

Re X-N (A Child)

[2014] EWCA Civ 1775

26/11/2014

Barristers

Rex Howling KC

Court

Court of Appeal (Civil Division)

Practice Areas

International Children Law

Summary

It was appropriate to set aside an order allowing a mother to take her four-year-old daughter to China for a short visit because, in making the order, the judge had failed to hear any evidence from the father as to his belief that there was a risk of abduction if the mother was allowed to go to China, and accordingly he had failed to engage with the father's allegations and find them proved or disproved on a proper analysis of all the evidence.

Facts

The appellant father (F) appealed against an order allowing the respondent mother (M) to take their four-year-old daughter (J) to China for a short-term visit.

M and F had separated. M, who was of Chinese origin, wished to take J to China to visit her maternal family. In October 2013 an order was made preventing either M or F removing J from the jurisdiction without the permission of the other party and the court. There was no transcript of the judgment leading to that order. M continued her application for leave to take J to China, and in June 2014 the court considered whether M should have permission to do so. In the course of that hearing, M gave oral evidence but F did not. Instead, he prepared an oral statement which referred to evidence he had advanced in earlier proceedings to substantiate his belief that M might abduct J if she was allowed to take her to China, but that evidence was not before the court. However, the judge did have before him letters from a Chinese lawyer, obtained by M, purporting to guarantee M and J's return to the United Kingdom after any trip to China. The judge concluded that he had formed a favourable view of M in terms of her trustworthiness, and he rejected F's concerns on the basis that there was no reliable evidence of any prospect of abduction.

Held

(1) The court was concerned that the judge had been led into conducting a hearing which, given the factual issues that F relied upon, was one-sided and which failed to engage with those very factual matters. It was odd that M had given oral evidence but F had not been called to do so, and that he had

only been permitted to read out an oral statement, which included his factual allegations about M's previous behaviour that caused him concerns about abduction. Given that, it was strange that there had been no cross-examination of F on those key issues. As a litigant in person, F may reasonably have understood that the court would have access to the earlier evidence on which he relied in his statement, but that was not the case. F was also entitled to conclude that the judge would be aware of the reasons for granting the October 2013 order, which may or may not have included findings about M's reliability, but that material was simply not before the judge. The judge had made his decision because he formed the view that there was no reliable evidence of any risk of abduction, but he did so without being exposed to any of the evidence F sought to rely on. It was important that F felt that his case had been heard and considered, but there simply had not been a process which engaged with the allegations he made and found them proved or disproved on a proper analysis of his evidence. (2) The judge had failed properly to consider all three questions he was required to consider by R (A Child) (Prohibited Steps Order), Re [2013] EWCA Civ 1115, [2014] 1 F.L.R. 643, namely the magnitude of the risk of breach of the order if permission was given, the magnitude of the consequence of breach if it occurred, and the level of security that might be achieved by building in to the arrangements all of the available safeguards, R (A Child) followed. The judge had fallen into the trap of using his conclusion on the first question, M's trustworthiness, to diminish his consideration of the consequence of any breach should it come to pass. The judge's approach to expert evidence was also concerning: he had simply not dealt with the point made in R(A Child) that there was a need in most cases for the effectiveness of any suggested safeguard to be established by competent and complete expert evidence, which dealt specifically and in detail with that issue. It was clear that although M had made informal contact with the Chinese lawyer, neither party had formally instructed experts, R (A Child) followed. (3) In those circumstances, the process followed was unsatisfactory both in terms of the application of the relevant law and its failure to engage with the factual issues. The whole process needed to be restarted by a fresh application, if M wished to make one. The proper outcome was to set aside the order made with the result that the order made in October 2013 remained in force.

It was appropriate to set aside an order allowing a mother to take her four-year-old daughter to China for a short visit because, in making the order, the judge had failed to hear any evidence from the father as to his belief that there was a risk of abduction if the mother was allowed to go to China, and accordingly he had failed to engage with the father's allegations and find them proved or disproved on a proper analysis of all the evidence.

Permission

Lawtel 

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