NOTE: ANY PUBLICATION OF A REPORT OF THESE PROCEEDINGS MUST COMPLY WITH S 139 OF THE CARE OF CHILDREN ACT 2004

IN THE SUPREME COURT OF NEW ZEALAND

SC 2/2009
[2009] NZSC 4

BETWEEN	MT Appellant
AND	DH Respondent

Court: Elias CJ, McGrath and Wilson JJ

Counsel: Applicant in Person
J E Key for Respondent

Judgment: 4 February 2009

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The order made on 16 January 2009 in this Court precluding return of the children lapses.

REASONS

[1] The applicant seeks leave to appeal against a judgment of the Court of Appeal in relation to proceedings for the return of her two children to Australia. The proceedings were brought by the respondent, who is the father of the two children, under the provision of Subpart 4 of Part 2 of the Care of Children Act 2004. The applicant has also applied for a stay of proceedings in respect of the return order.

[2] The parties are New Zealanders who moved to Australia in 2002. The children were born in Australia and lived there with the parties until they separated.

In February 2008 the applicant brought the children with her to New Zealand. The father applied for the children to be returned and on 10 September 2008, following a contested hearing, an order for their return was made by Judge Callinicos in the Family Court. An appeal by the applicant was dismissed, and the Family Court's order confirmed, in a judgment of the High Court delivered on 28 November 2008.

[3] The applicant applied for leave to appeal to the Court of Appeal against the High Court judgment. That application will be heard later this month. She also applied for a stay. The latter application was refused by a Judge of the Court of Appeal on the basis that the proposed grounds of appeal have no substance.

[4] The application to this Court has been treated as one for leave to appeal against the refusal of a stay. Written submissions on leave to appeal have now been received from the parties in accordance with accelerated timetable directions.

[5] In the High Court Mallon J, following a contested hearing, rejected the applicant's contentions that certain statutory requirements, under s 105(1)(b) and (c), for an order for return, had not been made out. The Judge held that at the time of their removal from Australia the respondent had custody rights in respect of the children which were being exercised by him. The Judge also rejected a submission that there were grounds for refusing an order for return under s 106. In particular she rejected an argument that there was grave risk of harm to the children if they were returned. For these reasons the appeal was dismissed.

[6] As indicated, the application for leave to appeal to the Court of Appeal has not yet been heard. The applicant has put the same arguments to us as to the Court of Appeal Judge who refused to order a stay. As well, certain new arguments were foreshadowed as grounds for appeal, including that the removal breached the children's rights and retention in New Zealand was justified under Family Court orders made in New Zealand.

[7] In considering whether to give leave to appeal against the order made in the Court of Appeal refusing a stay, we are required by s 13(4) of the Supreme Court Act 2003 not to give leave unless it is necessary in the interests of justice for the

appeal to be heard and determined prior to the conclusion of the Court of Appeal proceedings. That involves consideration of, in this case, whether the appeal against refusal of a stay involves a matter of general or public importance or a substantial miscarriage of justice may have occurred.

[8] The applicant has raised in her submissions a number of issues, in very general terms. She alleges breaches of her fundamental rights, those of the children's maternal grandmother, and breaches of statutory requirements for return orders. She also challenges the policy of the legislative provisions giving effect to the Hague Convention on the Civil Aspects of International Child Abduction. She wishes to raise new arguments in relation to s 105(d) and 106(e). The former proposition is that the children were not habitually resident in Australia at the time of removal. The latter reiterates concerns about protection of fundamental rights.

[9] We are satisfied that none of the matters raised by the applicant as a basis for appealing against the refusal to grant a stay raises a question of general or public importance. The other question is whether refusal of a stay by the Court of Appeal Judge was in error because it might lead to a miscarriage of justice through the children being returned prior to determination of the application for leave to appeal to the Court of Appeal. As indicated, the Judge who refused the stay was not persuaded that there was sufficient merit in that application to warrant granting a stay.

[10] The issue on appeal to this Court would be whether the Judge's determination refusing a stay, which in the end was based on his view of the weight of the competing considerations, was wrong. It is important to note that the fact that an application for leave to appeal may become nugatory of itself is not determinative of this issue. It is, however, a relevant factor, as the Judge recognised. So was the Judge's view that the grounds for the application for leave were weak. On an appeal the applicant would need to show the decision was wrong. We are satisfied that the points made in her submissions fall well short of demonstrating she has an arguable case. In those circumstances, we are not satisfied that a substantial miscarriage of justice may occur unless the appeal is heard.

[11] The application is accordingly dismissed and the order made on 16 January 2009 in this Court precluding return of the children pending determination of the application for leave lapses.

Solicitors:
John W Key, Fielding for Respondent