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Re S (A Child) (Habitual Residence & Child's Objections) (Brazil) (2015)

[2015] EWCA Civ 2

13/01/2015

Barristers
Henry Setright KC
Sam King KC

Court
Court of Appeal (Civil Division)

Practice Areas
International Children Law

Summary
Although a 12-year-old girl who had lived with her mother in Brazil for a year had become sufficiently integrated to acquire habitual residence there, a judge had been entitled to exercise her discretion to refuse to order her return under the Hague Convention on the Civil Aspects of International Child Abduction 1980. The child objected to being returned to Brazil and was of an age and degree of maturity where it was appropriate to take account of her views.

Facts
The appellant mother (M) appealed against a decision that her 12-year-old daughter (G) was habitually resident in England and had not been wrongfully retained by the respondent father (F).

M was Brazilian and F was English. Whilst married, they had lived in England, where G and their 10-year-old son (J) were born. They separated and in August 2013, M took G and J to live in Brazil, with the court's permission. In January 2014, they returned to England for a two-week holiday with F, following which they were upset for a period because they missed England. Financial provision had not been agreed following the divorce and G emailed F in March 2014, expressing anger about her perception that he was not providing the money he should be. There was no contact between them for a few months but they reconciled during a holiday together that summer and G decided that she did not want to return to Brazil. When J returned to Brazil, G remained in England. M sought a return order under the Hague Convention on the Civil Aspects of International Child Abduction 1980. The judge refused to order G's return, finding that she had not acquired habitual residence in Brazil and had not lost her habitual residence in England, having said that she had "nagging doubts" throughout about being in Brazil. The judge also concluded that even if G had been habitually resident in Brazil, she would not have exercised her discretion to return her, citing destabilising difficulties about money, the possibility of not being able to continue at independent school, and accommodation in Brazil.

M argued that (1) the judge had been wrong to allow G's "nagging doubts" to determine the question of habitual residence; (2) in light of para.32 of DL v EL (Hague Abduction Convention: Effect of Reversal of Return Order on Appeal) [2013] UKSC 75, [2014] A.C. 1017, the court had to ask itself whether it was in G's best interests to remain in England so that the dispute between the parents could be determined there, or whether she should be returned to Brazil so that it could be determined there.

Held

(1) The judge had not attached sufficient importance to the contemporaneous material in reaching the conclusion that G's doubts about the move were such that she lacked the degree of integration in a social and family environment in Brazil required for habitual residence. Her email to F and the subsequent lack of contact between them were significant in indicating what her state of mind was by that point. It had been essential for the judge to evaluate the implications of those features, but she had done. She had referred to destabilising factors, but had made no reference to positive remarks which G had made in her email to F about being "super happy" and feeling that she belonged for the first time. That was a significant omission because those matters went to the question of the existence and extent of G's "nagging doubts". Taking those indicators together with the overall picture, the judge had been wrong to find that G had been habitually resident in England throughout. Such nagging doubts as she had did not interfere with the process of integration in Brazil. G had been habitually resident in Brazil at the relevant time (see paras 30-33 of judgment). (2) There was no dispute that G objected to being returned to Brazil and was of an age and degree of maturity where it was appropriate to take account of her views. However, the court had to exercise its discretion to determine whether her objections amounted to an exception which justified refusing her return under art.13 of the Convention. It would be wrong to take an approach which risked narrowing the focus of the exercise of discretion so that it became a question of which was the correct forum for the necessary welfare proceedings. In para.32 of DL v EL, the judge had not been concerned with Convention principles at all and had simply been recasting the pertinent question for that particular case. The decision had not intended to change the approach laid down in J (A Child) (Custody Rights: Jurisdiction), Re [2005] UKHL 40, [2006] 1 A.C. 80 or M (Children) (Abduction: Rights of Custody), Re [2007] UKHL 55, [2008] 1 A.C. 1288. In exercising its discretion under the Convention, the court had to have regard to the wider considerations of the child's rights and welfare. The Hague policy had to be put into the balance, but there was no limitation on the other factors that could be considered and the weighting of individual features was not prescribed. That did not mean that the discretionary stage in a Hague Convention case had to involve a full-blown welfare enquiry. The process in a Hague Convention case was a summary one, designed to be concluded very quickly, DL v EL explained, J (A Child) and M (Children) followed (paras 35-36, 48-59). In the instant case, the judge's conclusion about how she should exercise her discretion was unsurprising. She had clearly considered G's views to be of central importance. There was a cogent case against return and no reason to interfere with the judge's decision about how she would have exercised her discretion if she had found G to be habitually resident in Brazil (paras 61-70).

Permission

Lawtel