Case No. PTA + A 1999/6586/2

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (FAMILY DIVISION)
(HER HONOUR JUDGE HALLON)

Royal Courts of Justice
Strand
London WC2

Date: Thursday 15th July 1999

B e f o r e:

LORD JUSTICE THORPE
SIR OLIVER POPPLEWELL

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K (Child)

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(Computer Aided Transcript of the Stenograph Notes of
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MISS B SHENTON (Instructed by Shanaz Ahmed & Co, 37 Newroad, London E1) appeared on behalf of the Applellant

MR A PERKINS (Instructed by Hornby Ackroyd & Levy, 2-6 Atlantic Road, Brixton, London SW9) appeared on behalf of the Respondent

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J U D G M E N T (As approved by the Court)

LORD JUSTICE THORPE: The father was born in Bangladesh on [a date in] 1959, so he is now 40. The mother is 33, having been born in the USSR in 1966. The couple met in Kiev in 1985 and married there in 1988. Their only child, J, was born there on [a date in] 1989 and is therefore ten years of age. When J was about three months of age, his father visited the United Kingdom, and when J was about eight months of age, he was brought here by his mother to unite the family. They were granted exceptional leave to remain. However, by June of the following year the marriage was in difficulties and the mother applied for an injunction. Shortly thereafter there was reconciliation but it was short-lived. The final separation came in [a date in] 1991 when the mother left the former matrimonial home, leaving the father to care for J.

The father's care has been the subject of innumerable applications and orders, both in courts of trial and in this court. It is quite unnecessary to recite any of that litigation history, save to note that in 1993 a residence order in favour of the father was made by His Honour Judge Platt. The issues between the parents were before Miss Recorder Bevington on [a date in] 1998 when, on the father's undertaking not to remove J from the jurisdiction without the written consent of the mother, his residence order was confirmed, as was the mother's contact order. The basic arrangement in relation to school holidays is that they are shared equally.

In December, six months later, during discussion the father mentioned his desire to take J to Bangladesh in the summer of 1999. In February 1999 both the father and J received notice of indefinite leave to remain in the United Kingdom, which the father construes as the essential foundation to enable him to make a holiday visit to Bangladesh. A letter was written, seeking the mother's consent, but it was not despatched until 12th April. The mother's solicitors responded by refusing consent. An issue developed as to whether the status accorded to the father in February would enable him to re-enter at the conclusion of the holiday as a matter of right. The mother, having made some enquiries, suggested that re-entry would be subject to the review of an immigration officer

at the point of arrival.

The application to resolve the dispute between the parents was unfortunately not issued until 19th May. The father sought the court's sanction for a holiday in Bangladesh commencing on 8th August and terminating on 6th September. I interpolate that J's school holidays in 1999 commence on 25th July and end on 7th September; thus the Bangladesh holiday would invade the mother's half of the school holidays, but proposals were advanced to compensate her in later holidays for the time lost.

A good deal of professional energy was devoted to resolving the issue as to whether the father would have a right of re-entry at the conclusion of the holiday. Written opinion on this point was obtained only by the mother's solicitors, from two separate sources which were not in agreement. But the more authoritative established that, although technically the father's return was subject to review, in practical terms he had a right of re-entry, as did J. Accordingly that issue departed from the case.

The first appointment was before Deputy District Judge Hodson on 18th June. Because of the international flavour of the application, he quite rightly transferred the case to the Family Division of the High Court, and said that the application was to be listed before a Family Division judge on 25th June or such other date as might be agreed. What happened thereafter was unfortunate. This matter was listed as at risk on Friday 25th, originally before Hogg J. But she had a part-heard case, and she was also applications judge. The Clerk of the Rules therefore transferred this matter to Hale J. Hale J, in common with many other judges of the Family Division on that day, had to leave for a judicial meeting. No time prior to or even during vacation was available for some half day before any judge of the Family Division. In the event, it was listed on 28th June, before Her Honour Judge Hallon sitting as a Section 9 judge.

Judge Hallon heard no oral evidence but read the statements of the parties and such other documents

as were agreed and she heard the submissions of counsel. She granted the application for leave, setting aside the restrictions derived from the order of June 1998 and accepting the father's undertakings across a wide field. The mother applied for permission to appeal on 2nd July. Her paper application came before me on 13th July and I directed an oral hearing, with appeal to follow, to be listed today, 15th July.

At the outset, we granted permission and heard the submissions of Miss Shenton for the mother. In essence, her case is that this significant application was prepared too hastily and too superficially. It was decided without any oral evidence and without any expert evidence as to the law of Bangladesh or as to the scope for mirror orders in that jurisdiction. Above all, the judge had fallen into manifest error in failing to require or to put into place any safeguards beyond the word of the father, expressed in undertakings to the court.

Mr Perkins in response emphasised that the father has an impeccable record as a parent, having provided J's primary care ever since the separation of the parents. He says that on that record the judge was entitled to repose her trust in the father and to accept his undertakings. It was not a conclusion that was plainly wrong and therefore this court should not interfere. In relation to the authorities relied upon by Miss Shenton, he says that the first, the decision of Hughes J in the case of re T (Staying Contact in Non-Convention Country) [1999] 1 FLR 262, is distinguishable on its facts. He points out that, although a 1997 decision, it only reached the Family Law Reports earlier this year, but it was available to the judge. The case of re A (Security for Return to Jurisdiction (Note) [1999] 2 FLR 1, although decided in July 1996, only reached the Family Law Reports the week before last, ie precisely three years after its decision. So, he says, really there is very little guidance to practitioners in this field and the judge was plainly right to take the line that she did. It was not contrary to any authority or any reported practice. Finally he relied upon J's expectations. He says that the father has purchased the tickets within the last week or so and there would be great disappointment for J were his

expectations now dashed.

In my opinion, the points relied upon by Miss Shenton prevail over those urged by Mr Perkins. An application of this character is one that requires careful and thorough preparation. This application did not receive care of that standard. It is customary, if there is to be an evaluation of the applicant's trust, for oral evidence to be led so that the judge has an opportunity of assessing credibility and reliability from exposure in the witness box.

Recognising that there may be an absence of authority in this field, it is nonetheless well known to specialist practitioners that the conventional disposal is, at the least, to require all practicable safeguards to be first put in place. Ordinarily speaking, applications of this sort, which involve the consideration of the legal system in a foreign state and which may require the putting in place of mirror orders, should be dealt with by judges of the division. The concentration of this category of work into that limited judicial number ensures the development of expertise as well as consistency of adjudication. No doubt it was pressure of litigation at this time of year which obliged the Clerk of the Rules to list this case before a deputy, but ordinarily that is a course that should be avoided.

As to Mr Perkins' submission that the judge was entitled to reach the conclusion that she did from the husband's impeccable record, I would emphasise that in these difficult cases it is for the trial judge to assess not only the magnitude of risk of breach of the contact order but also the magnitude of the consequence of breach of the contact order. As the judge herself rightly noticed, if the contact order were breached despite all the husband's undertakings, then it would, as a matter of reality, be impossible to secure J's return to the country which has been his country almost throughout his life.

Of course the father's impeccable record as a carer was highly relevant to an assessment of the risk of breach. But it was irrelevant to an assessment of the magnitude of the consequence of breach.

Where the consequence of breach would be the irretrievable separation of the child from previous roots, then in my opinion it is for the court to achieve what security it can for the child by building in all practical safeguards.

The judge here, having assessed only the litigation history, concluded thus:

> "It therefore seems to me more likely than not that the Father would return with [J] at the end of the proposed holiday."

That is a conclusion with which I would certainly not disagree, but it is an inadequate foundation for the making of the order which followed. That approach appears equally plainly from her concluding sentence, when she said:

> "I am therefore prepared to say that I do not believe he would act in that way and I will accede to his application for leave to remove [J] from England to Bangladesh for the purposes of a holiday. . ."

Although not a signatory to The Hague Convention on the Civil Aspects of International Child Abduction, Bangladesh of course has a fully-developed legal system. But within that legal system, the interpretation of child welfare will inevitably and properly be reflective of the culture, traditions and institutions of the state. It does not follow that if the issue of J's future were to be determined by a court in that state, following a breach of the contact order, that the mother's relationship with J or the importance of his rooting within this society would receive the same evaluation as in this legal system. That is not to criticise the system of law in Bangladesh, but simply to notice its necessary difference.

Accordingly, it seems to me that to preclude the possibility of competitive litigation within two systems, reflecting different traditions and cultures, it is desirable to confine the risk of competitive litigation by putting in place, wherever possible, whatever buttresses can be devised for the primary adjudication in this jurisdiction. It seems to me that the appearance within the Family Law Reports of the cases of re T and re A, whatever may have provoked that appearance, is useful as offering to

practitioners a precedent for the sort of mechanisms appropriate where the friendly foreign jurisdiction roots its family justice system in Islamic law.

There is obviously in this case the possibility of notarised agreements. There is the possibility of mirror orders. The financial circumstances of the parties put beyond reality the adoption of a monetary bond. There should have been an exploration of those practicalities in this case through expert evidence, and there was not. That should have been seen by the judge as a fundamental deficiency that was not to be cured by an evaluation of the father's responsibility, drawn from the history, nor a judicial evaluation of probabilities in relation to the performance of the contact order.

I recognise that to allow the appeal is to disappoint the child and also to risk a regression in the parental relationship, which seems to have been improving over the second half of 1998. I hope that the parents will understand that this judgment is not designed to prevent J from visiting his father's homeland and from meeting his father's extended family in their own homes. It is no more than an emphasis on the need for careful preparation before such an important development in J's life. That preparation must be to safeguard all that the father has achieved over the course of the last eight years of his primary care. He must understand that the mother's concerns are, on an objective view, reasonably founded and reasonably expressed, and it would be my hope that the parents will be able to continue to develop their mutual understanding and trust despite the fact that these proceedings have yet again had to come to this court for final resolution.

That said, I would allow the appeal and set aside the order made by the judge on 28th June 1999.

SIR OLIVER POPPLEWELL: I agree.

ORDER: Appeal allowed on paragraph 1 of Judge Hallon's order. Paragraph 2 to stand, paragraph 3 to be amended as agreed between the

parties. The father's passport to be held by the father's solicitor, not to be released without agreement or order. No order as to costs save legal aid assessment.

(Order not part of approved judgment)