Children and Families Across Borders intervene in a case before the Supreme Court of the United Kingdom

On 22nd and 23rd July 2013 the Supreme Court of the United Kingdom heard the appeal of the judgment of the Court of Appeal in **Re ZA [2012] EWCA Civ 1396**. The case concerned four children who, it had been found, had been retained in Pakistan by their father contrary to the wishes of their mother. The four children are British Citizens. Following a period of time during which the mother was detained against her will in Pakistan by the father and his family, she had managed to return to England from where she had issued proceedings seeking the children's return to England.

At first instance the court had found that all four children were habitually resident in England and ordered that the father return them. The position was complicated, however, in that whilst the three elder children had been born in England and taken to Pakistan by the mother and the father prior to their retention, the youngest child had been born in Pakistan and had never been physically present in this country. The father appealed that order. The Court of Appeal (by a majority, Thorpe LJ dissenting) held that there was no jurisdiction in respect of the youngest child, as he could not be habitually resident in England without having been at some point physically present here.

The substantive issues for determination by the Supreme Court were:

a) Whether a child could acquire an habitual residence in a country without ever having been physically present there, a decision of Mr Justice Charles to that effect having been considered by the Court of Appeal and rejected, save by Thorpe LJ who approved Charles J's reasoning (**B v H (Habitual Residence: Wardship) [2002] 1 FLR 388**); and

b) Whether as a matter of domestic law there was, within the concept of habitual residence or otherwise, a valid jurisdiction based on the child's nationality or allegiance.

Children and Families Across Borders sought to intervene in the appeal because of the importance of the outcome to the children and families that as a charitable organisation it assists on a regular basis, in many other countries around the world, including in Pakistan.

The primary aim of the charity is to identify and protect children who have been separated from family members as a consequence of abduction, trafficking, migration, divorce, conflict and asylum. It is a regrettable reality of a number of those unfortunate circumstances that the children concerned will find themselves the subject of litigation between their parents. Where such litigation is commenced, the charity seeks to support those involved, but retains a particular focus upon protecting and furthering the rights of the child.

It is a well-founded principle of the law concerning children that delay is detrimental to the welfare of the child.

It is beneficial for a substantive decision to be taken about a child's future as quickly as possible. This may particularly be so where the children concerned are separated internationally from one (or perhaps both) of their parents.

Children and Families Across Borders have therefore become concerned that the difficulty that has arisen in applying the 'habitual residence' test gives rise to a risk that proceedings will become unnecessarily protracted at a preliminary stage, delaying substantive resolution. Of relevance to this point is the fact that in this case the first instance hearing took place in February 2012. An order for the children's return to England was made at that hearing, which remains unimplemented due to the ongoing dispute about the court's jurisdiction. Given the primacy given by the Family Law Review and the Children Act 1989 to minimising delay in the Family Courts and an aim of six months duration for care cases, the fact that a substantive decision on this child's future has taken, to date, over 16 months is unacceptable and should be of concern to the President of the Family Division (although the appeal was expedited at Supreme Court level).

Due to their interest in ensuring that children's rights are protected in cross-border situations, **Children and Families Across Borders** sought leave to intervene in the appeal. Leave was granted to make written submissions, and an invitation extended to attend the hearing to answer any questions that the Justices may have had regarding the arguments raised.

Particularly, **Children and Families Across Borders** argued in its submissions to the Supreme Court that:

I) To ensure that any jurisdictional enquiry could be completed swiftly, thus minimising any delay as may be caused by such preliminary litigation, it was now necessary and, on the authorities, appropriate for there to be recognition by the Supreme Court that one test of habitual residence was applicable in any jurisdictional enquiry concerning children, which test could be derived from the CJEU authorities **Re A (Area of Freedom, Security and Justice) (C-523/07) [2009] 2 FLR 1** and **Mercredi v Chaffe (Case C-497/10) [2011] 1 FLR 1293**;

II) A child's fundamental Human Rights, as enshrined within the *European Convention on Human Rights 1950 ("ECHR 1950")* and the *United Nations Convention on the Rights of the Child* are relevant factors for consideration when determining the question of jurisdiction, whether on the connecting criteria of habitual residence or another criteria, for example nationality or allegiance;

III) There remained in English law a jurisdiction in wardship on the basis of nationality or allegiance, which could be exercised in an appropriate case (this

case being appropriate due to its facts), considering issues of comity where appropriate;

IV) In order to assist a court in determining the issues of jurisdiction, forum and (if that stage is reached) the welfare determination, it would be of assistance if first instance courts were to consider at an early stage what evidence should be gathered regarding the child's circumstances abroad and how that evidence could be obtained. **Children and Families Across Borders** have particular global expertise in this area and can be engaged swiftly at the court's request.

The oral arguments during the course of the appeal were wide-ranging, whilst being focussed on the jurisdictional issue at the heart of the case.

In relation to the instruments involved, the Justices considered the proper approach to the intra-EU jurisdictional scheme operational pursuant to *Council Regulation (EC) No. 2201/2003 ("Brussels II revised"),* the extension of all or parts of Brussels II revised (and the said jurisdictional scheme) to cases between England and non-Member states, the construction and application of the jurisdictional scheme operational pursuant to the Family Law Act 1986 and the inter-relation between the European and domestic law.

Within the two potentially applicable jurisdictional schemes, there was consideration of the proper approach to habitual residence under either of Brussels II revised or the Family Law Act 1986, whether the concept of habitual residence should be treated differently under those two instruments (it being agreed by all parties that the time had now been reached for there to be one test based upon the aforementioned European authorities) and what the test for habitual residence was, assuming that it is to be of broad application in domestic law, European law (Brussels II revised) and international law, including the 1980 and 1996 Hague Conventions. A point of particular interest in this regard, was the proper approach to consideration of the question of a child's habitual residence where, for example, they had been born whilst the child's parents were in a country for a demonstrably transient purpose. The example used by both Thorpe LJ in the Court of Appeal was of a child born whilst his English parents travelled through France on a train. This gave rise to the question of whether in such circumstances, a child would have no habitual residence, one habitual residence (with or without presence) or perhaps two habitual residences (see **Ikimi v Ikimi [2001] 3 WLR 672**, which was raised by the Appellants in this regard).

Finally, detailed discussion was held in the Supreme Court regarding the proper approach to questions of jurisdiction in cases that fall outside of either of Brussels II revised or the Family Law Act 1986 and whether the court could in an appropriate case exercise jurisdiction in respect of a child based not upon habitual residence but upon that child's nationality or *parens patriae* or citizenship.

Judgment was reserved, and will be eagerly awaited.

Children and Families Across Borders are extremely grateful to Alex Verdan QC, Jacqueline Renton and Michael Gration of 4 Paper Buildings (all of whom acted *pro bono* in this matter) and to Simon Bruce and Josephine Fay of Farrer & Co LLP,.

Upon delivery of the judgment, 4 Paper Buildings, Farrer and Co LLP and **Children and Families Across Borders** will hold a seminar to discuss the judgment and its impact upon such cases in the future, details of which will be released upon the judgment being published.