

Rashid Al-H V Sara F (2001)

(2001) 1 FLR 951 : [2001] EWCA Civ 186 ; Times, March 2, 2001

15/02/2001

Barristers

Henry Setright KC

Court

Court of Appeal

Summary

When determining habitual residence the relevant facts and circumstances must be properly appraised; habitual residence may be acquired even if the move is for a short duration or on trial basis. The courts in this jurisdiction must be slow to make orders that conflict with pre-existing orders in any friendly foreign state.

Facts

Appeal against an order made by Bracewell J, declaring that the minor ('T') was being unlawfully retained in Dubai and ordering his return to England forthwith. Following a brief affair in 1990 with the appellant ('A'), the respondent ('R') became pregnant with 'T'. A, a national of Dubai, had no knowledge of T until R informed him in 1998 and offered contact with him. R had by this time married her husband ('N') and they had two children. N had also adopted T. After A had his first contact with T he formed an agreement with R for her and her family to relocate to Dubai in exchange for a full relocation package and expenses, including a home, a job, schooling, medical expenses and entry and residence permits. Shortly after entry, T was granted a residence visa. R and the family moved in September 1999, but by December 1999, problems arose regarding the terms of the relocation package. The relationship finally broke down between A, R and N over arrangements for Christmas and R and N decided to leave Dubai. A then retained T during a contact visit and on 28 December obtained an order for custody of T on a without notice application. R failed in all attempts to fight this and therefore entered into a parental responsibility agreement with A that granted her many benefits. R also found solicitors in England to represent her in negotiations and in court proceedings in Dubai. Before those proceedings could be concluded, R issued wardship proceedings in England which were challenged on a jurisdictional basis by A. The matter was heard by Bracewell J on 12 September 2000. It was submitted on behalf of A that T had not been habitually resident in the UK at the time the wardship was issued, that the family had acquired habitual residence in Dubai and therefore that the judge had misdirected herself as to the legal test. It was alternatively submitted on behalf of R that R and N were habitually resident in this jurisdiction on 10 February and that T's residence was dependant on theirs.

Held

HELD: (1) The statutory provisions under s.2(3) Family Law Act 1986 provided that the court would not have jurisdiction to make an order unless the child was habitually resident in England and Wales. The determination of habitual residence was a question of fact to be decided by reference to all the circumstances of the case, as stated in *R v Barnet London Borough Council, ex parte Shah* (1983) 2 AC 309 at 343. (2) On appraisal of the directly relevant facts and circumstances, the proper conclusion was that the family had surrendered their habitual residence in this jurisdiction on the day of departure. (3) The family had acquired habitual residence in Dubai and the factors selected by Bracewell J did not bear the significance she sought to give them. Equally, she left out of account a number of highly relevant factors that pointed to the opposite conclusion. (4) T's residency was not dependent on R's and N's. The question of habitual residence was a question of fact and it was not possible to acquire residency in one country whilst remaining physically present in another. *Re M (Abduction: Habitual Residence)* (1996) 1 FLR 887 followed. (5) The courts in this country should be extremely circumspect in assuming jurisdiction founded only on the basis of nationality in relation to children physically present in some other jurisdiction. (6) The courts of this jurisdiction should be very slow to make orders that directly conflict with pre-existing orders in any friendly foreign state.

Permission

Lawtel 