Neutral Citation Number: [2023] EWCA Civ 887

Case No: CA-2023-000933

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
Mr Justice Francis
FD23P00226

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 July 2023

Before :

LORD JUSTICE LEWISON
and
LORD JUSTICE BAKER
- -

N and A (1996 HAGUE CONVENTION: COSTS)

- -
- -

The Appellant appeared in person
Michael Gration KC and Kitty Broger-Bareham (instructed by **Bindmans LLP**) for the **Respondent**

Hearing date : 26 May 2023
- -

Approved Judgment

This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 2:00pm on 25 July 2023.

LORD JUSTICE BAKER :

1. On 9 June 2023, this Court allowed an appeal against an order made by Francis J in proceedings under the inherent jurisdiction brought by a mother in respect of her three children, aged respectively six, four and two. Our judgment is reported as *Re N and A (1996 Hague Convention: Article 13)* [2023] EWCA Civ 623. The successful appellant was the children's father. He now seeks an order for costs against the mother.

2. The issue arising on the appeal was whether Francis J had jurisdiction to order the return of the children to this country and involved consideration of the provisions relating to jurisdiction in Chapter II of the 1996 Hague Convention on the jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children ("the 1996 Convention").

3. The background, much of which is disputed, is summarised in paragraphs 9 to 23 of our earlier judgment. In short, this is a Ukrainian family. In March 2022, they came to this country and subsequently an application was made for leave to remain here under the Homes for Ukraine Scheme. In October 2022, the father took the children to Thailand and then back to Ukraine. The mother contended that the father had abducted the children. The father stated that the mother had given her consent. Over the next six months, the children lived in their former family home in Kyiv and returned to their pre-school. The mother visited them in that country on several occasions, but otherwise remained in England. In March 2023, the mother applied via the English Central Authority for the return of the children to this country under the 1980 Hague Child Abduction Convention, but at the date of the appeal hearing that application had not yet been issued in the Ukrainian court. In May 2023, the father took the children to Poland and then came to this country. The mother filed an application under the inherent jurisdiction for the summary return of the children and obtained a location order under which the father's passport was seized by the Tipstaff. After two interim hearings, the application came before Francis J on 17 May 2023. On behalf of the father, it was submitted that under the provisions of the 1996 Convention the English court had no jurisdiction. Francis J made no finding as to jurisdiction or on the disputed claim of abduction but made an order for the mother to go to Warsaw to collect the children forthwith. He further ordered that the mother and children's passports be released to the mother's solicitor and that the father's passport be released to his solicitors to be held by them to the order of the court.

4. By the date of the appeal hearing on 9 June, the children had been returned to Kyiv, apparently by their paternal grandfather. The order for the return from Warsaw was therefore no longer capable of being implemented. The parties were, however, unable to reach an agreement as to the terms of a final order and we therefore proceeded to hear the appeal, albeit at a hearing that was rather shorter than it would have been had it been fully contested. On appeal, we held that under Article 13 of the 1996 Convention the English court was required to abstain from exercising such jurisdiction as it might have under Article 5 unless and until the Ukrainian court declined jurisdiction under Article 13(2). We therefore set aside the orders for the return of N and A to this country, and stayed the proceedings in relation to them under the inherent jurisdiction. We were not persuaded that the judge had been wrong to make the order about the father's passport, but endorsed an agreement reached by the parties that, in view of the change of circumstances, the passports should be returned to the father so that he could return

to Kyiv and resume caring for the children pending any determination by the Ukrainian court.

5. Following the hearing, an application for costs was submitted by solicitors who had acted for the father during the proceedings in which it was asserted that the mother's conduct of the proceedings had been unreasonable, in particular by pursuing her application after it had become clear that jurisdiction lay with the Ukrainian court as there were prior proceedings in that country and by refusing to concede the appeal when it became clear that it was academic and that the order would have to be set aside. Subsequently, the father withdrew instructions from his English lawyers and submitted his own expanded application for costs. In a detailed written submission, he described the restrictions on his life caused by the making of the location order and the seizing of his passport and gave particulars of the additional costs he had incurred as a result over the several weeks during which he was obliged to remain in this country while his children were being looked after in Warsaw. He set out in a schedule the costs he had incurred in (1) instructing solicitors and counsel in the proceedings; (2) instructing interpreters; (3) meeting the costs of accommodation and living expenses through being forced to stay in this country, and (4) meeting the children's living expenses in Warsaw.

6. In response, the mother's counsel submitted that there should be no order as to costs having regard to (1) the accepted approach to costs in children's cases, (2) the fact that much of the father's claim falls outside what should ever be recoverable as costs of an appeal, and (3) the mother's very limited means as she is living in this country under the Homes for Ukraine Scheme and has few resources.

7. The general practice in proceedings relating to children is to make no order as to costs save in exceptional circumstances. The rationale for this practice has been explained in two judgments of the Supreme Court in ***Re T*** [2012] UKSC 36, and subsequently in ***Re S*** [2015] UKSC 20. The principal reason, as recognised by Baroness Hale of Richmond in her judgment in ***Re S***, is that, whenever a court has to determine a question relating to the upbringing of a child, the welfare of the child is the court's paramount consideration, and as a result "in such proceedings there are no adult winners and losers – the only winner should be the child" (paragraph 20) and "it can … generally be assumed that all parties to the case are motivated by concern for the child's welfare" (paragraph 22).

8. It follows that "costs orders should only be made in unusual circumstances", for example, as identified by Wilson J (as he then was) in ***Sutton London Borough Council v Davis (No 2)*** [1994] 2 FLR 569, where "the conduct of a party has been reprehensible or the party's stance has been beyond the band of what is reasonable" (paragraph 26).

9. At paragraph 29, Baroness Hale added:

> "Nor in my view is it a good reason to depart from the general principle that this was an appeal rather than a first instance trial. Once again, the fact that it is an appeal rather than a trial may be relevant to whether or not a party has behaved reasonably in relation to the litigation. As Wall LJ pointed out in ***EM v SW, In re M (A Child)*** [2009] EWCA Civ 311, there are differences between trials and appeals. At first instance, 'nobody knows what the judge is going to find' (paragraph 23), whereas on

> appeal the factual findings are known. Not only that, the judge's reasons are known. Both parties have an opportunity to 'take stock' and consider whether they should proceed to advance or resist an appeal and to negotiate on the basis of what they now know. So it may well be that conduct which was reasonable at first instance is no longer reasonable on appeal. But in my view that does not alter the principles to be applied: it merely alters the application of those principles to the circumstances of the case."

10. These principles apply in cases of alleged child abduction. In *EC-L v DM (Child Abduction: Costs)* [2005] EWHC 588 (Fam), [2005] 2 FLR 722, Ryder J said (at paragraph 33):

> "It should be the expectation in child abduction cases that the usual order will be no order as to costs but where a party's conduct has been unreasonable or there is a disparity of means then the court can consider whether to exercise its discretion in accordance with normal civil principles."

11. It should be noted that the scheme for "costs protection" under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which imposes limits on costs awarded against a legally aided party in relevant civil proceedings, do not apply in family proceedings. Thus the fact that a party is legally aided does not by itself impose restrictions on any award of costs that might be thought appropriate applying normal principles, although the means available to the paying party will be relevant.

12. In this case, I am satisfied that no order for costs should be made for the following reasons.

13. There was nothing in the mother's conduct of proceedings which could be categorised as reprehensible or unreasonable. Given her case that these very young children had been abducted, it was not unreasonable for her to take measures to get them back. Although her argument on jurisdiction ultimately failed, I am unpersuaded that it was at any point prior to the hearing before Francis J so obviously wrong that it was unreasonable of her to pursue it, given what was at stake. In any event, the judge, whilst not ruling on the issue of jurisdiction, felt the circumstances were such as to require him to make an order seeking to facilitate the children's return to the mother.

14. Although it became clear in the days leading up to the appeal hearing that the order was now redundant as the children had been returned to Kyiv, I do not consider that the mother's refusal formally to concede the appeal was unreasonable conduct which merits an award of costs against her. As recited in our earlier judgment (paragraphs 31 to 32), the mother's case before us was that, as the order was now redundant, the appeal was academic. It should therefore have been dismissed, leaving the parties to submit an agreed order to Francis J discharging his order for the return of the children and staying the proceedings under Article 13 of the 1996 Convention. The father's case was that the appeal was not academic because Francis J's order had been made without jurisdiction and, if it stood uncorrected, it might mislead the Ukrainian authorities who had been "respectfully requested" to give all possible assistance to secure the return of N and A to this jurisdiction. We accepted the father's argument and proceeded to hear

and allow the appeal against the return order, but not the order relating to the passports. We therefore disagreed with the resolution proposed on behalf of the mother, but the position she took was not so unreasonable as to warrant an order for costs.

15. I therefore conclude that the circumstances were not so exceptional as to justify an order for costs on this appeal. Had I reached a different view, it would then have been necessary to consider the details of the claim advanced by the father and the mother's capacity to pay. At first sight it seems that the father's claim includes items which cannot properly be the subject of an order for costs on this appeal. There are also considerable doubts about the mother's capacity to meet any order for costs. But as the claim falls outside the category of family cases in which an award for costs should be made, it is unnecessary to consider these ancillary issues any further.

16. I would therefore make no order as to costs save for the necessary order for a detailed assessment of the respondent's publicly-funded costs.

LORD JUSTICE LEWISON

17. I agree.