NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION PLEASE SEE WWW.JUSTICE.GOVT.NZ/FAMILY/LEGISLATION/RESTRICTIONS.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA599/2010
[2010] NZCA 618

BETWEEN	L Applicant
AND	K Respondent

Hearing: 13 December 2010

Court: Chambers, Randerson and Stevens JJ

Counsel: C R Carruthers QC and J H Hunter for Applicant
M J Southwick QC and R A Hacking for Respondent

Judgment: 16 December 2010 11:00:00

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant is to pay costs to the respondent for a standard application on a Band A basis and usual disbursements.

Introduction

[1] The parties to this application are the parents of two children aged 7 and 5 years. We will refer to the applicant mother as L and to the respondent father as K.

[2] L applied under s 44 of the Care of Children Act 2004 (the Act) for permission to relocate the children to Australia. The application was granted by Judge David Mather in the Family Court on 3 July 2009.[1]

[3] K appealed to the High Court. After a three day hearing, Miller J allowed the appeal in a decision given on 17 August 2010.[2] The effect of the High Court decision is that L may not relocate the children to Australia.

[4] L now seeks leave to appeal to this Court under s 145(1)(b) of the Act. Counsel are agreed that the relevant principles in relation to the grant of leave for a second appeal are those set out by this Court in *Waller v Hider*.[3] These principles were later endorsed in *Downer Construction (NZ) Ltd v Silverfield Developments Ltd*.[4] In summary these principles are:

- The appeal must raise some question of law or fact capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the further appeal.
- In the end, the guiding principle must be the requirements of justice.
- Upon a second appeal, this Court is not engaged in the correction of error. Its primary function is to clarify the law and to determine whether it has been properly construed and applied by the court below.

The points proposed to be taken on appeal

[5] Mr Carruthers QC advanced two particular grounds in support of the application for leave:

---

1 *L v K* FC Waitakere FAM-2007-090-1546, 3 July 2009.
2 *L v K* HC Auckland CIV-2009-404-4457, 17 August 2010.
3 *Waller v Hider* [1998] 1 NZLR 412 at 413; and see also *X v Y* [2006] NZFLR 237 (CA); *SLB v The Secretary for Justice* [2007] 3 NZLR 447 (CA); and *Smith v Adam* [2007] NZFLR 447 at [14] (CA).
4 *Downer Construction (NZ) Ltd v Silverfield Developments Ltd* [2007] NZCA 355, [2008] 2 NZLR 591.

(a) Miller J erred by adopting the approach decided by this Court in *B v K*.[5] This was found to be incorrect by the decision of the Supreme Court on appeal in *K v B*,[6] a decision delivered after Miller J's judgment.

(b) The Judge erred in the approach to the appeal mandated by the decision of the Supreme Court in *Austin Nichols & Co Inc v Stichting Lodestar.*[7]

[6] We deal with each of these points in turn.

Error arising from the adoption of the approach of this Court in *B v K*

[7] Sections 4 and 5 of the Care of Children Act 2004 provide:

> **4 Child's welfare and best interests to be paramount**
>
> (1) The welfare and best interests of the child must be the first and paramount consideration—
>
> (a) in the administration and application of this Act, for example, in proceedings under this Act; and
>
> (b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.
>
> (2) The welfare and best interests of the particular child in his or her particular circumstances must be considered.
>
> (3) A parent's conduct may be considered only to the extent (if any) that it is relevant to the child's welfare and best interests.
>
> (4) For the purposes of this section, and regardless of a child's age, it must not be presumed that placing the child in the day-to-day care of a particular person will, because of that person's sex, best serve the welfare and best interests of the child.
>
> (5) In determining what best serves the child's welfare and best interests, a Court or a person must take into account—

---

5 *B v K* [2010] NZCA 96, [2010] NZFLR 865 at [50] – [52].
6 *K v B* [2010] NZSC 112,[2010] NZFLR 884.
7 *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 4 NZLR 141.

(a) the principle that decisions affecting the child should be made and implemented within a time frame that is appropriate to the child's sense of time; and

(b) any of the principles specified in section 5 that are relevant to the welfare and best interests of the particular child in his or her particular circumstances.

(6) Subsection (5) does not limit section 6 (child's views) or prevent the Court or person from taking into account other matters relevant to the child's welfare and best interests.

(7) This section does not limit section 83 or subpart 4 of Part 2.

5. Principles relevant to child's welfare and best interests

The principles referred to in section 4(5)(b) are as follows:

(a) the child's parents and guardians should have the primary responsibility, and should be encouraged to agree to their own arrangements, for the child's care, development, and upbringing:

(b) there should be continuity in arrangements for the child's care, development, and upbringing, and the child's relationships with his or her family, family group, whanau, hapu, or iwi, should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents):

(c) the child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation among and between the child's parents and guardians and all persons exercising the role of providing day-to-day care for, or entitled to have contact with, the child:

(d) relationships between the child and members of his or her family, family group, whanau, hapu, or iwi should be preserved and strengthened, and those members should be encouraged to participate in the child's care, development, and upbringing:

(e) the child's safety must be protected and, in particular, he or she must be protected from all forms of violence (whether by members of his or her family, family group, whanau, hapu, or iwi, or by other persons):

(f) the child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

[8] The error identified by the majority of the Supreme Court in *K v B* was that this Court fell into error by suggesting that s 5(b) was to be given "some priority or

weighting as between the various principles", drawing attention to the bracketed words at the end of s 5(2)(b). The majority of the Supreme Court held:[8]

> The bracketed portion of principle (b), containing as it does the words "in particular", creates internal emphasis within principle (b). It does not signal that any aspect of principle (b) has presumptive emphasis or priority as against the other lettered principles in s 5.

[9] The minority in the Supreme Court did not consider there was any error in the Court of Appeal's approach. All five members of the Supreme Court agreed that any error of approach by the Court of Appeal was not material to the outcome.

[10] The written submissions advanced on behalf of L maintained that Miller J had wrongly adopted a presumptive approach against relocation which was said to be contrary to the Supreme Court's decision in *K v B*. In oral argument, Mr Carruthers submitted that it was sufficient for the purposes of a leave application to establish that the Judge had adopted an approach which was incorrect in law. Consideration of the effect of that error was a matter to be determined on the substantive appeal. He drew our attention to passages in the judgment of Miller J which, he submitted, showed that the Judge had taken an inappropriately narrow view of the matters he was required to consider under ss 4 and 5.

[11] We are unable to accept L's submissions on this point. The Judge recorded the agreement of the parties that: [9]

> … the Judge [Judge Mather] correctly identified the main issue in the case as the impact of the decision to relocate or not on the children's relationships with their parents. On the one hand, relocation will harm the relationship with their father; on the other, if they must remain in New Zealand then the mental state of their mother and primary caregiver may deteriorate, affecting their relationship with her.

[12] However, Miller J did not limit his consideration to the identified issues:

- He correctly identified, on a number of occasions, that the welfare of the children was of paramount concern in deciding whether to permit

---

8 At [28].
9 At [30].

relocation.[10]

- He noted the views of academic commentators and a paper presented by the Principal Family Court Judge discussing the weight to be given to the child's relationship to both parents in relocation cases[11] but without necessarily endorsing such material.

- He correctly identified that the s 5 principles relevant to the case at hand were those in paras (a) to (d).

- He found it convenient to evaluate the evidence by considering the impact of relocation (or not) on the parental relationships and guardianship roles, before turning to relationships with the wider family.

- He identified as the dominant issue, as put by counsel for the children:[12]

  > Whether on the one hand the children's primary attachment to their mother will be compromised should she remain in New Zealand and, on the other, whether their relationship with their father would suffer should they relocate to Australia.

- He noted that the case at hand differed from others in that, because of L's mental health issues, remaining in New Zealand was not "costless so far as child-parent relationships are concerned".

- L's mental health issues, while deserving of sympathy and concern, were influential only insofar as they affected the children's welfare. He gave careful consideration to the consequences in this respect should permission to relocate be granted or declined.

- He also considered the degree of conflict between the parties and the effects on the children's welfare of such conflict.

---

10 For example, at [32].
11 At [33].
12 At [60].

- He considered the relationship of the children with the respective grandparents and the impact the grant of permission to relocate might have in respect of those relationships.

[13] The Judge's final conclusions are expressed in the following terms:

> [77] The decision turns on the impact of relocation, or not, on the children's relationships with each parent. On the one hand I am satisfied that if they relocate their important and promising relationship with K will suffer greatly, to the point perhaps of being lost altogether. On the other, their primary relationship with L is intact and strong, and it will remain so if they do not relocate unless she suffers severe depression causing her to become emotionally unavailable to the children. The risk of that happening is real, notwithstanding treatment and some reduction in stress when the litigation ends, but it is much less concrete than the risk to the children's relationship with K should they relocate.
>
> [78] Although the balance of risk to child-parent relationships falls clearly in the end at this time, the decision is a weighty one because it does entail accepting a risk to L's mental health, a risk that I am very aware of the health professionals preferring to avoid. The Court cannot deal with it so easily. There is some force in Ms Southwick's argument that the experts and the Family Court responded to L's condition by taking a parent-centred approach to the decision. If the decision were governed by the interests of the parents, L might well prevail. But the legislation not only adopts the welfare of the children as the first and paramount consideration but also, as interpreted in *B v K*, attaches some priority to the maintenance of their relationships with both parents.

[14] We do not discern anything in the High Court judgment suggesting that a presumptive approach for or against relocation was adopted by the Judge. Indeed, the reverse is the case. The Judge carefully weighed the issues which would affect the children's welfare if relocation were permitted and then considered the counter-factual situation, ie if permission were declined.

[15] There is no indication that the Judge gave inappropriate weight to the importance of maintaining the relationship between the children and both parents, or that he gave undue weight to the importance of maintaining the relationship with K. The statement made by the Judge at [78] of his judgment refers to "some priority" being given to the maintenance of the children's relationship with both parents. But we do not consider it is seriously arguable that this led the Judge into error in his conclusions, given his clear view as to where the balance of the risk to child-parent

relationships fell. There is nothing to suggest that the Judge lost sight of the welfare of the children as the first and paramount consideration.

[16] The Judge accorded greater weight than the Family Court Judge did to the maintenance of the children's relationship with K, but he was entitled to take that view. He did not do so at the expense of failing properly to weigh the children's relationship with L and the importance of maintaining their relationship with both parents.

[17] We do not accept Mr Carruthers' submission that it is sufficient for L simply to establish an error of law. It must be shown at the leave stage that there is a material error of law or fact capable of bona fide and serious argument. We are not satisfied that there was an error of law or that there is any arguable case that any such error was material to Miller J's decision in the sense that it may have led him to reach a different conclusion.

The alleged error of approach as mandated by *Austin Nichols*

[18] Mr Carruthers drew our attention to a passage in the decision of the Supreme Court in *K v B* referring to the Supreme Court's earlier decision in the *Austin Nichols* case. As is well understood, an appellate court has responsibility on a general appeal to consider the merits of the case afresh. The weight it gives to the court or courts below is a matter for the appellate court's assessment. Mr Carruthers particularly emphasised that the Supreme Court in *K v B* had said:[13]

> … if the appellate court admits further evidence, that evidence will necessarily require de novo assessment and consideration of how it affects the correctness of the decision under appeal.

[19] Mr Carruthers submitted that the Judge had erred by focusing wholly or mainly on the fresh evidence led in the High Court and had failed properly to consider the evidence presented in the Family Court. He also submitted that, in the circumstances, this might have been a case where the Judge should have re-heard all the evidence de novo.

---

[13] At [31].

[20] We are unable to accept this submission. The Judge outlined the scope of the evidence in the following passages from his judgment:

> [34] This Court routinely receives updating evidence in relocation appeals. In this case that was rendered inevitable by the long delay between the Family Court judgment and the present hearing. Nonetheless, the evidence went far beyond updating. K filed five affidavits and L four. Much of the evidence comes down to a blow by blow refutation of one another's allegations about seemingly every detail of the children's care and welfare. The record fills more than three Eastlight folders.
>
> [35] I also considered updating reports from the two court-appointed psychologists who gave evidence in the Family Court, Sylvia Blood and Gail Ratcliffe. I have already referred to Ms Blood's brief in [14] above. Ms Ratcliffe was appointed to assess L's mental health as noted above in [13]. I note that because of the specific nature of her brief, Ms Ratcliffe did not have the opportunity to test what she was told by interviewing K or others.
>
> [36] The parties and the two experts also gave oral evidence before me.

[21] Counsel confirmed before us that the High Court heard extensive oral evidence and submissions. Our reading of Miller J's decision does not support L's submission that he failed to follow the approach in *Austin Nichols*. Plainly he had regard to the evidence in the Family Court (to which he specifically refers at various parts of his judgment). He explained his approach to the evidence in the Family Court in the following passage:[14]

> I have taken the Judge's findings into account. But having regard to the long delay and the nature of the updating evidence, the weight to be attached to the Judge's decision is necessarily somewhat less than would normally be the case. With the benefit of the updating evidence I have reached a different view of the facts in some respects.

[22] The Judge was entitled to take this approach for the reasons he gave. We do not view *Austin Nichols* or *K v B* as requiring the Judge to re-hear all the evidence as if the case were starting again. A re-hearing in this context is undertaken on the notes of evidence supplemented by any additional material permitted on appeal. All that *Austin Nichols* and *K v B* require is that the appellate court should apply its own judgment afresh to all that material. We are not persuaded that the Judge failed to meet that standard. Indeed, the judgment shows that the Judge gave thorough and

---

[14] At [57].

thoughtful consideration to all the evidence before him and to the effect the fresh evidence had on that given in the Family Court.

Conclusion

[23] In summary, we do not accept that the proposed appeal raises any question of law or fact capable of bona fide and serious argument. While the matter is undoubtedly of interest to the parties, those interests are not of sufficient importance to outweigh the cost and delay of a further appeal. It is important, as the High Court Judge observed, that this litigation be brought to an end. He concluded that this would remove stress associated with uncertainty and that the undoubted conflict between the parties would be materially reduced.[15]

[24] We accept the point made by Ms Southwick QC on behalf of K that the delay which would inevitably flow from the grant of leave for a further appeal would not achieve the desirable aim of ending the litigation and would not be consistent with s 4(5)(a) of the Act which requires the court to take into account the principle that decisions affecting children should be "made and implemented within a time frame that is appropriate to the children's sense of time."

[25] For these reasons, leave to appeal is declined. The applicant must pay to the respondent costs for a standard application on a Band A basis and usual disbursements.

Solicitors:
Jackson Russell, Auckland for Applicant
Shieff Angland, Auckland for Respondent

[15] At [50].