United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
May 1, 2023
Lyle W. Cayce
Clerk

No. 23-50281

LUIS ORTIZ HERNANDEZ,

Petitioner—Appellee,

versus

RUTH SARAI ERAZO,

Respondent—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:22-CV-1069

Before KING, JONES, and SMITH, *Circuit Judges*.

PER CURIAM:[*]

Respondent-Appellant Ruth Sarai Erazo moves to stay a district court order granting a petition for the return of her minor child to his father in Mexico pursuant to the Hague Convention. For the reasons articulated herein, the motion is DENIED.

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

I.

On September 29, 2022, Petitioner-Appellee Luis Ortiz Hernandez submitted a petition in the United States District Court for the Western District of Texas for the return of his minor son, M.S.O., to Mexico. In his petition, Ortiz asserted that M.S.O.'s mother, Respondent-Appellant Ruth Sarai Erazo, wrongfully removed M.S.O. from Mexico and crossed with him unlawfully into the United States. Mother and son presently reside with her aunt, Telma Marilu Chinchilla Reyes, in San Antonio. On January 5, 2023, the district court held a hearing on Ortiz's motion, at which Ortiz, Erazo, and Reyes testified.

On February 28, 2023, the district court issued an order granting Ortiz's petition, which was subsequently amended and restated on April 4 (the "Final Order"). The court began its analysis by determining that M.S.O. had been wrongfully removed under the Hague Convention. Erazo, though, had asserted two affirmative defenses—consent and M.S.O. being well-settled—requiring the court to assess, in part, two competing versions of events as told by the parties. The following facts are undisputed: Ortiz and Erazo had met and began dating in August 2019 while working in Cancun; the two were eventually engaged in December 2019. They both lost their jobs in the spring of 2020 due to the COVID-19 pandemic and learned that Erazo was pregnant with M.S.O. in June. After learning of the pregnancy, Ortiz and Erazo decided to move to Mexico City to live with Ortiz's parents. M.S.O. was born on January 25, 2021.

At this point, the parties' accounts diverge. Ortiz testified that Erazo, who is a Honduran citizen, had initially expressed that her "ultimate intention" was to move to the United States but had later ceased speaking of such intentions once the engagement and pregnancy had occurred. According to Ortiz, Erazo had stopped expressing interest in her earlier plans

because Ortiz, who is a Mexican citizen, is barred from returning to the United States after he was deported for overstaying his visa in 2016. Erazo testified that the birth of M.S.O. only increased the urgency she felt to come to the United States and that she and Ortiz had jointly agreed on a plan where they could all resettle there. According to Erazo, she and Ortiz agreed that she and M.S.O. would leave first; Ortiz would join them later once Erazo managed to secure an apartment for them in San Antonio.

On October 3, 2021, Ortiz, Erazo, and M.S.O. left for Monterrey, Nuevo Leon, Mexico, where they arrived the next day and stayed with Ortiz's aunt. Meanwhile, Erazo and M.S.O. met with a Honduran coyote on October 5. Erazo paid the coyote $2,000, which she borrowed from Reyes, for her and M.S.O.'s passage to the United States. Erazo testified that Ortiz helped her and M.S.O. into the car for the first leg of their journey, purchased a phone for her in preparation for the crossing, and that the two were in daily contact throughout her journey. Ortiz disputes that he was involved in or aware of Erazo's crossing into the United States. He returned to Mexico City alone on October 6. On October 11, Erazo and M.S.O. surrendered to the United States Border Patrol and after a few days were released to Reyes in San Antonio. Erazo ended her relationship with Ortiz on October 31 after it deteriorated upon her arrival in the United States.

Faced with reconciling the parties' competing versions of the events, the district court found that M.S.O. had not been removed from Mexico without Ortiz's permission. Instead, based on Erazo's testimony, the court found that Ortiz had consented to M.S.O.'s removal, but on the condition that Ortiz would be reunited with both mother and son in the United States. Accordingly, the court held that Erazo had failed to show that Ortiz had consented to M.S.O.'s removal notwithstanding the status of the couple's relationship or his ability to join M.S.O. in the United States.

The court also ruled that Erazo failed to adequately prove her second affirmative defense: that M.S.O. was well-settled in his new environment. Specifically, the court reasoned that M.S.O. had not "formed significant connections to his new environment" because he is only two years old; he was living in San Antonio for less than a year; and Erazo's immigration status was "uncertain." Erazo is neither a citizen of the United States nor Mexico, and she has not filed an application for asylum while her immigration status is pending in the United States. The court held that these factors carried greater weight than those that might counsel in favor of M.S.O. being well-settled: M.S.O. has a stable place of residence in Erazo's apartment, he attends daycare six days a week while his mother works, and Erazo has consistently worked in construction clean-up since arriving in San Antonio.

Having concluded that Erazo failed to establish an affirmative defense to M.S.O.'s wrongful removal, the court ordered that M.S.O. "be promptly and safely returned to Ortiz's custody in Mexico." Erazo now appeals the Final Order. On the same day this appeal was filed, Ortiz moved the district court to hold Erazo in contempt for failing to comply with the Final Order, alleging that Erazo has refused to comply. Erazo now moves our court for a stay of the Final Order pending the resolution of her appeal.

II.

In deciding whether to issue a stay pending an appeal, we consider four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Veasey v. Perry, 769 F.3d 890, 892 (5th Cir. 2014) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)). "The first two factors of the traditional standard are the most critical." *Id.* (quoting *Nken*, 556 U.S. at 434). If, however, (1) the latter three factors are "heavily tilted in the movant's favor"—*i.e.*, "the balance of the equities weighs heavily in favor of granting the stay"—and (2) a "serious legal question is involved," an applicant "need only present a substantial case on the merits." *Ruiz v. Estelle*, 650 F.2d 555, 565–66 (5th Cir. Unit A June 26, 1981) (per curiam); *see, e.g.*, *United States v. Transocean Deepwater Drilling, Inc.*, 537 F. App'x 358, 360–65 (5th Cir. 2013) (per curiam) (applying the *Ruiz* standard).

Erazo contends that her stay application meets the *Ruiz* standard. But Erazo cannot satisfy any of the requirements under *Ruiz*.

A.

First, Erazo has not shown that she will present a substantial case on the merits. *Ruiz*, 650 F.2d at 565. "The [Hague Convention] was adopted in 1980 in response to the problem of international child abductions during domestic disputes." *Abbott v. Abbott*, 560 U.S. 1, 8 (2010). "The Convention seeks 'to secure the prompt return of children wrongfully removed to or retained in any Contracting State,' and 'to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.'" *Id.* (quoting Hague Convention on the Civil Aspects of International Child Abduction art. 1, Oct. 25, 1980, T.I.A.S. No. 11670 [hereinafter *Hague Convention*]). "The return remedy is the central operating feature of the Convention and provides that a wrongfully removed child must be returned to his or her country of habitual residence unless certain defenses apply." *Hernandez v. Garcia Pena*, 820 F.3d 782, 786 (5th Cir. 2016) (footnote omitted). "Notably, the return remedy does not address the merits of any underlying custody dispute but instead only determines

where any custody decision should be made." *Id.* "The Convention is based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence." *Abbott*, 560 U.S. at 20. "This principle works to 'restore the pre-abduction status quo and deter parents from crossing borders in search of a more sympathetic court.'" *Hernandez*, 820 F.3d at 786 (quoting *England v. England*, 234 F.3d 268, 271 (5th Cir. 2000)).

"The Convention provides several narrow affirmative defenses to wrongful removal." *Sealed Appellant v. Sealed Appellee*, 394 F.3d 338, 343 (5th Cir. 2004). Erazo argues that the district court erred in holding that she failed to prove either of the two affirmative defenses she raised—Ortiz's consent or M.S.O. being well-settled—to the Hague Convention's return remedy and that this constitutes a substantial case on the merits. We consider both arguments in turn below.

1.

"[T]he consent defense involves the petitioner's conduct prior to the contested removal or retention . . . ." *Larbie v. Larbie*, 690 F.3d 295, 308 (5th Cir. 2012) (quoting *Baxter v. Baxter*, 423 F.3d 363, 371 (3d Cir. 2005)), *abrogated on other grounds by Smith v. Smith*, 976 F.3d 558, 561 (5th Cir. 2020). "The focus of inquiry is 'the petitioner's subjective intent,' as 'evinced by the petitioner's statements or conduct, which can be rather informal.'" *Id.* (citation omitted) (first quoting *Baxter*, 423 F.3d at 371; and then quoting *Nicolson v. Pappalardo*, 605 F.3d 100, 105 (1st Cir.2010)). "[I]f a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to 'exercise' those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child." *Sealed Appellant*, 394 F.3d at 345 (quoting *Friedrich v. Friedrich*, 78 F.3d 1060, 1066 (6th Cir. 1996)).

Accordingly, a court "liberally find[s] 'exercise' whenever a parent with *de jure* custody rights keeps, or seeks to keep, any sort of regular contact with his or her child." *Id.* at 344–45 (quoting *Friedrich*, 78 F.3d at 1065). The consent defense must be proven by a preponderance of the evidence. 22 U.S.C. § 9003(e)(2)(B).

Here, Erazo argues that the record was devoid of evidence demonstrating that Ortiz only provided her with his conditional consent to cross with M.S.O. into the United States. But the district court relied on Erazo's own testimony in finding that "Ortiz eventually planned to join his family in the United States." Indeed, Erazo testified that she and Ortiz had discussed and eventually decided to come to the United States as a family. She also testified that "the plan was that by the time he [Ortiz] got here [to San Antonio] I would already have an apartment for the two of us." The court relied on Erazo's testimony concerning Ortiz's conduct in determining that he had only provided his conditional consent. Furthermore, the court's analysis below was consistent with the applicable standard: that courts "liberally find 'exercise'" in such situations. *Sealed Appellant*, 394 F.3d at 344 (quoting *Friedrich*, 78 F.3d at 1065). Erazo's argument that the district court erred in relying on analogous caselaw involving conditional consent is thus misplaced. *See Hofmann v. Sender*, 716 F.3d 282, 293 (2d Cir. 2013); *Mota v. Castillo*, 692 F.3d 108, 117 (2d Cir. 2012); *Baxter*, 423 F.3d at 372–73.

2.

"Article 12 of the Convention provides, in relevant part, that when return proceedings are commenced more than one year after the date of wrongful removal, the court must 'order the return of the child, unless it is demonstrated that the child is now settled in its new environment.'"

Hernandez, 820 F.3d at 787 (quoting Hague Convention, art. 12).[1] We consider seven factors when evaluating this defense:

> (1) the child's age; (2) the stability and duration of the child's residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child has friends and relatives in the new area; (5) the child's participation in community or extracurricular activities; (6) the respondent's employment and financial stability; and (7) the immigration status of the respondent and child.

Id. at 787–88. The immigration status of the respondent or child "is neither dispositive nor subject to categorical rules, but instead is one relevant factor in [this] multifactor test." *Id.* at 788. A respondent must establish that her child is well-settled by a preponderance of the evidence. 22 U.S.C. § 9003(e)(2)(B).

Erazo contends that the district court incorrectly weighed these seven factors. Erazo also argues that "the weight the district court applied to her pending immigration status was dispositive and against this Court's instruction in *Hernandez*." First, at this stage, we are not persuaded by Erazo's arguments that the district court erred in its weighing of the *Hernandez* factors. M.S.O. is currently two years old. We have held that a child who was six years old was "not able to form the same level of attachments and connections to a new environment as an older child." *Hernandez*, 820 F.3d at 789. Although M.S.O. has now been in a stable home for over a year and attends daycare six days a week, his young age discounts the detrimental effect of being relocated. Additionally, M.S.O.'s social

[1] There was some disagreement below regarding whether Ortiz had filed his petition within one year of M.S.O.'s removal and thus Erazo's entitlement to raise this affirmative defense. We assume without deciding that Erazo is not precluded from raising this defense for the purpose of her stay application.

interactions are largely confined to Erazo and Reyes outside of daycare. There was no testimony provided as to M.S.O.'s participation in community or extracurricular activities. And while Erazo has consistent employment in construction cleanup, she is not legally authorized to work, and her immigration status is uncertain. Considering M.S.O.'s young age, lack of robust connections to the broader community, and Erazo's uncertain immigration status, it is not obvious to us that the district court incorrectly weighed the *Hernandez* factors. Second, it is clear that neither Erazo's nor M.S.O.'s immigration status was dispositive to the district court's analysis. Specifically, the court explained that it was "[g]iving due consideration to immigration status *and the other relevant factors*."

* * *

Accordingly, Erazo has not shown that she will bring a substantial case on the merits regarding either of her affirmative defenses.

B.

Next, even assuming that she has demonstrated a substantial case on the merits, Erazo cannot show that the remaining three stay factors—the balance of the equities—heavily tilt in her favor. *Ruiz*, 650 F.2d at 565–66. The Supreme Court has cautioned against routinely granting stays pending appeal in cases involving the Hague Convention. *See Chafin v. Chafin*, 568 U.S. 165, 178–80 (2013). Indeed, the Court has explained that "[i]f losing parents were effectively guaranteed a stay, it seems likely that more would appeal, a scenario that would undermine the goal of prompt return and the best interests of children who should in fact be returned." *Id.* at 179. Erazo argues that both she and M.S.O. will suffer irreparable harm if he is returned to Mexico. She emphasizes the "physical and emotional disruption to M.S.O.'s life" and the further risk to his stability if she is successful in her appeal and M.S.O. must then return to the United States. Relatedly, she

asserts that there is a strong public interest "in protecting children from the risk of being unnecessarily shuttled back and forth between two countries as a result of ongoing litigation." But these are the risks facing many of the children and parents litigating under the Hague Convention; granting stay applications such as these would become routine if Erazo's arguments, without more, were sufficient. Furthermore, we cannot ignore the "precious months" that M.S.O. might lose "readjusting to life in [his] country of habitual residence" given the dubious merits of Erazo's appeal, *see id.* at 178, along with the harm that Ortiz suffers the longer that he is separated from M.S.O.

C.

Finally, Erazo's appeal does not raise a serious legal question. *Ruiz*, 650 F.2d at 565. She asserts, however, that she has identified two: the district court's conclusions of law (1) regarding whether Ortiz provided his conditional consent and (2) in weighing the *Hernandez* factors. Serious legal questions have "far-reaching effects" or are matters of "public concern[]" that go well beyond the interests of the parties. *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 24 (5th Cir. 1992) (by the court); *see, e.g.*, *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 40 (5th Cir. 1983) (per curiam) ("Whether Medicare and Medicaid payments constitute federal financial assistance within the meaning of the Rehabilitation Act is a serious legal question that could have a broad impact upon federal/state relations."). Such cannot be said of the present dispute, which concerns whether the court below correctly applied established legal standards to the facts of this case. *Cf., e.g.*, *Weingarten Realty Invs. v. Miller*, 661 F.3d 904, 910 (5th Cir. 2011) (no serious legal question in "private contractual matter"); *Wildmon*, 983 F.2d at 23–24 (same).

III.

Even under a traditional analysis, a stay would not be warranted here. The probability of Erazo succeeding on the merits of her appeal is far from certain. Meanwhile, the harm faced by Erazo if her stay application is denied is similar to what Ortiz would encounter if it was granted. Lastly, there is no strong public interest favoring a stay.

Therefore, for the foregoing reasons, the motion for a stay is DENIED.