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Re L (A Child) (2012)

[2012] EWCA Civ 1157

21/08/2012

Barristers
Private: Marcus Scott-Manderson QC
Cliona Papazian

Court
Court of Appeal (Civil Division)

Practice Areas
International Children Law

Summary
The exception to the recognition of a foreign judgment in family proceedings under Regulation 2201/2003 art.23(a) was a very narrow one and was not met by virtue of an English mother's emotional or mental state in having to deal with Portuguese proceedings. A judge had, accordingly, erred in refusing the father's application to recognise and enforce a Portuguese order under art.21 of the Regulation on that basis.

Facts
The appellant Portuguese father (F) appealed against a decision ([2012] EWHC 983 (Fam)) refusing his application for recognition and enforcement of a Portuguese judgment providing for shared-care arrangements for his child (L) with the English respondent mother (M).

After L's birth in England in April 2011, M and F had moved to Portugal. After a failed attempt by M to remove L to England in November 2011, M and F had entered into an "Agreement on the Exercise of Parental Responsibilities" that provided for equal shared care on a rotating two-monthly basis in England and Portugal until L's third birthday. A Portuguese judge homologated the agreement, ordering M and F to abide by its terms. M then returned to England with L to begin her first two-month rotation. She then applied to the English courts for a residence order. That application was stayed and F sought to recognise and enforce the Portuguese judgment under Regulation 2201/2003 art.41 or art.21. M, relying on art.23(a) of the Regulation as a basis for resisting recognition of the Portuguese order, contended that the agreed arrangements for L were so contrary to his welfare that recognition of the homologated order would be manifestly contrary to public policy taking into account L's best interests. The judge found that F's application should be determined under art.21 rather than art.41. She rejected M's case that the arrangements for L qualified as an exceptional case justifying non-recognition of the Portuguese order, but found that M's mental health at the time of the agreement raised concerns about her ostensible consent and her ability to make any dissent known so that, pursuant to art.23(a), it would be manifestly contrary to public policy to recognise the judgment. The judge went on to consider whether the English

courts had jurisdiction to hear M's application for a residence order. She considered that L had been habitually resident in Portugal when the Portuguese order was made, but that the agreement between M and F had the effect of changing L's habitual residence every two months, and that M's application for a residence order had been made when the English courts were endowed with jurisdiction. The stay on that application was, accordingly, lifted.

F contended that (1) the judge had erred in finding that an exception to recognition of the Portuguese order existed under art.23(a) on the basis of M's emotional and mental health; (2) the English court lacked jurisdiction since L's habitual residence remained in Portugal.

Held

(1) The exception to recognition of the judgment of another Member State under art.23(a) of the Regulation was a very narrow one and, consistently with the entire scheme and underlying philosophy of the Regulation, set the bar very high. The proper approach where art.23(a) was relied on was to consider whether recognition was manifestly contrary to English public policy, S (Brussels II: Recognition: Best Interests of Child) (No.1), Re [2003] EWHC 2115 (Fam), [2004] 1 F.L.R. 571 approved. A high onus rested on a parent who sought to reopen welfare issues and a foreign judgment would not be subverted save in the most exceptional of circumstances; the use of the word "manifestly" in art.23(a) indicated that a high degree of disparity was required between the effects of the order if enforced and the child's welfare interests, W v W (Foreign Custody Order: Enforcement) [2005] EWHC 1811 (Fam) and LAB v KB (Abduction: Brussels II Revised) [2009] EWHC 2243 (Fam), [2010] 2 F.L.R. 1664 approved. The judge had, accordingly, been right to find that the arguments based on L's welfare did not suffice to bring the case within art.23(a). However, having done so, she was wrong to have found that the test in art.23(a) was met by virtue of M's mental or emotional state. It was not possible to see how those circumstances could render it manifestly contrary to public policy to recognise the Portuguese order. M's complaints about the effect of the process in Portugal on her emotional and mental health fell far short of what was required to bring art.23(e) into play (see paras 46, 49-54, 56 of judgment). (2) The judge was wrong to have held that L was habitually resident in England when M applied for a residence order; he was still habitually resident in Portugal. At any given time, a person could have only one habitual residence for the purpose of the Regulation. L's arrival in England pursuant to the agreement for the purpose of living with M for two months did not have the effect of changing his habitual residence, Proceedings Brought by A (C-523/07) [2010] Fam. 42 and Mercredi v Chaffe (C-497/10 PPU) [2012] Fam. 22 followed. L's presence in England on a two-month basis lacked the necessary degree of permanence to change his habitual residence; the cycle, whilst regular, nonetheless provided for presence in England which on each occasion was only temporary and intermittent. L's perpetual oscillation between Portugal and England was simply inconsistent with his acquisition of habitual residence in the latter (paras 64, 75, 78-80). (3) It followed that the Portuguese order would be recognised under art.21 of the Regulation. L remained habitually resident in Portugal and the Portuguese court alone had jurisdiction (para.82).

Permission