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In the matter of B (A child)

[2016] UKSC 4

04/02/2016

Barristers
Private: David Williams QC
Henry Setright KC
Alistair G Perkins
Michael Gration KC
Dorothea Gartland KC
Deirdre Fottrell KC
Michael Edwards
Private: Hassan Khan

Court
Supreme Court

Practice Areas
International Children Law
Appeal to Supreme Court by non-biological mother against decision that court did not have jurisdiction to deal with application seeking return of child removed to Pakistan. Appeal allowed.

Background to the appeal
The girl at the centre of this appeal, B, is a British national now aged 7. The Respondent (a British national of Pakistani ethnicity) is B's biological mother and was previously in a same-sex relationship with the Appellant (a British national of Indian ethnicity), who has strong claims also to be described as a mother of B. The couple lived in England and set up home together, but they never became civil partners. Following IUI treatment, given to them both as a couple, the Respondent gave birth to B in April 2008. The Respondent undertook most of B's care but the Appellant also helped care for her and, as co-parents, they took B out at weekends, in particular to visit members of their families.

In December 2011, the relationship broke down acrimoniously and the Appellant left the family home. Over the next two years, the Respondent progressively reduced the level of the Appellant's contact with B. The Appellant objected and suggested mediation. Meanwhile, the Respondent decided privately to move with B to live in Pakistan where she says members of her wider family remain. She did not share this decision with the Appellant. On 3 February 2014 the Respondent moved to Pakistan with B where they have remained ever since. Although the Appellant did not consent to it, B's removal to Pakistan was lawful. On 13 February 2014, unaware where the Respondent had taken B, the Appellant applied under the Children Act 1989 ("1989 Act") for orders for shared residence of B, or for contact with her. This application depended upon showing that B was "habitually resident" in England at the time it was issued

(i.e. 13 February 2014). Subsequently, having learned that the Respondent had taken B to Pakistan, the Appellant also applied for orders under the court's inherent jurisdiction over B (as a British national) that she be made a ward of court and returned to England.

In July 2014 Hogg J held that (a) the English court had no jurisdiction to determine the Appellant's 1989 Act application because B had lost her habitual residence immediately upon her removal to Pakistan on 3 February 2014; and (b) the inherent jurisdiction over a British national who was neither habitually resident nor present in England should be exercised only if the circumstances were "dire and exceptional", and this was not such a case. On 6 August 2015, the Court of Appeal dismissed the Appellant's appeal. The Appellant appeals to the Supreme Court in respect of both applications.

Judgment
The Supreme Court allows the appeal on the Appellant's application under the 1989 Act by a majority of 3:2 (Lord Clarke and Lord Sumption dissenting) on the basis that B remained habitually resident in England on 13 February 2014. Lord Wilson gives the lead judgment.

Reasons for the judgment
Habitual residence
Lord Wilson (with whom Lady Hale and Lord Toulson agree) observes that two consequences flow from the modern international primacy of the concept of a child's habitual residence. First, it is not in the interests of children routinely to be left without a habitual residence [30]. Second, the English courts' interpretation of the concept of habitual residence should be consonant with its international interpretation [31]. The present case, however, involved a third aspect of the concept of habitual residence: the circumstances in which a child loses his or her habitual residence [32]. The traditional English law approach to this issue is heavily dependent upon parental intention. In particular, in In re J (A Minor), Lord Brandon observed that a person may cease to be habitually resident in a country in a single day if he or she leaves it with a settled intention not to return and settle elsewhere [33-34].

Lord Wilson notes that the Supreme Court in A v A held that the English concept of habitual residence should be governed by the criterion set out in the CJEU jurisprudence: namely, that there be some degree of integration by the child in a social and family environment. This focuses on the child's situation, with parental intention being merely one relevant factor [35-38]. Lord Wilson identifies two points in the CJEU jurisprudence relevant to the issue of when habitual residence is lost. First, the effect of Recital 12 to the Brussels II Regulation is that, where the interpretation of the concept of habitual residence can reasonably follow two paths, the courts should follow the path perceived better to serve the interests of children. Second, the CJEU has indorsed the view that, although it is conceivable that a child may have no habitual residence, this will only be in exceptional cases [40-44].

Lord Wilson concludes that the modern concept of a child's habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be left without a habitual residence; the concept operates in the expectation that, when a child gains a new habitual residence, he or she loses their old one. Lord Brandon's observation in In Re J should no longer be regarded as correct, and Hogg J fell into error in being guided by it [45-47].

Lord Wilson therefore states that the correct question is whether B had by 13 February 2014 achieved the requisite degree of disengagement from her English environment [48]. He concludes that, taken cumulatively, the factors pointing to the conclusion that B had not by 13 February 2014 achieved the requisite degree of disengagement compel the conclusion that she retained habitual residence in England [49-50]. Accordingly, the Appellant's application under the 1989 Act can and should proceed to substantive determination by the High Court (Family Division) [51].

Lord Sumption (dissenting) considers that Hogg J made no error of law and, having heard and reviewed the evidence, was entitled to find that B lost her habitual residence in England on 3 February 2014 [64-80]. Lord Clarke agrees [89-95].

Inherent jurisdiction
Given the majority's conclusion on habitual residence, it is unnecessary to decide whether the inherent jurisdiction can be exercised. Lady Hale and Lord Toulson observe that none of the reasons for caution when deciding whether to exercise the inherent jurisdiction has much force in this case. They consider that the jurisdiction is not confined to exceptional circumstances; it could have been exercised if the court held that B required protection [59-62]. Lord Wilson agrees, but leaves open the question of whether it would have been appropriate to exercise the inherent jurisdiction in this case [53].

Lord Sumption (dissenting) considers that, unless the inherent jurisdiction is reserved for exceptional cases, it may be exercised in a manner which cuts across the statutory scheme. He considers that the jurisdiction could not have been exercised in this case [81-87]. Lord Clarke, noting that the jurisdiction must be exercised with great caution, agrees that it should not be used on the facts of this case [96-97].

To read the judgment, click here.

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