

Re A, HA v MB (Brussels II Revised: Article (11)7 Application) (2007)

[2007] EWHC 2016, [2008] 1 FLR 289 : Times, November 2, 2007

14/08/2007

Barristers

Private: Marcus Scott-Manderson QC
Kate Branigan KC
Private: David Williams QC

Court

High Court

Summary

Where a French court had made a non-return order under the Hague Convention on the Civil Aspects of International Child Abduction art.13, the English court examining the question of custody of the child under Regulation 2201/2003 Art.11(7) retained the power to make contact orders even if it did not order the child's return to England.

Facts

The applicant father (F) applied for orders for his two-year-old son (S) to reside with him in England and for S's mother (M) to return S to England from France for that purpose. F was aged 44 and was a Palestinian national born in Gaza. M was a French national aged 27. F had come to England on a six-month visitor's visa in 1996. In 2001 he had met M who was then working and living in London. Within a few months they had married. As a consequence F obtained a right of residence. F had lost his employment in about April 2004 after his employers discovered that he had assumed a false identity. M had worked until shortly before S was born in May 2005. Shortly after S's birth M had taken S to France. She had soon after decided to end the marriage. F, through the International Child Abduction and Access Unit, requested the institution in France of proceedings seeking an order for S's return to England under the Hague Convention on the Civil Aspects of International Child Abduction art.12. The French court refused to order S's return on the basis that although wrongful retention in France was established, so was the defence under art.13(b) that there was a grave risk that S's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation. Following the departure of M and S from the United Kingdom F's right of residence had been revoked. M submitted that a court examining the question of the custody of the child after an Art.13 non-return order was limited to examining the question of custody and whether an order entailing the child's return should be made under Regulation 2201/2003 Art.11(7). F submitted that an order for contact or staying contact would fall within the scope of what the court could order when it examined the question of custody of the child

under Art.11(7), and that such an order would constitute a judgment which required the return of the child to England for the purposes of Art.11(8).

Held

HELD: (1) The French non-return order set in train the procedures set out in Regulation 2201/2003 Art.11(6) and Art.11(7). An application for the court “to examine the question of custody of the child” under Art.11(7) was an innovation introduced by the Regulation in relation to which neither domestic rules nor consistent practice had yet been established in England. The conventional domestic application made by F under the Children Act 1989 s.8 for residence, contact and specific issue orders was in some ways inappropriate in an Art.11(7) case, and some specific procedure should be set in place for such cases. (2) Under Art.10 of the Regulation the English court, as the court of S’s habitual residence before his removal to France, continued to have jurisdiction if it became seised. In factual and practical terms S was resident, and habitually so, in France and if the English court did not order his return then jurisdiction would pass to France in accordance with Art.10. Until such an order was issued F remained able to seise the English court and was entitled to continue to pursue his Children Act applications notwithstanding that if the court made an order which did not entail S’s return to England jurisdiction would pass to France, *Leon v Leon* (1967) P 275 PDAD applied. It followed that the English court retained power to make contact orders even if it did not order S’s return to England. (3) An order for contact in England did not amount to a judgment requiring the return of the child for the purposes of Art.10. (4) The court would make an order for F to have contact with S in England. The court’s order was an order for contact rather than a shared residence order. The court declined to order S’s return to England or make an order that he should live in England with either parent. The court rejected the argument that it should make a residence order in order to strengthen F’s immigration position, *A (Children) (Care Proceedings: Asylum Seekers), Re* (2003) EWHC 1086 (Fam), (2003) 2 FLR 921 considered. The court would make a residence order in favour of M in France. (5) The autonomous meaning which the English court should ascribe to “judgment” for the purposes of the Regulation was a document containing the terms of the judge’s order which was issued by the court. Therefore until that order was drawn up the English court remained seised of the contact and other issues. (6) The court gave guidance, approved by the President of the Family Division, on the appropriate practice to be adopted in such cases, pending the entry into force of the Family Procedure Rules.

Application granted in part

Permission

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