Expert evidence and the removal of a child to a non-Hague Convention country

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Family analysis: Abigail Bond, barrister at St John's Chambers, looks at the court's approach to an application to remove a child to a non-Hague Convention country and the difficulties in funding the appointed expert.

Original news

Re AB (A Child: Temporary Leave To Remove From Jurisdiction: Expert Evidence) [2014] EWHC 2758 (Fam), [2014] All ER (D) 129 (Aug)

The parents were separated. The mother applied to the court for permission to take their six-year-old son to India, where he had relatives, for three weeks. The Family Court held that the balance came down against granting the mother's application. Comments were made concerning the actions of the Legal Aid Agency (LAA) with regard, among other things, to the appointment of an expert in Indian law.

What is the background of this case?

In *Re AB* the mother of a six year old boy applied within longstanding private law proceedings to take him on holiday to India for three weeks. Until the mother's arranged marriage to the father in 2005 she had spent her whole life living in India. By contrast, the father was of Indian parentage and had lived in England throughout his life. It was common ground that their son was a British citizen with a British passport and that he was habitually resident in England. By the time of the application, the child was having regular, albeit limited, contact with the father, whose aim was to progress to include overnight contact at some point.

What issues did this case raise in relation to applications to take children to non-Hague convention countries?

The father opposed the application on the basis that the mother might refuse to return AB to the UK. It seems that he thought that the mother might use the child as some sort of bargaining tool in order to try and claim some of the paternal family's land in India, although the justification for this concern is not spelt out in the judgment. Of significance is the fact that India is a non-Hague Convention country (the Hague Convention on the Civil Aspects of International Child Abduction 1980).

The approach to an application to remove a child to a non-Convention country was considered by the Court of Appeal in *Re: A (a child) (prohibited steps order)* [2013] EWCA Civ 1115, [2013] All ER (D) 64 (Sep) where Patten LJ, giving the judgment of the court, specified that applications will involve consideration of three related factors:

- the magnitude of the risk of breach if permission were given
- the magnitude of the consequence of breach if it were to occur

- the level of security that might be achieved by building in to the arrangements all of the available safeguards

In addition, Patten LJ stated that expert evidence would usually be required to address the effectiveness of any safeguards that could be implemented to minimise the possibility of the child being retained and of any measures to secure the child's return. He went on to say that a judge who decided to proceed in the absence of expert evidence would need to give very clear reasons for doing so.

How did the court approach the expert evidence in this case?

In the current case, and in accordance with the approach set out in *Re R* [2013] EWCA Civ 1115,[2014] 1 FCR 113, the judge had at an earlier hearing granted the mother's application for permission to obtain expert evidence from a dual qualified solicitor and advocate (India and England) who was a specialist in Indian law. Despite the fact that the LAA overrode the court's case management directions and refused to grant prior authority for the instruction of such an expert, the mother's solicitors managed to put before the court--having obtained all the necessary consents--a redacted version of a report written by the same expert on similar facts in another case. That evidence suggested that:

- in the event that the mother refused to return the child the father would have to make an application for custody under Indian law
- any such application could take one to two years to resolve, and
- any declaration of habitual residence by the English court or an order for summary return would only be one of the factors for consideration in the welfare decision-making

Further, there was no scope for the mother to obtain a mirror order in India although she could file a letter of request from the UK court and lodge her passport and the child's with the Registrar General of the High Court in whatever Indian state she chose to live.

Applying the guidance to the facts, HHJ Bellamy found that:

- there was a low to medium risk that the mother might not return the child to the UK
- any breach by the mother would have profound practical consequences for the father in that he would face significant challenges in pursuing a remedy through the Indian courts
- the consequences would also have a detrimental effect on the child, who would lose his relationship with the father in circumstances where regular contact had only recently got going again

In addition, the evidence was that there were no safeguards available which were capable of having a meaningful effect in India. The judge then carried out the welfare analysis and held that the balance came down against granting the mother's application.

What issues were raised in relation to the conduct of the LAA in this matter?

In granting the mother permission to instruct the Indian legal expert, the judge had also ordered that she alone should bear the costs of paying for that report on the basis that:

- it was her application to remove the child from the jurisdiction, and
- the father, who was a litigant in person of very limited means, could not afford to pay anything towards it

HHJ Bellamy relied upon *JG v The Lord Chancellor & Ors* [2014] EWCA Civ 656, [2014] All ER (D) 192 (May) in doing so (a decision that the LAA, in rejecting the claim on the basis that the costs should be borne equally between the parties, appeared to be unaware). The second strand of the LAA's refusal to fund the costs of the report was based upon the erroneous assumption that the Civil Legal Aid (Remuneration) Regulations 2013, SI 2014/1824 and the 2013 Standard Civil Contract prevented the instruction of a solicitor for the purpose of providing an expert opinion on the law (rather than for providing legal advice). In holding that it had not been open to the LAA to disregard a judicial decision that the Indian legal specialist was an expert, the judge went on to express significant concerns about the inadequate training for those members of

LAA staff responsible for determining applications for prior authority and about the inefficient use of resources in the processing of these applications.

What should lawyers take from this case?

Expert evidence is an essential component (in most cases) of an application for temporary removal to a non-Convention country but in those rare circumstances where either of the parties is in receipt of public funding it can be an uphill struggle to get prior authority from the LAA. This case adds to the body of jurisprudence (*JG v The Lord Chancellor*, the judgment of Holman J in *Kinderis v Kineriene* [2013] EWHC 4139 (Fam) and the judgment of HHJ Bellamy in *Re R (Children: temporary leave to remove from jurisdiction)* [2014] EWHC 643 (Fam), [2014] All ER (D) 165 (Mar)) all of which raise the simple question of how the court can deal with a case justly if, having determined that the instruction of an expert is 'necessary' to achieve that objective, the absence of funding makes what is necessary impossible. The practical and serendipitous solution in the present case (the use of a redacted report written by the same expert for another case on a similar issue) will only rarely be available as an alternative.

Interviewed by Evelyn Reid.

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