TUC
v
TUD

[2017] SGHCF 15

High Court Family — District Court Appeal No 158 of 2016 (Summons No 171 of 2017)
Judith Prakash JA
26 May 2017

Civil procedure — Appeals — Leave to appeal

22 June 2017

Judith Prakash JA:

Introduction

1 This was an application for leave to appeal against the decision of the High Court in *TUC v TUD* [2017] SGHCF 12 ("the Judgment"). Having heard the application on 26 May 2017, I dismissed it with costs. The Judgment contained the High Court's reasons for allowing an appeal against the decision of a District Judge in the Family Court. The unusual feature of this bench was that it comprised three Judges instead of the usual single High Court Judge who hears appeals from a decision of a District Judge. In dismissing the application, I expressed the view to counsel that in a situation like this, the usual grounds founding an application to appeal are inapplicable. This judgment gives the reasons for that view and for the dismissal of the application.

The background

2 The original application in the Family Court was made under s 8 of the International Child Abduction Act (Cap 143C, 2011 Rev Ed) ("the ICAA"). The applicant in that application, who subsequently became the appellant in the appeal before the High Court (and whom I shall refer to as "the Father"), was the father of two young boys. His application was for an order that the two children be returned from Singapore to San Francisco, California, USA. He alleged that the children had been wrongfully retained in Singapore by their mother, his wife, in breach of his rights of custody under US law. The District Judge who heard the matter dismissed his application. The Father then appealed to the High Court. The respondent to the application and to the appeal was the wife (whom I shall refer to as "the Mother").

3 Section 23(3)(*a*) of the Family Justice Act 2014 (No 27 of 2014) provides that an appeal to the High Court from a decision of a Family Court may be heard before one Judge or three Judges. The present matter required the High Court to consider, for the first time, the approach to determining "habitual residence" under Art 3 of the Hague Convention on the Civil Aspects of International Child Abduction (the provisions of which are set out in the Schedule to the ICAA and have the force of law in Singapore), and also the approach to construing the exception of "consent" under Art 13(a). Accordingly, to ensure that these issues would be given the fullest possible consideration, the Chief Justice appointed a bench of three to sit in the High Court to hear the appeal from the District Judge's decision. The members of the bench were the Chief Justice, Andrew Phang JA and me. I shall refer to this bench as "the Court" hereafter. All three members of the Court are permanent

judges of the Court of Appeal. Additionally, an *amicus curiae* was appointed to address specific questions on the interpretation of the Hague Convention.

4 The Court heard the appeal on 16 March 2017 and reserved judgment. On 9 May 2017, it allowed the appeal and ordered that the children be returned to San Francisco, California, USA. It gave detailed reasons for its decision in the Judgment. In brief, the Court rejected the Mother's argument that the children were habitually resident in Singapore and that she had not wrongfully retained them here. It found, instead, that the children were habitually resident in California, USA immediately before the date on which they had been wrongfully retained. It also found that the Father did not consent to such retention.

5 On 16 May 2017, the Mother filed an application for leave to appeal as she had no right of appeal. This is provided by s 34(5) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA"):

> (5) Except with the leave of the Court of Appeal, or of a Judge of the Family Division of the High Court, no appeal shall be brought to the Court of Appeal from any decision, judgment or order of the Family Division of the High Court involving the exercise of the appellate civil jurisdiction referred to in section 23 of the Family Justice Act 2014.

Section 35 of the SCJA provides that wherever an application may be made either to the High Court or to the Court of Appeal, it shall be made in the first instance to the High Court.

6 Since s 34(5) of the SCJA says, on its face, that leave may be granted by "a Judge of the Family Division of the High Court", the Mother's application for leave was fixed for hearing before me sitting alone. In any event, neither party objected to this application being heard by a single Judge.

The grounds for granting leave to appeal

7 The long-established legal position is that leave to appeal may be granted if the applicant persuades the court that there is (a) a *prima facie* case of error; (b) a question of general principle decided for the first time; or (c) a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage. These grounds were set out in the Court of Appeal's decision in *Lee Kuan Yew v Tang Liang Hong* [1997] 2 SLR(R) 862 ("*Lee Kuan Yew*") at [16].

The usual grounds do not apply in this case

8 The Mother's submissions in support of her application were based on the second and third grounds. Counsel for the Mother, Ms Wong Kai Yun, clarified at the start of the hearing that she was not arguing that there was any *prima facie* error of law in the Judgment. She correctly conceded that there was no basis for such an argument in view of the absence of any decision or statute setting out a legal position contrary to that established and followed in the Judgment.

9 Before dealing with the substance of the Mother's submissions, I should say that her reliance on the second and third grounds seemed misplaced in view of how the appeal had been managed. Those grounds were designed for the usual situation in which a single High Court Judge sits in an appellate capacity in respect of a decision given by the District Court. In that situation, it may be that further consideration by a bench of three or more Judges at a senior level may be necessary or helpful or advantageous. The position here was different not only because of the number of Judges but also because the constitution of

the bench made it plain that in effect the Court of Appeal was sitting albeit as a bench of the High Court.

10 It was precisely because there were questions of general principle to be decided for the first time, on which a decision by a higher tribunal would be to the public advantage, that three members of the Court of Appeal sat in the High Court to hear this appeal. It was for the same reason that an *amicus curiae* was appointed. All three Judges who heard this appeal were involved in the first case under the ICAA to reach the Court of Appeal, *BDU v BDT* [2014] 2 SLR 725. In that matter, I was the High Court Judge who heard the appeal from the District Court's decision (see *BDU v BDT* [2013] 3 SLR 535) and Menon CJ and Phang JA were two of the three Judges who heard the appeal from my decision. That matter was drawn out, however, by having to proceed through two tiers of appeal.

11 In this case, if the children were found to have been wrongfully removed or retained in Singapore, then the objective of the Hague Convention – to secure the prompt return of such children – would have been compromised by the time the final appeal was concluded. Thus, three members of the Court of Appeal heard the matter directly on appeal from the Family Court this time around. In this way, the application could be disposed of expeditiously while still allowing for the issues of law to be given ample consideration.

12 More generally, it is not often that an appeal to the High Court will be heard by three Judges. Such a procedure is necessary only when there are novel or important legal issues requiring detailed examination. It may fairly be presumed that the resulting decision will consider the issues at some length and the analysis thereof will be highly persuasive. The argument that a further

appeal is justified because there is a question of general principle decided for the first time, or a question of importance on which a decision of a higher tribunal would be of public advantage, therefore loses most of its force. Indeed, I would say that in the circumstances of this case in particular (see [10] above), the second ground is totally inapplicable.

13 I am thus of the view that if an appeal is heard by a High Court bench comprising three Judges, leave to appeal against that decision should not be granted on the second and third grounds save in exceptional circumstances. One possible exception is where the bench of three is split on the result. Even then, however, the divergence of opinion must be on a point of law rather than a finding of fact. Otherwise, there will be no question of general principle or question of importance on which the Court of Appeal's authoritative guidance is needed. All that it will be asked to do is to sift through the facts again in order to determine whether the lower court's findings were correct. That is not a permissible reason for granting leave to appeal.

14 Another possible exception is this: the decision of the High Court is unanimous, but it has expressed disagreement with legal principles set out in a decision of the Court of Appeal though it was bound by law to apply them, or has departed from an established line of High Court authority. In such a situation, the question of law may not have been decided for the first time, but there may be cause for revisiting it, for example, because of developments in other jurisdictions. If so, it may be considered necessary to grant leave to appeal on the third ground in order for the Court of Appeal to have an opportunity to provide guidance on the issue.

15 In this case, neither of the possible exceptions was relevant. Thus, neither the second nor the third ground could possibly apply. In any event, I will now explain why I did not find the Mother's arguments in support of her application persuasive.

Habitual residence

16 To begin with, the Mother argued that the test of habitual residence set out in the Judgment would cause uncertainty and that further guidance from the Court of Appeal was required. In essence, her contention was that the Court appeared, in the Judgment, to have laid down a two-step test of habitual residence. This test requires a court to ask, first, whether there is joint parental intention to relocate; and secondly, whether the children's length of stay in the new country was long enough to indicate sufficient integration. In her view, framing the test in this way gives primacy to parental intention and is a departure from the "child-centric hybrid approach" endorsed by the courts in other jurisdictions. Further, she submitted that although the Court said that the test of habitual residence required a court to consider all the circumstances of the case, in applying that test the Court applied two main factors, namely, parental intention and the length of stay of the children. It was unclear whether this two-step analysis was what the Court really meant to propound in the Judgment and, therefore, further guidance from the Court of Appeal would be to the public advantage.

17 For the purpose of dealing with the Mother's arguments, it is neither necessary nor desirable to elaborate on the test of habitual residence that the Court set out in the Judgment. It is sufficient to refer to the summary of the applicable principles at [74] of the Judgment. The Court noted that the question of habitual residence was "ultimately a question of fact to be determined having

regard to all the circumstances of the cases", which included the joint intentions of the parents and the objective indicia of the child's integration in the new jurisdiction. The Court added its observations on the two factors of parental intention and the children's length of stay, noting that joint parental intention could be a significant factor in determining the habitual residence of young children, and that the longer the period of the children's stay in the new country, the less relevant would be the parents' joint intentions in determining whether the child's habitual residence had changed. However, the Court stressed that none of this derogated from the general point that the search for habitual residence depended on all the circumstances of the case.

18 As this summary makes plain, parental intention and the length of stay of the children are but two factors to be weighed with all the circumstances of the case in determining a child's habitual residence. It is not correct, as the Mother contends, that the Court reduced the test of habitual residence to a two-step test. Thus, there was nothing that required clarification by the Court of Appeal and the Mother's main argument for granting leave to appeal was not convincing.

19 I would add that the extent to which the test of habitual residence the Court set out was "parent-centric" or "child-centric" is not a matter on which the Court of Appeal needs to provide clarification. These labels are not legal concepts; they are used by commentators to classify the various approaches to determining habitual residence that have been enunciated by contracting States to the Hague Convention. Whether the Court's formulation of the test of habitual residence should be characterised as "parent-centric" or "child-centric" is a debate whose proper province is beyond the courts. It cannot be a reason to grant leave to appeal.

20 The Mother argued, further, that the Court relied heavily on parental intention and the length of stay of the children even though it had stated that the test of habitual residence required a court to consider all the circumstances of the case. In my opinion, this argument could not justify a further appeal. At its highest, this argument is that the court should not have given significant weight to those two factors. The Mother essentially disagrees with the Court's application of the test of habitual residence and believes that a different court would reach a different result on the issue of the children's habitual residence. However, determining a child's habitual residence requires a court to consider and weigh various factors. The weight to be given to any one factor varies from case to case and involves a fact-sensitive value judgment. Even if an appellate court weighs the factors differently from a lower court, and thus reaches a different conclusion, its assessment is one made on the facts of the particular case. There is thus no question of general importance which would justify granting leave to appeal in the first place.

21 This reasoning is supported by the Court of Appeal's decision in *IW v IX* [2006] 1 SLR(R) 135. In that case, it was argued that the weight to be given to various factors in deciding whether custody with one parent was in the welfare of a child was a question of general importance which justified the granting of leave to appeal (at [25]). The Court of Appeal rejected this argument, explaining (at [27] to [28]) that the weight to be given to each of the various relevant factors varies from case to case and is essentially an exercise of judgment. Accordingly, the court was not satisfied that it should grant leave to appeal under the second and third grounds of *Lee Kuan Yew* ([7] *supra*).

Consent

22 Regarding the test of consent, the Mother argued that there was no evidence that she knew of the condition attached to the Father's consent. Nor had she agreed to it before moving to Singapore with the children. She said that it is unfair that she can be held to have "breached" the condition which was "retrospectively imputed" to her. She therefore submitted that it would be opportune for the Court of Appeal to provide guidance on when knowledge of a consent could be imputed and when such a condition can be found to have been breached.

23 I considered that guidance from the Court of Appeal is not necessary. Nothing was said in the Judgment about the need to analyse whether the abducting parent has knowledge of the conditions attached to a relocation, much less anything about breaching them. The focus was on whether, on a balance of probabilities, the left-behind parent – here, the Father – subjectively and unconditionally consented to the retention of the children in Singapore. The issue of the Mother's knowledge of the condition simply did not arise in this case. This point was not argued by either party before the Court and it did not feature at all in the Court's decision. It is a point best left to be explored, if at all, in a future case.

24 The thrust of the Mother's argument was that the Father's consent was not conditional in the way the Court had made it out to be. This explains her submission that "[t]here is not a shred of evidence that his consent to relocation was limited in duration to the time they would stay living as a family". As with her submissions on habitual residence, the Mother seemed to wish to persuade the Court of Appeal to re-assess the facts on the issue of the Father's consent

and come to a different conclusion. However, as I have already stated, that is not a reason for granting leave to appeal.

Conclusion

25 To sum up, I dismissed the application for leave to appeal primarily for the reason that this was a unanimous decision of a High Court bench comprising three Judges and, as I have explained, in such circumstances the default rule must be that leave to appeal will be refused. There must be exceptional circumstances to justify a further appeal. No such circumstance existed here. The Mother's application was nothing more than an attempt to obtain a chance to persuade a different court to reach a different legal conclusion on the facts, one that would be in her favour. That, however, is never on its own sufficient reason for granting leave to appeal.

Judith Prakash
Judge of Appeal

Yap Teong Liang and Tan Hui Qing (TL Yap & Associates) (instructed) and Rina Kalpanath Singh (Kalco Law LLC) (on record) for the Appellant/Respondent;
Wong Kai Yun, Han Shurou and Ng Huan Yong (Chia Wong LLP) for the Respondent/Applicant.