

X-N (A Child) [2014]

[2014] EWCA Civ 1775

28/01/2015

Barristers

Rex Howling KC

Court

Court of Appeal (Civil Division)

Practice Areas

International Children Law

Summary

Father's appeal against a decision to permit the mother to take their daughter to China for a 4 week visit

Facts

The mother was of Chinese origin and the father originated from this jurisdiction. Their daughter J is aged 4.

In October 2013, at a contested hearing, an order was made preventing either party from removing J from the jurisdiction without the permission of the other party or the court. A transcript of that judgment was not obtained, so later courts considering the matter were not aware of what, if any, findings lay behind the order. The matter was then heard by Baker J for directions and a short final hearing thereafter.

The Court of Appeal noted the difficulties due to the parties being litigants in person, leading to the evidence presented to Baker J being incomplete. The trial bundle did not include earlier statements which had been filed and it was disputed as to whether evidence produced from the mother by a lawyer in China about possible safeguards was before Baker J, particularly as the documents were not referred to in the judgment. At the final hearing (lasting about 2 hours) there was short oral evidence from the mother and no sworn evidence from the father.

Having regard to the guidance in *Re R* [2013] EWCA (Civ) 115, Baker J accepted the mother's evidence that she did not intend to abduct J to China and that she is settled in this jurisdiction. He concluded that there was no reliable evidence of any risk of abduction. Although the consequences would be very serious if there was a breach of the order, because the risk was negligible, he did not consider that the consequences were a significant factor in this case. In order to give reassurance to the father, he would accept an undertaking from the mother to lodge her and J's passport with the Chinese lawyer for the duration of the visit and concluded it would be in J's best interests to visit China.

In considering the appeal, the court reiterated the guidance in *Re R*, which noted that clear reasons

should be given when a judge proceeds without expert evidence as to safeguards in a non-Hague Convention country. Further, when considering temporary removal to a non-Hague Convention country, consideration should be given to the:

1. magnitude of the risk of breach of the order if permission is given,
2. magnitude of the consequence of the breach if it occurs, and
3. level of security that might be achieved through available safeguards.

The father's case was that Baker J dealt with magnitude of risk, but did not adequately consider the second and third issues. The father disputed that there was expert evidence before the court as to safeguards and no clear reasons were given for granting the application without expert evidence. The father claimed to have cogent evidence to support his contention that there was a high risk of the mother retaining J in China and that Baker J did not fully grapple with this factual issue in the case.

Held

The court was concerned about the way in which the final hearing unfolded, in that the father made allegations of a real risk of abduction but the oral evidence was limited to brief evidence from the mother and no sworn evidence from the father. Further, previous statements filed were not included in the bundle before Baker J. As a litigant in person, it was not unreasonable for the father to believe that previous documents filed would be before the court and that the court would be aware of the reasons for the court's determination of the issue in October 2013.

The court concluded that this situation was likely to have arisen due to both parties being litigants in person and the court was inadvertently led into a process that was not designed to get to grips with the factual disputes about the risks of abduction.

It was important for the decision to be based on a sound factual basis, taking account of all the evidence and for the father to feel that his case was fully heard. The way in which the proceedings unfolded meant that there was no reliable fact-finding process addressing the father's allegations of threats of abduction.

The judge did not fully engage with the three issues set out in *Re R*, in that he used his conclusion about the mother's overall trustworthiness to diminish the consequences of a potential breach. There was no analysis of what it would mean for this child if J was retained in China. Further, the issue of expert evidence was not fully addressed – whilst there may have been information from a Chinese lawyer before the court, there was no formal instruction of an expert in accordance with Part 25 of the FPR. In any event, as the documents were not referred to by Baker J in his judgment, there was “more than a lurking concern” that the material was not before Baker J.

The hearing was unsatisfactory in terms of the application of the law and in engagement with the factual issues that would assist the court in determining where J's welfare interests lie. As the guidance in *Re R* is to approach granting leave to non-Convention countries with caution, the appeal was allowed. Rather than remitting the matter for rehearing, the whole process should be restarted by a fresh application if the mother wished to make one. The order by Baker J was set aside and the previous order of October 2013 was to remain in force, namely that neither party should remove J from the jurisdiction without the permission of the other or leave of the court.

It was noted that had the parties had proper legal representation earlier in the proceedings, it may have obviated the need for long proceedings below or the necessity for an appeal.

Permission

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