

Mercredi v Chaffe

22/12/2010

Barristers

Private: Marcus Scott-Manderson QC

Private: David Williams QC

Court

The Court of Justice of the European Union

Practice Areas

International Children Law

Summary

The First ever family case from England to go to the Court of Justice of the European Union

Facts

The unmarried father issued proceedings 2 days after the mother removed the child to France. The High Court ordered the return of the child and subsequently made provisional and then final Declarations that the child was habitually resident in England at the time the proceedings commenced and that her continued retention in France was in breach of rights of custody of the father and the court. Meanwhile the father pursued Hague Convention proceedings in France. The French Court did not refer to the provisional English declarations and concluded that the father had no rights of custody at the time of removal and rejected the Hague application. The High Court then made final declarations and the father sought to appeal the French Hague Convention decision. The French Central Authority failed to lodge an appeal in time. The mother then appealed against the Declarations and return orders made by the High Court. The Court of Appeal referred 3 questions to the Court of Justice of the European Union. They were.

'(1) Please clarify the appropriate test for determining the habitual residence of a child for the purpose of:

- Article 8 of ... Regulation [No] 2201/2003;
- Article 10 of ... Regulation [No] 2201/2003.

(2) Is a court an "institution or other body" to which rights of custody can be attributed for the purposes of the provisions of ... Regulation [No] 2201/2003?

(3) Does Article 10 have a continuing application after the courts of the requested Member State have rejected an application for the return of the child under [the 1980 Hague Convention] on the basis that Articles 3 and 5 are not made out?

In particular, how should a conflict between a determination of the requested State that the requirements of Articles 3 and 5 of [the 1980 Hague Convention] are not met and a determination of the

requesting State that the requirements of Articles 3 and 5 are met be resolved?’

Held

The Court of Justice declined to answer the 2nd questions but answered the 1st and 3rd as follows

1. The concept of ‘habitual residence’, for the purposes of Articles 8 and 10 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother’s move to that State and, second, with particular reference to the child’s age, the mother’s geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case.

If the application of the abovementioned tests were, in the case in the main proceedings, to lead to the conclusion that the child’s habitual residence cannot be established, which court has jurisdiction would have to be determined on the basis of the criterion of the child’s presence, under Article 13 of the Regulation.

3. Judgments of a court of a Member State which refuse to order the prompt return of a child under the Hague Convention of 25 October 1980 on the civil aspects of international child abduction to the jurisdiction of a court of another Member State and which concern parental responsibility for that child have no effect on judgments which have to be delivered in that other Member State in proceedings relating to parental responsibility which were brought earlier and are still pending in that other Member State.

Significance of the Decision

The Court re-affirmed and explained the test that must be applied in relation to the determination of habitual residence. This test must be taken to supersede all domestic authorities on the point. However the Court of Appeal subsequently concluded that the test was essentially the same as existing English jurisprudence. This may yet require further exploration by the English courts for a number of reasons, not least that the Court of Appeal held (in effect) that the existing approach to the loss of habitual residence required modification in the light of the judgment. The CJEU judgment though must now be seen as the primary source of law on the issue of habitual residence.

As or more importantly the CJEU confirmed the primacy of the jurisdiction of the courts of habitual residence over Hague courts. Thus a determination in a Hague court that the father had no rights of custody could be over-riden by the decision of the courts of the country of habitual residence. This approach is wholly consistent with previous ECJ/CJEU decisions which have stressed the primacy of the substantive jurisdiction over Hague. It further reinforces the contention that domestic proceedings should not be held in suspension pending the outcome of Hague proceedings.

In declining to answer the 2nd question the CJEU made some surprising observations about the applicability of the Hague Convention following lawful removals. They suggested that the Hague would not apply if there was a lawful removal. This would mean that wrongful retention cases were not covered by the Hague Convention which plainly cannot be right as they are covered both by the Hague Convention and Article 10 of BIIR. It is not clear what the CJEU were getting at in the observations they made.