4pb Four Paper Buildings

4pb International Newsletter

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Welcome

Having established the newsletter in 2014, we have updated the presentation and revised its content in an effort to bring you information about a wider range of issues under the general heading of international family law.

To that end, we have expanded the scope of the newsletter. Previously we have focussed on the law relating to children, but we will now cover international family law as a whole, including child abduction, relocation, jurisdiction and international finance. To assist us in this, we welcome three new specialist editors to the team.

Each issue will include an analysis of recent case law, guidance notes on a particular topic (this issue covers habitual residence in cases concerning children) and articles from guest contributors. We are delighted that in this, the first issue in this new format, Hannah Budd of the International Family Law Group has agreed to share her expertise in matters of international finance. Her article, 'International Enforcement: The Final Frontier', is the first of what we are sure will be an interesting and engaging series.

We hope that you will find the Newsletter a useful resource for any international issues that arise in your practice. You can sign up on our website to receive the newsletter quarterly.

We are always looking for ideas, guest articles and news items to include in this newsletter. If you have any suggestions or would like to offer a guest article for publication, please contact Michael Gration (mg@4pb.com) or Michael Edwards (me@4pb.com)

News & Updates

Alistair McDonald QC made High Court Judge

Alistair McDonald QC, formerly of St. Philips Chambers, has been appointed a High Court Judge and allocated to the Family Division. He commenced sitting on 4th June 2015

New guidelines for lawyers faced with litigants in person

The Law Society, Bar Council and CiLEx have issued guidelines intended to offer practical advice to lawyers facing litigants in person in civil courts. The guidelines can be found at www.lawsociety.org.uk/Support-services/Advice/Articles/Litigants-in-person-new-guidelines-for-lawyers-June-2015/?utm_source=emailhosts&utm_medium=email&utm_campaign=PU+-+4%2F6%2F15

Procedure for applying for Female Genital Mutilation Protection Orders established by amendment to the FPR 2010

The Family Procedure (Amendment No. 2) Rules 2015 amend Part 11 of the FPR 2010 to provide for applications for a female genital mutilation protection order under Part 1 of Schedule 2 to the Female Genital Mutilation Act 2003. The amendment also disapplies fees in proceedings relating to the grant, variation or discharge of such orders.

Certificates of Financial Complexity (FRU)

The Central Family Court has recently released a Certificate of Financial Complexity, which must be completed by advocates seeking the referral of a case to the FRU. The certificate and accompanying guidance can be downloaded from www.jordanpublishing.co.uk/system/redactor_assets/documents/3029/FRU_Complexity_Cert_and_Guidance_Approved.doc Case Law Update (Cont.)

Case Law Update

J (A Child)(1996 Hague Convention)(Morocco) (2015) EWCA Civ 329

1996 Hague Convention – BIIR – inherent jurisdiction

Summary

This complex judgment from Black LJ deals with the interface between the 1996 Hague Convention, BIIR and the inherent jurisdiction.

In brief outline, the parties were joint Moroccan and British nationals. The marriage broke down in 2011 and the mother was granted custody of the child by the Moroccan courts. In 2013, the mother moved to England, leaving the child with the maternal grandparents in Morocco. In September 2013, the mother returned to Morocco, collected the child and removed him to England.

The father initially replied for a change of residence in the Moroccan courts. This was refused on the basis that the father was not in a position to look after the child. He then applied in the English courts for the child's return. At first instance, Wood J found that the child had been habitually resident in Morocco prior to the removal, that the father had not given consent and that the removal was unlawful. The mother was ordered to return the child to Morocco.

The mother appealed. The mother, now represented by leading counsel who had not appeared before Wood J, relied on a number of grounds which had not been raised first time round. The most important of these, which apparently emerged over the course of the oral hearing before the CofA was the challenge to the entire bases of the English court's jurisdiction to make any orders in respect of the child.

Black LJ found that:

i BIIR did not apply on the basis of the child's habitual residence in Morocco (see Article 61 BIIR);

ii The 1996 Convention did apply on the basis that Morocco and England are both signatories;

Case Law Update (cont.)

iii Article 11 (urgent protective measures) of the 1996 Convention could not be used in this case to make a return order – six months had passed before the father's application and a year had passed before Wood J's decision;

iv Having ruled out Article 11, there was no other jurisdiction under the 1996 Convention to make the order made by Wood J.

The mother's appeal was therefore allowed on the basis that Wood J had no jurisdiction to order the child's return to Morocco.

Comment

Black LJ accepts in her judgment that the consequences of her decision 'may seem rather strange.' This is perhaps an understatement. The consequences are that neither the 1996 Convention – which has child protection as one of its central aims – nor the inherent jurisdiction – also routinely invoked for the protection of children – could be relied upon in this case to undo the effects of international child abduction. We are repeatedly told of the harmful effects on children of abduction, but the court on Black LJ's analysis was powerless in this case to undo those effects.

The decision does not rule out the use of Article 11 to secure a return order where the two countries are signatories to the 1996 convention (and BIIR does not apply – if it does, Article 20 could be used but this is unchartered territory). If the case is 'urgent' then Article 11 may apply. The basis on which this case was found not to be urgent is perhaps questionable. The father made his application six months after the removal. He was well within the 1980 Convention 12 month time frame (see Article 12 of the 1980 HC). Had this been an ordinary 1980 Convention case, it would have been treated as urgent and dealt with summarily. But under the 1996 Convention, the application was not deemed urgent.

Where does this decision leave the court's inherent jurisdiction? Black LJ explicitly rejected the argument put by counsel that it exists in the background, waiting to fill any gaps in the international instruments. The inherent jurisdiction, on Black LJ's view, can only be relied on where that is specifically permitted by those instruments. So, for example, Article 14 BIIR permits the exercise of the inherent jurisdiction but only where no court has jurisdiction pursuant to Article 8-13. Article 14 is the gateway to the inherent jurisdiction in a BIIR case. The same principle applies under the 1996 Convention. On this reading, the inherent jurisdiction is more limited than previously thought.

What is clear is that in every international case, the court and the parties must consider at the outset the basis of the court's jurisdiction. If there is no jurisdiction, the court must say so.

Permission to appeal to the Supreme Court is being sought at the time of writing. The last word on this case may still to be said.

K (A Child) (2015) EWCA 352

Forum conveniens

Summary

The mother was Mongolian. The father was from Singapore. The parties met in 2011 and married later that year. They moved to England the child was born in 2012. In summer 2013, the parties agreed that the child should return to Singapore to be cared for by the paternal grandparents. The mother's case was that this was a temporary plan and they would bring the child back to England later that year. The parties ultimately travelled to Singapore in January 2014. While there, the mother was served with divorce and custody proceedings issued by the father in the Singapore High Court. The mother returned to England alone and applied for orders under the inherent jurisdiction for the child's return. Russell J made the return order and committed the father to prison for his failure to comply with previous return orders.

Case Law Update (cont.)

The father appealed. The CofA had previously overturned the committal order but dismissed the father's appeal against the finding that the child was habitually resident in England (see Re K (A Child) (2014) EWCA Civ 905).

The warship proceedings were remitted to the High Court. Matters then took a bizarre turn, summarised in McFarlane LJ's judgment back in the CofA:

'There were, however, subsequently developments with respect of M during the summer, the most striking being that the mother contracted the services of an independent agency with the aim of snatching M from the paternal grandparents' care in Singapore and removing him from that jurisdiction by sea in a boat that had been chartered for the purpose. The snatch was achieved but before they could leave the jurisdiction the mother was arrested and M was returned to the grandparents' care. In consequence she faced criminal proceedings in Singapore, was given a short prison sentence and, upon her release from prison, she was immediately deported to her home country of Mongolia, eventually making her way back to this jurisdiction in October.'

The matter came before Newton J in October 2014 when the issue of forum conveniens was raised for the first time. The father argued that Singapore was now the forum best placed to hear the litigation given the child's presence there for some 15 months. Newton J refused the father's application and found that the English courts were better placed to hear the case. He made a further return order, again requiring the father to return the child to England.

The father appealed for the second time. Newton J's decision was criticised by McFarlane J in the strongest terms:

'The judgment, coming as it does from a specialist High Court judge in the Family Division, demonstrates, I am afraid, an astonishing lack of grasp of the basic core concepts in an international case relating to jurisdiction and forum conveniens. It is also, I am afraid to say, a confusing and very poorly constructed judgment which displays little clarity as to the issues that fell to be decided, the applicable law and the relevant facts.'

The appeal was, unsurprisingly, allowed.

Comment

The judgment is a timely reminder of the strict procedural requirements which often apply in international case. The framework set out by McFarlane LJ must be followed in every case in which forum conveniens is raised. That is:

i The basis of the court's jurisdiction must be establish (in line with Black LJ's comments in J (A Child)(1996 Hague Convention)(Morocco));

ii The party asserting that England is not the conveneint forum to hear the proceedings should apply for a stay;

iii The burden is on the applicant to persuade the court that a stay should be granted – applying the principles from Spiliada Maritime Corp v Cansulex Ltd (1987) AC 460;

iv The child's welfare is a consideration, but not the paramount consideration;

v If the stay is refused, the English court can go on to make more generally based welfare determinations.

This approach was not followed at first instance and was fatal to the judge's decision. The case was remitted again and is ongoing in the Family Division.

Re AR v RN (2015) UKSC 35

Habitual Residence

Summary

The family lived in France. The mother became pregnant with their second child and the parents agreed that she would spend her one-year maternity leave with both children in Scotland. The father remained in France.

The parents' relationship broke down after four months and the mother applied for a residence order. The father cross-applied for a return of the child to France.

Case Law Update (cont.)

The Lord Ordinary granted the father's application on the basis that there had not been a joint intention between the parents to permanently relocate to Scotland. The mother successfully appealed to the Inner House. The father than appealed to the Supreme Court.

The Supreme Court dismissed the father's appeal. The Lord Ordinary had failed to apply the correct legal test for habitual residence and the Inner House had been right to allow the appeal. The Supreme Court reiterated that there was no requirement for a stay to be permanent to establish habitual residence. Nor should intention be elevated above the other facts of the case. Habitual residence is a question of fact to be evaluated by reference to all relevant circumstances. The Lord Ordinary had exclusively focused on parental intention.

Comment

You might have thought that the Supreme Court had had enough of habitual residence cases after hearing 3 in the space of 2 months in 2013. And you'd probably be right. This one seems to have snuck through on the basis of the peculiar Scottish procedure whereby if the silk running the appeal certifies that the case is fit to be heard by the Supreme Court, permission is not required. So their Lord and Ladyships were stuck with this one whether they liked it or not. Their mild irritation can perhaps be taken from the brevity of the judgment – it's certainly a lot shorter than any of three 2013 cases.

Ultimately the decision does not move the law on, it simply corrects a mistake that was made in this specific case. Re A remains the guide, with Re LC adding the additional element of the child's state of mind in the case if older children. The case is in some ways a missed opportunity as the question of intention remains open. It is, we know, just one part of the factual matrix. But there will be cases where it is the key fact. In these cases, will judges be open to appeal if they places too much weight on this factor, even in these cases?

Guidance Notes: Habitual Residence

The question of the proper test to be applied when determining a child's habitual residence came before the Supreme Court on three occasions in 2013, resulting in a 'triumvirate' of cases from which the proper approach in English law is now derived. Those cases are 'In the matter of A (Children)' (2013) UKSC 60, 'In the matter of KL (A Child) (2013) UKSC 75 and 'In the matter of LC (Children) (2014) UKSC 1

The three judgments allow a number of key principles to be identified that are applicable in any determination of a child's habitual residence:

Habitual residence is a question of fact, and not a legal concept (In the matter of A, §54(i))

It is highly desirable for the same test for habitual residence to be adopted in all contexts, and the test established by the CJEU in Proceedings brought by A (Case C-523/07) (A, §35)

The child's habitual residence is therefore " 'the place which reflects some degree of integration by the child in a social and family environment' in the country concerned", which "depends upon numerous factors, including the reasons for the family's stay in the country in question" (A, §54(iii), KL §§18 & 19 and LC §30)

The social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned (A, §54(vi), KL §20 and LC §§ 35&36)

The question of the proper test to be applied when

Guidance Notes: Habitual Residence (cont.)

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The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce (A, §54(vii)).

"it is clear that parental intent does play a part in establishing or changing the habitual residence of a child: not parental intent in relation to habitual residence as a legal concept, but parental intent in relation to the reasons for a child's leaving one country and going to stay in another." (KL, §23)

Following those three cases there have been further developments both in England and in Europe. In Re H (2014) EWCA Civ 1101 the Court of Appeal concluded that there was no longer any rule that were two parents have parental responsibility for a child, neither can unilaterally change the child's habitual residence (Re H, §34).

In *C v M (Case C376/14 PPU)* the CJEU considered a situation very similar to that which concerned the UKSC in KL (above). The CJEU maintained that a factual approach was required, and there was no rule that habitual residence could not change whilst there was an outstanding appeal (in that case of a leave to remove order) pending in the country of the child's previous habitual residence. The court commented, however, that in such circumstances it might be unlikely that the child's residence in the `new' country, could have sufficient stability for that child to acquire habitual residence there (C v M, §55).

International Finance

The 4 Paper Buildings International Family Law news letter is now expanding to cover updates on the international elements of financial remedy proceedings.

The contributors from 4 Paper Buildings are Harry Nosworthy, Rachel Chisholm and Francesca Dowse. All three contributors specialise in financial remedy proceedings involving international issues.

To kick start the expansion of the news letter, we are delighted to announce that Hannah Budd, partner at The International Family Law Group LLP has written an article on international enforcement.

Hannah's practice focuses on the resolution of complex financial disputes, often with an international element. She undertakes a significant amount of cross border enforcement work. She can be contacted on hannah.budd@iflg.uk.com.

International Enforcement: The Final Frontier?

Hannah Budd

A major day to day role of international family law practitioners is quickly to identify for our clients the most advantageous forum for them in which to divorce. We quickly compare the likely outcomes for our clients in different jurisdictions. What is essential is the continuing challenges of international enforcement are at the forefronts of our minds at the very outset. There is little point obtaining a bumper settlement for our clients if there are no teeth with which to enforce.

Given the myriad of local national legislation, international conventions and bi-lateral treaties in place between various countries throughout the world, it is quite staggering to think that some of the world's leading economic powers are still not signatories to any significant conventions for

International Finance (cont)

the enforcement of family court orders. These enforcement "black holes" include Russia, China and Japan which are together home to more than 1.5 billion people.

Even where reciprocal arrangements are in place the international enforcement of family court financial orders remains one of the most complex areas of an international family lawyer's work. It is highly procedural and technical, involving overlapping and conflicting legislation, conventions and treaties. In England we rely on legislation dating as far back as the 1920s.

Change is happening. The EU Maintenance Regulation, despite its justifiable criticisms and some potentially unintended consequences, has without doubt simplified the automatic recognition and enforcement of orders. As a result, the needs elements of orders are now far easier to enforce within the EU.

Beyond the EU change is on the horizon but slow to come. The much awaited 2007 Hague Convention on Child Support is at last in force. It is intended to provide a simpler, quicker and more efficient global system for the enforcement of family maintenance orders. At present it is only in force within the EU, Albania, Norway, Bosnia and Herzegovina and the Ukraine. The treaty was signed first by the United States (itself an enforcement minefield owing to the lack of consistency between various federal states and the conventions/treaties to which they are each signed up, if any) but they are yet to ratify it. President Obama has signed the enacting legislation but earlier this year there were still eight states to enact the necessary legislation. This is likely during 2015. The hope is that once the US are signed up and with the EU now on board this will then prompt a number of other countries to follow suit.

If they work as intended, the complementary EU Maintenance Regulation and 2007 Hague Convention are likely significantly to simplify issues surrounding the enforcement of international orders both within the EU and further afield. Nonetheless, we must all continue to take great care in relation to enforcement issues and ensure that your clients receive specialist advice on this issue at the outset of their cases.

Hannah Budd is a partner at The International Family Law Group LLP (www.iflg.uk.com). Hannah's work focuses on the resolution of complex financial disputes, often with an international element. She undertakes a significant amount of cross border enforcement work. She can be contacted on hannah.budd@iflg.uk.com