RE A (REMOVAL FROM JURISDICTION) [2012] EWCA Civ 1041

Court of Appeal

Thorpe, Black LJJ and Sir David Keene

22 June 2012

Relocation – Turkish mother applied for permission to take child on holiday to Turkey – Views of maternal grandfather caused judge alarm – Whether the judge's refusal could be upheld

The Turkish mother and English father met and had a child in England. When the relationship ended a shared residence order was granted with the child spending weekends with the father. Some months later the mother applied for leave to take the child and relocate to Turkey on a permanent basis. That application was refused and a year later the mother, opposed by the father, sought permission to take the child to Turkey on holiday. The judge imposed a prohibition on the mother taking the child on holiday to Turkey for 1 year with liberty to apply for a review before the expiration subject to the mother obtaining the views of her family on such a holiday. Eight months after the prohibition was imposed the mother renewed her application to take the child on holiday to Turkey and the maternal grandfather gave evidence on his views. In refusing the application the judge highlighted the concerns she had following the grandfather's evidence which included: the dynamics of the family consisting of three maternal uncles and the grandfather; the lack of open communication; the fact that the uncles exercised the financial power; the fact that they supported the mother's application to relocate and emphasised the higher standard of living to be enjoyed in Turkey. These were matters that failed to offer reassurance to the judge and weighed against the grant of the application. The mother appealed.

Held – dismissing the appeal –

(1) It was for the judge below to see, hear and evaluate the evidence of the maternal grandfather. There was no doubt that his performance in the witness box was the cause of the heightened anxiety to the judge. Far from reassuring her as no doubt she had in advance anticipated, he caused her something close to alarm. It was not for the Court of Appeal to minimise that key consideration. She alone heard the voice of the grandfather, she alone had the opportunity of assessing the dynamics (see para [11]).

(2) The judge was not speaking forever and she had actively encouraged the mother to reapply once the child was older and they had established a regular routine in this country (see para [12]).

Statutory provisions considered

Child Abduction Act 1984

Children Act 1989, ss 9, 13

Hague Convention on the Civil Aspects of International Child Abduction 1980

Council of Europe Convention on the Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children 1980

Stuart McGhee for the appellant

The respondent did not attend and was not represented

THORPE LJ:

[1] This is an appeal against the order of Her Honour Judge Sullivan QC, sitting as a s 9 judge in the Southampton County Court. Before her were the

parents of a little boy, J, born in June 2009. J's mother is Turkish, she comes from a well-to-do family in Turkey, and J's father is English. The parents formed a relationship here, the child was born here, and, when their relationship broke down, there were commonplace issues in relation to the future care of their child. It seems that on 18 May 2010 a district judge in the court made an allocation of time as between the two parents who enjoyed a shared residence order. The basic regime was that J should spend every weekend, Friday to Sunday, with his father, and it seems that there may be a midweek visit as well.

[2] Not surprisingly, later in the year 2010, it fell to this judge to decide an application by the mother for leave to return permanently to her homeland and to her family. She failed in that application. There were proceedings in 2011 when the father applied for a variation in the division of time between himself and the mother from the pattern that had been ordained by the district judge. There was also an issue as to whether the mother should be entitled to take J home to her family for holidays, she having the general liberty under the statute (s 13 of the Children Act 1989) to depart for a holiday of not more than 28 days' duration without order of the court. Effectively, it seems to me that the father was seeking not only a variation of the time share, but also a prohibition on the mother exercising her general leave to choose Turkey and her family as the holiday destination.

[3] In the first objective the father failed, as we see from para 1 of the order of 16 January 2011. However, he succeeded in his second objective in that para 2 recites the general arrangement that the mother, desiring to go abroad with the child, should give notice to the father 1 month in advance whereupon the father was obliged to deliver up the passport to the mother, that passport to be returned to the father at the conclusion of the holiday. Then para 3 encapsulated the prohibition on the mother taking J on holiday to Turkey at this time. The issue of whether she can take the child to Turkey on holiday will be reviewed in 1 year's time, with liberty to the mother to apply to the court in advance of the review upon her producing evidence from her family as to their views about such holiday, the review hearing reserved to His Honour Judge Sullivan.

[4] The order of 16 August laid the foundation for the mother's renewed application which was the subject of the judgment which we review. The important point to emphasise is that the evidence from the maternal family, identified in para 3 which I have cited, took the form of the presence and oral evidence of the maternal grandfather. There is a plain inference from para 3 that the judge anticipated in August 2011 that the future hearing in 2012 would be the opportunity for the mother to adduce reassuring evidence to overcome such misgivings as the judge had entertained in August. However, we can see from her judgment that the evidence of the maternal grandfather had precisely the opposite effect. The concerns that the judge derived from the live evidence of the maternal grandfather are itemised and explained at some length in paras [2]–[4] inclusive of her judgment, and again in paras [8] and [9].

[5] In fairness to the maternal grandfather, I emphasise that the judge accepted his evidence to the effect that he would not seek to persuade her to stay in Turkey and further that he would do his best to return J to this country even if the mother did not. But her concerns all related to the dynamics of the

maternal family; the consortium of three brothers and the father in the older generation; the lack of open communication between them; the fact that the younger generation, the three brothers, exercised the financial power; the fact that those three brothers had supported the mother in her application for leave to remove permanently; the fact that those three brothers had emphasised what a higher standard of living they would provide for her were she in Turkey. All these were matters that caused the judge not to see reassurance and a clear way forward, but rather to see anxiety and doubt that weighed against the grant of the application, or, put the other way, which encouraged the making of the prohibition.

[6] The case in this court for the mother has been extremely well put by Mr McGhee, who appeared below. He says first of all that the judge has arrived at a plainly illogical conclusion. How can it be logical for this mother to enjoy the freedom to travel to any country in the world without being able to visit her homeland and the homeland in which J can be encouraged to know and understand his Turkish heritage and the religion of his maternal family? How can that be logical? She is not regarded as a risk, she is not regarded as a parent who would breach the order of the court and the control of the court, otherwise she would not have her worldwide freedom.

[7] Secondly, he emphasises that here there are treaty obligations between the United Kingdom and Turkey which would be the strongest safeguard against future breach. Not only is Turkey a signatory to the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention), but the Turkish accession has been recognised by the United Kingdom since 2000. Secondly, both the United Kingdom and Turkey are parties to the Council of Europe Convention on the Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children 1980. So, says Mr McGhee, and I think he is correct in this submission, absent any evidence of Turkey's failure to conform and to perform either of those Conventions, exceptional reasons would be required to deny a parent a relatively brief holiday in the homeland.

[8] I would unhesitatingly accept that general proposition. It is incumbent upon the United Kingdom not only to itself honour its treaty obligations under international Conventions, but also to trust other nations to do the same. Mr McGhee also submits that not only has the mother pointed to these available treaty safeguards, but she has gone further. She approached the judge as though there were no such treaty safeguards in that she has offered any undertakings that might be required from her or from members of her family and the family has offered a financial bond which would meet the legal costs of any enforcement proceedings that might become necessary.

[9] Finally, he has said that the judge has paid too little regard to the consequences of breach upon the mother. Were she to breach the order of this court, she would not only be in civil contempt but she would have committed a crime under the Child Abduction Act 1984 and would be at risk of substantial penalties under that criminal statute.

[10] I would myself add that it is a very strong order for a court in this jurisdiction not only to refuse an application for permanent removal but then subsequently refuse an application even for holiday visits of limited duration.

[11] The reason why I would uphold the order of the judge below is a very simple one. It is that it was for her to see, hear and evaluate the evidence of

the maternal grandfather. There can be no doubt at all that his performance in the witness box was the cause of heightened anxiety to the judge. Far from reassuring her as no doubt she had in advance anticipated, he caused her something close to alarm. It is not for this court to minimise that key consideration. She alone heard the voice of the grandfather, she alone had the opportunity of assessing the dynamics. In my opinion, that constitutes a sufficiently exceptional factor to come within Mr McGhee's formula.

[12] Finally, I would emphasise that the judge was not speaking forever, for when Mr McGhee asked her to expand on her oral judgment, she did say:

> 'I must take into account [J]'s very young age. It might happen that it is in his best interests that a visit to Turkey should be delayed until he is a little older and the mother is able to establish a more regular routine with him in this country.'

So the door was not closed forever. Indeed, there was active encouragement on the mother to apply again when J is a little older.

[13] In all the circumstances, and for the reasons that I have already stated, I would dismiss this appeal.

BLACK LJ:

[14] A decision of this kind depends on the judge evaluating all the factors that are relevant in the case and determining what is in the best interests of the child. I would not interfere with the balancing exercise that the judge carried out here, and I would also dismiss the appeal.

SIR DAVID KEENE:

[15] I agree with both judgments which have been delivered.

Order accordingly.

Solicitors: *Eric Robinson & Co* for the appellant

SAMANTHA BANGHAM
Law Reporter