, describing a very close relationship between the mother and N. He said he was particularly impressed with how the parents interacted with one another and thought their relationship "considerably improved over the past few months suggesting that they are able to place N's needs before their own". He said that both parties had proactively sought support and advice regarding N's welfare and had been accommodating with regard to any requests that the Local Authority had made. He also relayed that the father had acknowledged during a meeting in mid September 2014 that N's situation had improved.

37. The judge's treatment of Ms Khalifah's evidence in his judgment *was* brief but I was not persuaded that it has been shown that he was wrong to decline to put weight on her views.

38. As for Ms Odze, the advice of an experienced CAFCASS officer must always, of course, be given careful consideration. The judge was well aware of her assessment of the matter as his judgment shows. However, he was entitled to differ from her and his reasons for doing so are clear and valid. He picked out two flaws in her assessment.

39. The first was that she mistakenly thought that Ms Butterfield had said that the mother required therapeutic work to "address some aspects of her vulnerability arising from her own complex attachment history" with her parents (see Ms Odze's July 2014 report at C267 in the bundle). In fact, as Ms Butterfield's report of 2 July 2014 shows, she did think that the mother remained vulnerable and was benefiting from psychological support through community mental health, but as to the future, she advised that the mother "will continue to need additional professional support for the medium term" if the mother had to stay in London, whereas, if she were to move to Sweden, she "may benefit from professional support". As the judge said (§68), if anything the recommendation of Ms Butterfield would tend to support the application being granted rather than the reverse.

40. The second flaw was that Ms Odze had formed the view that life in Sweden may be "harmful" to N as she did not know the family dynamics over there, but she had not spoken to any member of the maternal family. The judge was therefore in a better position than she was as he had heard oral evidence by video link from all the key family members in Sweden, namely both maternal grandparents and the mother's sister and her husband.

41. The judge set out his impressions of them all at §§60 and 61 of the judgment. There was no challenge to the fact that the maternal grandparents have a very close relationship with the mother. The evidence satisfied the judge that the sister and her husband would fully support the mother were she to return to Sweden and that they would not attempt to disrupt contact even though they did not think

much of the father. It has not been demonstrated that these findings were not open to the judge and there is no reason for this court to interfere with them.

42. The constant refrain of Mr Vater QC (who did not appear below but had been instructed on the appeal to lead Mr Leong, who did) throughout his submissions was "Piglowska". He was, of course, referring to the case of Piglowska v Piglowski [1999] 2 FLR 763 (in which the House of Lords explained the reasons why it is so difficult to succeed in appealing against findings of fact made following a trial), and he was right so to do. The judge had a considerable opportunity to assess the parties and other witnesses over the course of the hearing which lasted, in total, for a week. He had the advantage, not available to Ms Odze and Ms Khalifah, that he did not have to reach a final conclusion until he had heard and read everything. And of course he had a huge advantage over us as we have heard nothing at all by way of evidence.

43. The judge's evaluation of how the mother and the father would respond in the future was fundamental to his decision.

44. He was criticised by Mr Setright QC, who was brought in at the appeal stage to lead junior counsel, Ms Amiraftabi, who had appeared alone in front of Mostyn J, for relying upon Dr Draper in assessing the mother's position.

45. It was submitted that the value of Dr Draper's evidence was reduced because he had been treating the mother rather than having been instructed as an independent joint expert. I do not subscribe to the idea that a psychologist (or psychiatrist) can have nothing/little of value to say because they have a therapeutic relationship with their patient. Some treating professionals may be partisan, some will not be, and it is a matter for the judge to assess. It was also argued that the judge should not have given weight to Dr Draper's views because he did not give oral evidence. However, his attendance was not required and it was not suggested that his report should be removed from the papers. What was submitted was that weight could not be put on what he said. This too was a matter for the judge. It can be seen that he compared Dr Draper's view with what he saw of the mother himself when she was in the witness box for a prolonged period and found it confirmed. In the circumstances, he was entitled to rely upon Dr Draper.

46. The judge was also criticised for failing to give sufficient weight to the fact that the mother's abstinence from alcohol dated from relatively recently. It is apparent from his judgment, however, that he was aware of that as he identified her excessive use of alcohol up to February 2014. It was part of the picture that he had to assess, and did assess, by weighing up all the material available to him, together with how the mother presented when she gave evidence.

47. The judge thought the mother was truthful even when it was against her interests. He ascribed her irresponsible behaviour in England to deep inner unhappiness. He thought her proposals in relation to the move were realistic and well-researched and that things would be better in Sweden. I accept Mr Vater's submission that the judge's finding at §58 (see above) about the stability and security that the move to Sweden would bring was a key finding and he made it knowing about the fractures and rifts in the family in Sweden.

48. The judge's adverse findings about the father also played a key part in his decision. He said that the father's stance as regards the outcome of the proceedings had not been consistent; by the time of the hearing he was seeking an almost equal division of N's time between the parents which was a substantial departure from the contact arrangement that had been in place. The judge found the father to be highly emotional and found that he had become obsessed by the case and its outcome. In Mostyn J's view, he had not altogether been able to separate his own personal needs from an objective assessment of N's best interests. The judge's core finding about the father is perhaps that in §65:

> "65. My impression is that if the present situation, or anything like it, continues the father will not be able to control himself from monitoring every aspect of the mother's life. Her sense of being beleaguered will continue. I foresee endless further complaints and allegations."

49. Mostyn J was criticised for going back into the history in the examples he gave to illustrate his assessment of the father. It might be added that it would have been of assistance if he had expressly mentioned the improvement in parental relationships detailed by Mr Walesby. However, he clearly placed weight on what the father had said in oral evidence and, in my view, he was entitled to do so and to take the whole picture together. We did not have a transcript of the father's evidence but were told that he was cross-examined for 2 ½ hours during which time it was put to him that he was not, in fact, a protective influence but an undermining influence on the mother. Nothing has been said that persuades me that the conclusions that the judge reached after having had this direct opportunity to assess the father were not open to him.

50. The judge's finding in §65 detracted significantly from any protective influence the father might have. But the consequence of the judge's finding that the mother's problem behaviour here resulted from her isolation and unhappiness, which would be cured by a return to Sweden, was that the question of protection faded into the background anyway. Mostyn J's assessment was that in Sweden the mother would live a healthy and purposeful life with stability and security. In those circumstances, issues of protection were not determinative or even necessarily of any real weight at all. In any event, Ms Odze had spoken to social services in Sweden and been reassured by their response, and it was anticipated that they would be contacted about the mother's arrival.

51. The judge had in mind the impact of the move on the father's contact. Apart from the issue of the father's protective role, with which I have just dealt, this case was in line with most relocation cases in that distance would inevitably impair the ability of one parent to participate in the child's day to day life. The judge commented upon this at §4 of his judgment and was obviously acutely aware of it in making his decision. He proceeded, as he was entitled to do, upon the basis that the contact provisions could be enforced in Sweden and he warned the mother of the possible consequence of failing to adhere to them. His approach to this aspect of the case does not provide any more fruitful ground for challenge to his overall decision than the other matters advanced as part of the appeal.

52. Full weight has to be given to the great advantage that the judge had by virtue of having presided over a relatively lengthy hearing with oral evidence. It has not been demonstrated to me that he was wrong in the approach that he took to the material before him or in the decisions that he made. Accordingly, I concluded that the appeal should be dismissed.

Briggs LJ:

53. I agree.

President of the Family Division:

54. I also agree