IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC(A) 24

Originating Application No 3 of 2022

In the matter of Orders 19, Rule 24, Rule 26 and Rule 35 of the Rules of Court (S 914/2021)

And

In the matter of Section 29A of the Supreme Court of Judicature Act 1969

And

In the matter of HCF/DCA 140/2021

Between

VXF

… *Applicant*

And

VXE

… *Respondent*

JUDGMENT

[Civil Procedure — Appeals — Leave]

TABLE OF CONTENTS

INTRODUCTION **1**

BACKGROUND **2**

OUR DECISION **5**

PRIMA FACIE ERROR OF LAW 6

QUESTION OF PUBLIC IMPORTANCE 9

THE JUDGMENT AFFECTS THE SUBSTANTIVE RIGHTS OF THE PARTIES 9

CONCLUSION **11**

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VXF
v
VXE

[2022] SGHC(A) 24

Appellate Division of the High Court — Originating Application No 3 of 2022
Woo Bih Li JAD and Hoo Sheau Peng J
11 May 2022

1 June 2022

Woo Bih Li JAD (delivering the judgment of the court):

Introduction

1 The present Originating Application ("OA") is an application by the applicant wife ("W") for permission to appeal against the decision of Debbie Ong J (the "Judge") on 13 April 2022 to orally dismiss HCF/DCA 140/2021 (the "Judgment" and "DCA 140" respectively). In the Judgment, the Judge had affirmed the decision of DJ Nicole Loh (the "DJ") in *VXE v VXF* [2021] SGFC 114 awarding, *inter alia*, care and control of the two children from the parties' marriage (the "children") to the respondent husband ("H") and relocation of the children to Indonesia. Having considered the parties' submissions, we dismiss the application. We give our reasons below.

Background

2 H and W divorced after about 11 years of marriage. They have two daughters who are 10 and 12 years old. H is an Indonesian citizen and W is an Australian citizen. The children hold dual citizenship, *ie*, Indonesia and Australia citizenship. The couple married in Indonesia in 2009 and lived in Indonesia until early 2011, around which time they moved to Singapore. In April 2020, H filed for divorce.

3 At the time of the hearing of the ancillary matters before the DJ, W and the children were in Singapore based on short-term visit passes, W having resigned from her employment in February 2021. As a result, her employment pass ("EP") was cancelled, which resulted in the children's dependent passes ("DPs") also being cancelled. Although the children had been studying at [School S] with student passes, these were also cancelled on 13 August 2021 due to W's residency status in Singapore. Hence, although W wanted to remain in Singapore with the children, this did not appear possible at that time. Accordingly, the DJ ordered on 15 October 2021 that H would have care and control of the children and that the children were to relocate to Indonesia (as sought by H).

4 On 19 October 2021, W filed a notice of appeal *vide* DCA 140 appealing against, *inter alia*, the DJ's orders in relation to care and control of the children by H and their relocation to Indonesia. DCA 140 was first heard together by the Judge with HCF/SUM 342/2021 ("SUM 342") (which was W's application to adduce further evidence in DCA 140) on 14 January 2022. On 17 January 2022, the Judge issued brief grounds of decision in DCA 140 (the "January 2022 Decision"). She found significant the evidence on W's latest immigration status which was sought to be adduced in SUM 342 and which the Judge held was to

be admitted. This evidence was that W's EP application submitted on 20 October 2021 had been approved and that W had an EP valid for a period of two years until 11 November 2023. W had subsequently obtained, on 13 November 2021, DPs for the children based on her EP. The Judge observed that the DJ had been constrained in the options available due to the immigration issues that were relevant at the time of the hearing before the DJ. However, bearing in mind that W was the primary and constant caregiver of the children throughout their lives, the Judge was of the view that it was appropriate and in the welfare of the children that W should have care and control of the children who would remain in Singapore with her, and that no leave was to be granted for the relocation of the children to Indonesia (the January 2022 Decision at [9], [15] and [22]). The Judge observed, however, that a court's decision to refuse an application for leave to relocate a child was not a permanent prohibition against future relocations (the January 2022 Decision at [20]). Furthermore, the Judge decided that the issues on access to the children after H returned to Indonesia and maintenance of W and the children would be addressed subsequently, after parties had time to consider how to work them out (the January 2022 Decision at [23]).

5 On 23 February 2022, H filed HCF/SUM 58/2022 ("SUM 58") for leave to adduce further evidence at the further hearing of DCA 140. This was in the form of an affidavit by H and consented to by W. H's affidavit addressed, broadly, issues of his proposed access to the children and expenses he would incur due to travels between Singapore and Indonesia to see them, and updates on his income.

6 Subsequently, on 3 March 2022, counsel for H wrote to the court stating that W's EP and the children's DPs had in fact been cancelled with effect from 28 February 2022, and that the children's short term visit passes would expire

by end April 2022. The following day, H filed FC/SUM 703/2022 ("SUM 703") in the Family Justice Courts seeking, *inter alia*, care and control of the children as well as leave to relocate with them to Indonesia. In his affidavit in support, H stated essentially the same matters raised in his counsel's letter: that sometime on 28 February 2022, he was made aware that W's employment had been terminated and her EP was cancelled, and that the children's DPs had been cancelled (at para 10). He therefore had "no other option than to apply to … seek the [c]ourt's urgent assistance once more" (at para 19).

7 At the hearing of DCA 140 on 7 March 2022, the Judge observed that H had filed SUM 703 in the Family Justice Courts. She was of the view that she had not concluded DCA 140 and was not *functus officio*, and asked counsel for H if the development would be "significant so that [she could] still consider it in DCA 140". Counsel for H then stated that if she would hear it, they would be happy to proceed under DCA 140. The Judge indicated that the termination of W's EP was significant. She was not keen to let matters drag with uncertainty about W's attempt to obtain an EP and about school for the children which was based on W's EP. The Judge decided that it would be best if the matters raised in SUM 703 were heard under DCA 140 and gave directions for this to be done as well as for W to file an affidavit in reply. DCA 140 was adjourned to be fixed for further hearing in early April 2022. The eventual hearing date was 13 April 2022.

8 On 11 April 2022, two days before the next hearing of DCA 140, W filed FC/SUM 1115/2022 ("SUM 1115") in the Family Justice Courts. In SUM 1115, W sought, *inter alia*, leave to relocate with the children to Australia, in the event that she was unable to obtain a fresh EP within one month from the date of an order from the court. In affidavits filed in SUM 1115, W and her fiancé deposed to their plan to get married and that he had applied for a Long-

Term Visit Pass ("LTVP") for her and would be applying for DPs for her and the children once they were married.

9 At the hearing of DCA 140 on 13 April 2022, the Judge noted that SUM 1115 was not before her and was of the view that it was not in the interest of the children to delay concluding DCA 140. Although W had blamed H for causing the termination of her employment and the consequential termination of her EP, the Judge noted again the cancellation of W's EP and the children's uncertain immigration status in Singapore. The Judge proceeded to dismiss DCA 140, and affirmed the DJ's decision on relocation as well as care and control of the children to be granted to H (the Judgment at [14]). The proceedings in SUM 1115 are currently on hold pending the outcome of the present OA, to which we now turn.

Our decision

10 The three grounds upon which permission to appeal may be granted are: (i) a *prima facie* error of law; (ii) a question of general principle decided for the first time; or (iii) a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage (*Lee Kuan Yew v Tang Liang Hong and another* [1997] 2 SLR(R) 862 at [16]). W seeks permission to appeal pursuant to the first and third grounds. W also cites an additional ground that the Judgment affects the substantive rights of the parties (*Aries Telecoms (M) Bhd v ViewQwest Pte Ltd (Fiberail Sdn Bhd, third party)* [2017] 4 SLR 728 ("*Aries Telecoms*") at [81]). Before we continue, we clarify that before 1 April 2022, the appropriate expression was "leave" to appeal, which has since been changed to "permission" to appeal under the Supreme Court of Judicature Act 1969 and the Rules of Court 2021.

Prima facie error of law

11 Under the ground of a *prima facie* error of law, W's key contention is that the Judge erred in not hearing SUM 1115, even though the Judge had considered SUM 703. It was argued that the Judge therefore did not consider all the facts and circumstances of the matter. Before dealing with this point, we note that W's other contentions under this heading concern alleged errors of fact, in respect of which permission to appeal is generally not available (*IW v IX* [2006] 1 SLR(R) 135 at [20]; *Engine Holdings Asia Pte Ltd v JTrust Asia Pte Ltd* [2022] 1 SLR 370 at [10]).

12 H's submissions in the present OA did not elaborate on the question of the non-hearing of SUM 1115, save to note the Judge's observations that SUM 1115 was in itself a concession that the children's immigration status in Singapore was uncertain, and that the children were far more connected to and familiar with Indonesia than Australia. H argued that W had "every opportunity" to canvass her position on the issues of care and control as well as relocation of the children in affidavits filed in the Family Justice Courts and DCA 140.

13 We make two preliminary observations. First, the question of the relocation of the children to Indonesia had been before the courts for some time, as opposed to SUM 1115. Furthermore, it appeared that H did not have adequate time to address W's position therein: H had filed an affidavit in SUM 1115 on 12 April 2022, the day after SUM 1115 had been filed. It appeared from the notes of a Case Conference on 10 May 2022 that this was in case the Judge would wish to consider SUM 1115, but H in fact wanted more time to file affidavits.

14 Second, although W's submission in the present OA stated that her request for SUM 1115 to be transferred to the Family Division of the High Court to be dealt with together with DCA 140 was "declined", the minute sheet for the hearing of DCA 140 on 13 April 2022 does not show that counsel for W made any such application. The Judge only stated that SUM 1115 was not before her, which was factually correct.

15 In any event, we consider the following points. As mentioned above, SUM 1115 is ostensibly for leave for W to relocate with the children to Australia, if W is still unable to obtain an EP. Having briefly considered the documents filed in SUM 1115 for the purposes of the present OA, we note that a large portion of W's supporting affidavit for that application concerns how H had allegedly caused her to lose her employment and her EP. A portion of her affidavit then mentions that she will marry her fiancé who is in Singapore, and she may then stay in Singapore. These two points could and should have been included in an affidavit for DCA 140 itself, before applying for leave to adduce it as evidence, in view of time constraints.

16 The final substantial portion of W's affidavit in SUM 1115 is on relocation to Australia. This is a new option raised at the eleventh hour. Perhaps that was why the summons for relocation to Australia was filed by W's solicitors in the Family Justice Courts instead of in the Family Division of the High Court. However, W must have been well aware, a considerable length of time before that, that there was uncertainty as to her immigration status in Singapore. She ought to have raised Australia as an alternative earlier, if that were a genuine alternative, to meet H's application for relocation to Indonesia. Such a position would mean that even if she would not be able stay in Singapore on a more permanent basis, her alternative would be to go to Australia. Unfortunately for her, she did not take that point earlier. The belated application for relocation to

Australia (as an alternative) was an unsatisfactory situation which W has to take responsibility for.

17 In the circumstances, we do not think it can be said that the Judge erred in not hearing SUM 1115 when she was prepared to hear the matters raised in SUM 703. SUM 703 concerned new evidence pertaining to an issue which could still be re-visited in DCA 140, namely the immigration status of W and the children. On the other hand, in SUM 1115, W sought to raise a different and new issue on relocating to Australia which had never been raised previously. The two applications cannot be equated. Also, had the Judge decided to have the question of relocation to Australia fixed for hearing before her, there would have to be a further adjournment to give time to H to file a more substantive affidavit in reply. In the circumstances, it is difficult to say that the Judge erred in the exercise of her discretion not to give directions for the relocation matter raised in SUM 1115 to be heard by her. In any event, the Judge's decision would not have been an error in law.

18 We also note that W's argument on how H allegedly caused W to lose her employment and her EP was considered by the Judge, who was of the view that there was insufficient information to make that serious finding (the Judgment at [9]). The Judge also noted that even if this were the case, W's uncertainty in securing an EP had occurred even before the alleged incident of H contacting her previous employers. Apart from having had her EP cancelled in February 2021 after resigning from her employment at the time, as noted above, W had also failed in three other different applications for EPs and LTVPs (the Judgment at [8]).

19 If W is very likely to marry her fiancé and it is likely that he will be able to secure DPs for her and the children, that may well be a different matter.

However, and importantly, W has not asserted that as a ground for the present OA, beyond saying that the Judge ought to have heard SUM 1115, which is a summons for relocation to Australia. In any event, if W re-marries, it may be the basis of an application for variation of the order of care and control to H and relocation of the children to Indonesia, based on a material change in the circumstances. Whether such an application will succeed is, of course, another matter.

Question of public importance

20 We turn to W's contention of a question of importance on which further argument and a decision of a higher tribunal would be to the public advantage. Essentially, W argued that the Judgment "exposes a loophole" that a person may exploit in seeking to be granted care and control of children as well as relocation and there are a substantial number of expatriates in Singapore. W submitted that the parent seeking relocation can refuse to enrol the child in a school in Singapore or interfere with the other parent's employment in Singapore, in order to successfully obtain a relocation order to his desired country. However, as mentioned above at [18], the Judge thought that there was insufficient evidence that H had caused W to lose her employment and her EP. This was not a case where such a finding had been made and yet the Judge found it irrelevant. W cannot turn a decision based on a lack of evidence into a question of law, let alone one of public importance.

The Judgment affects the substantive rights of the parties

21 As for W's final argument on her substantive rights being affected by the Judgment, that is not a reason *per se* to grant permission to appeal. The observation in *Aries Telecoms* that the order concerned affected the substantive rights of the parties and that leave to appeal should be granted, if leave was

required (at [81]; see also *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) at para 56/3/2) must be read in the context of the specific facts of that case. That case was concerned with whether leave to appeal was required in relation to the determination of a preliminary issue by the High Court under O 14 r 12 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). Such a determination had been made concerning the plaintiff's entitlement to various reliefs, after an interlocutory judgment had been entered in its favour with damages to be assessed. It was therefore expected that the parties would carry on with the assessment of damages based on the court's determination to curtail the types of relief that the plaintiff was entitled to. Notably, the High Court found that leave to appeal was not required in relation to its decision. Since an order had been made which finally disposed of the substantive rights of the parties regarding the entitlement to those reliefs, it was not considered "an order at the hearing of an interlocutory application" as provided in para (e) of the Fifth Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), which was intended to "restrict the proliferation of appeals to the Court of Appeal only where no substantive right was in issue" (at [50]). However, the court did mention, in *obiter*, that if leave to appeal was required, the court would have granted leave as the parties' substantive rights would be in issue (at [81]). This was because there was a continuing dispute before the same court on the quantum of relief which the plaintiff was entitled to, and this would be affected by the decision to curtail the types of relief which the plaintiff was entitled to in the first place. If the plaintiff had waited for the quantum to be determined with such a curtailment, it would have been too late for it to appeal against the initial determination to curtail the types of relief which it was entitled to. Therefore, the decision in *Aries Telecoms* does not stand for the proposition that where a substantive right is engaged and where permission to appeal would otherwise be necessary, it would follow that permission to appeal should be granted.

Conclusion

22 We therefore dismiss the present OA and award costs fixed at $5,000 (all in) to H, which shall be payable by W. The usual consequential orders will apply.

Woo Bih Li Judge of the Appellate Division	Hoo Sheau Peng Judge of the High Court

Hing Wei Yuen Angelina and Denny Lin Dianyan (Integro Law Chambers LLC) for the applicant;
Foo Siew Fong and Oon Weishein Deseree (Harry Elias Partnership LLP) for the respondent.