

D (A Child) (International Recognition) [2016]

[2016] EWCA Civ 12

03/02/2016

Barristers

Henry Setright KC
Private: David Williams QC
Michael Gratton KC
Jacqueline Renton

Court

Court of Appeal (Civil Division)

Practice Areas

International Children Law

Appeal against an order of Peter Jackson J concerning the recognition and enforcement of an order relating to custody of a nine year old child which had been made by the Romanian Court of Appeal.

This case concerned David, who is 9, and has lived with his mother in England since shortly after his birth. His father lives in Romania.

Background

In June 2014, Peter Jackson J had allowed an appeal by David's mother against the recognition and enforcement of an order pursuant to B11a made by the Romanian Court of Appeal in November 2013 (see judgment: *Re D (Recognition and Enforcement of Romanian Order)* [2014] EWHC 2756 (Fam)). The Romanian order provided that custody of David be transferred from his mother to the father.

Judgment of Peter Jackson J

Peter Jackson J found that the mother succeeded under Article 23(b) (i.e. without the child having been given an opportunity to be heard), (c) (i.e. respondent not served) and (d) (i.e. the respondent had not been given an opportunity to be heard), B11a; her appeal under Article 23(a) (i.e. manifestly contrary to public policy) was dismissed.

The father appealed to the Court of Appeal in relation to Art. 23(b), (c) and (d); the mother provided a respondent's notice in which she again relied inter alia on Art. 23(a) B11a.

The Court of Appeal judgment

Ryder LJ gave a lengthy and detailed judgment that certainly merits reading by those who practise in this area. His judgment, inter alia, noted that:

(1) Re Article. 23(b), the failure to hear the child constituted a violation of a fundamental principle of

procedure, with s. 1(3)(a) CA 1989 being an example of our domestic legislation giving effect to such a fundamental principle. Indeed, the importance of the participation of the child in our domestic proceedings generally merits reiteration, [26] - [49];

(2) Re Article. 23(a), this public policy ground should be an “exceptional remedy”; although there is an obvious overlap between Article. 23(a) and (b), the former requires “something more” and the particulars that satisfied Art. 23(b) (i.e. breach of a fundamental principle of procedure) are distinct to those required to satisfy Art. 23(a) (i.e. “breach of a substantive principle such as welfare itself”), [50];

(3) Re Article. 23(c) and (d), the key issue was whether the mother had been served with a document instituting proceedings in sufficient time to be able to arrange for her defence, [53]. The submission that it is for the originating court alone (and not the enforcing court) to determine issues of service and default of appearance was rejected, [67] - [72]. No actual service on the defendant is required as long as it was possible reasonably to have arranged for a defence, with the defendant’s knowledge a factor to be taken in to account, [82] - [86];

(4) In the present case, Peter Jackson J was not entitled to reject the father’s application for registration and recognition pursuant to Article. 23 (c), [104];

(5) Nevertheless, given the conclusion in respect of Article. 23(b), the appeal was dismissed, [105].

Permission

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