1KBW

Setting aside orders

JENNIFER PALMER

Setting aside orders

JENNIFER PALMER | JPALMER@1KBW.CO.UK

The background – 'alternative finality'

1. Section 31F (6) of the Matrimonial and Family Proceedings Act 1984:

   '*(6) The family court has power to vary, suspend, rescind or revive any order made by it, including –*

   (a) *power to rescind an order and re-list the application on which it was made,*

   (b) *power to replace an order which for any reason appears to be invalid by another which the court has power to make, and*

   (c) *power to vary an order with effect from when it was originally made.*

2. This is the power given to the Family Court, but not the Family Division of the High Court.

3. Section 17 of the Senior Courts Act 1981:

   '*17 Applications for new trial*

   1. Where any cause or matter, or any issue in any cause or matter, has been tried in the High Court, any application for a new trial thereof, or to set aside a verdict, finding or judgment therein, shall be heard and determined by the Court of Appeal except where rules of court made in pursuance of subsection (2) provide otherwise.

   2. As regards cases where the trial was by a judge alone and no error of the court at the trial is alleged, or any prescribed class of such cases, rules of court may provide that any such application as is mentioned in subsection (1) shall be heard and determined by the High Court.

   3. Nothing in this section shall alter the practice in bankruptcy.'

4. Rule 4.1 (6) 2010 Family Procedure Rules:

   '*(6) A power of the court under these rules to make an order includes a power to vary or revoke the order.*'

5. How then to approach applications to set aside orders in abduction proceedings (whether proceedings are under Brussels II, the 1980 Hague Convention or the inherent jurisdiction) when these applications are made and heard in the Family Division of the High Court?

6. Should it be possible to set aside final orders in summary return cases? Does this undermine the very purpose of the Hague Convention?

Technical hitches – is there jurisdiction to set aside?

7. Does the High Court in fact have the power to set aside its own orders in abduction proceedings? In recent months, the Court of Appeal has twice been asked to consider the High Court's jurisdiction to set aside return orders which had been made by a judge at the same level:

(a) Re H (child) [2016] EWCA Civ 988

8. The Court of Appeal determined that it was not necessary to rule upon the question, as the order in that case was a wardship order which could be varied by the first instance court if the child's welfare so required.

9. Black LJ delivered the judgment of the court and consideration of the issue of jurisdiction to set aside is found at paragraphs 9 — 15, with her decision as follows:

> *"12. I would not give permission for the father's grounds of appeal to be pursued. For reasons which I will set out below, I would allow the child's appeal in relation to the July order and set it aside. If my Lords agree with that course, there will have to be a fresh start for the proceedings in any event and the question of whether a judge, in the position of Judge Bromilow, could entertain an application such as the mother's would not require determination. This appeal gives rise to other issues which are of significant difficulty and it is undesirable, in my view, that attention should be diverted from those issues in order to arrive at a definitive determination of a dispute without practical consequences.*
>
> *13. In any event, I am not persuaded as to the merits of the father's arguments which, it seems to me, fail to recognise what Judge Bromilow's role really was at this stage in the proceedings. By the time that the mother's application reached Judge Bromilow, it was characterised as an application to set aside the July consent order. It is perhaps not surprising that this characterisation generated arguments about whether a first instance judge is entitled subsequently to revisit his own decision or that of another judge of the same level, and as to the technicalities that might attend an application to set aside in the High Court. However, an unfortunate consequence of this focus upon technicalities appears to have been that the true nature of the court's task was obscured. Judge Finnerty's order was made in the context of wardship, and A's best interests were therefore the determining consideration on that day. To use the terminology adopted by Mr Williams QC (who with Ms Jacqueline Renton represented A in the appeal) in his oral submissions, it was a welfare order. The parents' cross-applications which ultimately came on for trial before Judge Bromilow were also made within the wardship proceedings. The situation was not, therefore, the same as that in proceedings under the 1980 Hague Convention, and authorities dealing with such proceedings (as does Re M (Abduction: Undertakings)) are not of assistance. Equally, reliance on Re M (Abduction: Non-Convention Country) may not be helpful either because, although this was not a Hague Convention case, the court still applied Hague Convention principles. That would not happen now as, in Re J (Child Returned Abroad: Convention Rights) [2005] UKHL 40 [2005] 2 FLR 802, the House of Lords held that the outcome must be dictated by the welfare of the child and that the specialist rules and concepts of the Hague Convention should not be applied by analogy in non-Convention cases.*
>
> *14. Once the return order in relation to A is seen as a product of the court's normal welfare jurisdiction in wardship, it seems to me that it should be evident that if the child's welfare so required, the court could revisit it. The idea that it would not be able to do so at all (because only the Court of Appeal could handle the matter), or not be able to do so unless strict criteria for setting aside an order were satisfied, runs counter to the purpose of wardship, which is designed to respond flexibly to the best interests of the child at any given time.*
>
> *15. Although counsel for the father (Mr Vine QC, who did not appear below, and Mr Bennett, who appeared in front of Judge Bromilow) seemed in writing to be advancing the case that Judge Bromilow simply had no jurisdiction to set aside the return order, after discussion during the appeal hearing, it became apparent that the argument was, in fact, more one of form than of substance.*

Mr Vine conceded that if the mother had made an application for variation of the July order, he could not have submitted that the court was not entitled to deal with it. His argument was based upon that not having been the form of her application. In fact, however, the mother did seek a variation of the return order (see the extract from her application form at paragraph 4 above), albeit that she confined the basis upon which this variation was sought. Furthermore, Judge Bromilow would have been entitled to vary the order of his own motion if A's best interests required it. Proceedings under the inherent jurisdiction of the High Court in relation to children are "family proceedings" (section 8(3)(a) of the Children Act 1989) and, in family proceedings, the court can make a section 8 Children Act order even if no application has been made (section 10(1)(b) ibid). And if there is any question as to whether the order sought by the mother amounted to a section 8 order, the judge was, in my view, entitled to act of his own motion in relation to his ward's best interests. Whether it is appropriate, in the exercise of these powers, to do anything other than enforce the original consent order will, of course, always depend upon the circumstances of the individual case. For example, if a party were to return to court the day after the order, unable to point to any significant changes that had taken place, he or she could not normally expect to succeed in displacing the previous day's order, and could anticipate his or her application being dispatched in very short order. But the reason why a subsequent application such as this will have foundered immediately is because that is what is required in the best interests of the child, and not because the court had no jurisdiction to entertain it."

(b) Re F (Children) [2016] EWCA Civ 1253

10. In this case it had been conceded by all parties at the first instance hearing that, in an appropriate case, the High Court can set aside a return order made under the 1980 Hague Convention. The appellant did not seek to argue otherwise at the appeal hearing but did argue that guidance was required on the subject and so invited the Court of Appeal to deal with the law concerning applications to set aside return orders made under the 1980 Hague Convention within its judgments.

11. Black LJ again gave the court's judgment and declined to make definitive pronouncements, albeit that the appeal was refused and the Court of Appeal upheld the decision of Mr Cohen QC which had set aside return orders made previously within the proceedings The relevant passage of Black LJ's judgment is as follows:

"[26] It was conceded by the father before Mr Cohen QC that, in an appropriate case, the High Court can set aside a return order made under the 1980 Hague Convention and Mr Gupta QC did not seek to argue otherwise on appeal. Had he sought to do so, he would, of course, have had to surmount the obstacles which stand in the way of those who seek to raise a new point only on appeal (see, for example, the notes at 52.8.2 of the White Book). As it was the case of both the mother and L that the judge had power to make the order that he did, we therefore received no submissions questioning that proposition. An argument to the contrary was mounted in Re H (child) [2016] EWCA Civ 988 (see §§9-11) but, for the reasons set out in §§12 – 14 of Re H, it was unnecessary to rule upon it, the order in that case being a wardship order which could be varied by the first instance court if the child's welfare so required.

27. In the absence of comprehensive submissions, I would be reluctant to make definitive pronouncements upon the subject of the existence, and, if it exists, the nature, of the High Court's power to set aside 1980 Hague Convention return orders. The one reported example of the exercise of such a power is the decision of Mostyn J which was cited by Mr Cohen QC in this case, namely TF v PJ [2014] EWHC 1780 Fam, reported as Re F (A Child)(Return Order: Power to Revoke) [2015] 1 WLR 4375, where Mostyn J relied upon Rule 4.1(6) of the Family Procedure Rules 2010. However, although I am not prepared to hazard a view as to whether the power actually does exist, I do acknowledge that TF v PJ and the instant case show that it is plainly desirable that there should be such a power in the High Court, albeit that it can be anticipated that it would rarely be used. If an application to set aside an order made under the 1980 Hague Convention could only be made to the Court of Appeal, this would have considerable practical disadvantages which would be likely to work against the interests of the children whose welfare should be served by the Convention. The Court of Appeal is not well suited to hearings of the type that would be required as, for example, Thorpe LJ explained in the case of Walley v Walley [2005] EWCA Civ 910 at §14. Although

every effort is made to accommodate Hague cases speedily in the Court of Appeal, any application would have to take its turn in an already very over-charged list. It would require determination by two or three judges rather than one. The only appeal route from the Court of Appeal's decision would be to the Supreme Court. And it would, furthermore, not be feasible for the same judges to deal with the application to set aside and any resulting re-hearing of the original return application."

12. It therefore remains to be clarified whether rule 4.1(6) FPR 2010 specifically does provide the exception envisaged pursuant to s.17(2) of the Senior Courts Act 1981 in the context of 1980 Hague Proceedings.

13. There is a line of jurisprudence within the civil authorities which holds that the equivalent rule within the Civil Procedure Rules (rule 3.1(7), which is drafted identically) allows the High Court to set aside its own orders (whilst emphasising the limited ambit of such a power)[1]. It would be anomalous if this was a power available to the Queen's Bench and Chancery Divisions of the High Court, but not the Family Division of the High Court.

14. In *TF v PJ* [2014] EWHC 1780 Fam, Mostyn J relied upon rule 4.1(6) of the Family Procedure Rules 2010 to revoke a return order in Hague proceedings. He held that this rule was not confined to only procedural or case management orders, but applied to final orders in all family proceedings, with Hague Convention proceedings being 'quintessentially' proceedings about children. However, it is notable that the Court of Appeal had the opportunity to expressly approve Mostyn J's decision in that case, and did not do so.

15. It is also notable that when the question arose of the court's power to set aside its own final orders in financial remedy proceedings[2], the apparent lacuna was addressed by statutory amendment – namely the insertion of s.31F(6) into the Matrimonial and Family Proceedings Act 1984 (as above)) and the insertion of a new rule 9.9A into the FPR 2010 which is expressly made pursuant to s.17 of the Senior Courts Act 1981. There has been no such statutory amendment for proceedings under the 1980 Hague Convention.

Fairness, finality and flexibility

16. This is not (merely) a boring, technical issue of drafting – there are policy implications which fall to be considered. Is it right at all that a party should be able to make an application to set aside a final order for return in Hague Convention proceedings?

17. It might fairly be argued that if a party can apply to set aside a final return order, this would 'drive a coach and horses' through the whole policy underlying the summary nature of Hague Proceedings.

18. This must be particularly so if the set aside application follows an unsuccessful appeal. In *Re F (Children)* [2016] EWCA Civ 1253, before the mother made the (upheld) application to set aside return orders, she and the eldest child had already unsuccessfully appealed the original return orders.[3] The eldest child had also already unsuccessfully applied to set aside the original return orders, (after her appeal was refused), and had also been refused permission to appeal the first set aside decision. Is the concept of finality not central to the principle of fairness?

19. Further, is the concept of finality not central and fundamental to the very operation and success of the Hague Convention? It could be argued that the decision in Re F (Children) undermine the purpose and policy of the treaty.

20. Against those arguments runs the core proposition that whilst the child's welfare is not 'paramount', it is well established that in proceedings under the 1980 Hague Convention and/or Brussels II, the welfare of the children concerned is a 'primary consideration'. See, inter alia, article 3.1 of the UN Convention on the Rights of the Child; article 24 of the Charter of Fundamental Rights of the European Union; *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27 at paragraphs 12 – 18.

21. These are proceedings which concern children. The court must be able to adapt to new circumstances as they develop in order to remain faithful to the overarching principle. A court should arguably be more willing to set aside orders as new circumstances demand in cases concerning a child's welfare, rather than in ordinary civil cases where considerations of finality may carry greater force. Fairness, in all children cases, must allow an element of flexibility to respond to children's interests at a given time.

The grounds for an application to set aside

22. Given that there is no definitive answer as to the existence of the High Court's power to set aside its own orders in child abduction proceedings, there is not a definitive answer as to what the test for such an application may be.

23. Nonetheless, if you agree that such a power in the High Court is 'plainly desirable' and are contemplating make a set aside application in one of your cases, the following may be useful considerations:
    (a) Permission is not required, unlike the procedure for an appeal.[4]
    (b) Have regard to the rarity (and perhaps, therefore, prospects of success) of such applications – see for example Black LJ's comment above that '*it can be anticipated that* [the power to set aside] *would rarely be used*.'
    (c) The court's ability to set aside orders is not unbounded but is a discretion which requires principled curtailment.[5]
    (d) The appropriate test in any abduction proceedings is likely to be whether there has been a material change of circumstances to justify the setting aside or revoking of an original return order.[6]

24. Whether or not a change of circumstances is material will depend upon the facts and context of each specific case. What may tip the scales in one case may not suffice in another: for example, in a finely balanced case, a change need not be very significant in order to tip the balance towards a different conclusion. In contrast where the original decision has been made on the basis of overwhelming evidence it may require any change of circumstances to be very substantial indeed in order to be 'material'.

Watch this space

25. In *Re F (Children)* Black LJ (a) commented that it is plainly desirable that the High Court has the power to set aside its own orders in Hague Convention proceedings; and (b) identified the considerable practical disadvantages (which would be likely to work against the interests of the children whose welfare should be served by the Hague Convention 1980), should a set aside application only be made the Court of Appeal.

26. Perhaps we can expect an amendment to the relevant procedural rules to hit the statute books near us, 'soon'!

END NOTES

[1] Extensively reviewed in the Court of Appeal in Tibbles v SIG PLC [2012] EWCA Civ 518 and cited with approval thereafter, see for example Arif v Zar & Anor [2012] EWCA Civ 986 [Patten LJ at paragraph 27] and *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537 [at paragraph 44].

[2] See Gohil [2015] UKSC 61 and Sharland [2015] UKSC 60.

[3] Re F [2016] EWCA Civ 546

[4] See the President's judgment in CS v ACS [2015] EWHC 1005 (Fam) at paragraph 13, (a matrimonial finance case, but the principle in respect of permission to commence an action to set aside should still apply).

[5] As per Lord Dyson MR in *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537, at paragraph 44.

[6] Materiality' is the test identified by the Court of Appeal in *Tibbles v SIG* PLC [2012] EWCA Civ 518; In TF v PJ [2014] EWHC 1780 (Fam) Mostyn J uses both 'significant' and 'material' seemingly interchangeably to describe the requisite change of circumstances.

1KBW

JENNIFER PALMER

T 0207 936 1500 E jpalmer@1kbw.co.uk
1 King's Bench Walk, London EC4Y 7DB